WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MADELINE CLARK
Grievant,

v. **Docket No. 2013-0123-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Madeline Clark, Grievant, filed this grievance against her employer, the Kanawha County Board of Education ("KCBE" or "Board"), Respondent, on July 31, 2012, protesting her termination from employment. As her statement of grievance, Grievant, by counsel, provided:

> Respondent has terminated Grievant for off duty conduct that has no rational nexus with her job responsibilities. Grievant alleges a violation of W. VA. CODE 18A-2-8 and that the Respondent's action is too harsh, arbitrary and capricious.

As relief, Grievant seeks the following:

> Grievant seeks reinstatement with back pay, all benefits lost, and interest on all sums to which she is entitled.

The general facts of this case are not in dispute. By letter dated October 26, 2010, Grievant was advised that the Superintendent had received information which indicated Grievant had been indicted by the Kanawha County grand jury on a felony charge. Grievant was, in fact, indicted by the Kanawha County Grand Jury on October 22, 2010, charged with two felonies; conspiracy and operating/attempting to operate a clandestine drug laboratory for the purpose of manufacturing methamphetamine. Subsequent to a hearing held on December 8, 2010, the Kanawha County Board of Education voted on January 3,

2011, to suspend Grievant from her employment, without pay, pending the outcome of the felony charges against her. Grievant grieved the Board's action. The West Virginia Public Employees Grievance Board issued a decision upholding Grievant's suspension on August 17, 2011.[1] Subsequently, in the Circuit Court of Kanawha County, on November 9, 2011, Grievant pled guilty to the offense of purchasing substances to be used as precursor to manufacture of methamphetamine,which is a misdemeanor criminal offense.

On May 15, 2012, Respondent held a hearing to determine if Grievant should be subject to further disciplinary action. The Kanawha Superintendent of Schools recommended Grievant's employment be terminated. On July 19, 2012, the Kanawha County Board of Education voted to approve the Superintendent's recommendation and terminated Grievant's employment.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the instant grievance was filed directly to level three of the grievance procedure. A level three hearing was held before the undersigned Administrative Law Judge on October 22, 2012, in the Grievance Board's Charleston office. Grievant Clark appeared at the hearing with her representative, John E. Roush, Esq. Respondent was represented by James W. Withrow, Esq., General Counsel.

A transcript of Grievant's pre-termination hearing was submitted as part of the level three record. At the level three hearing, the Respondent testimony of John Baird, former principal of Ben Franklin Career Center, Fred McPherson, Assistant Principal of Ben

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[1] It is acknowledged and specifically recognized that the question of whether Grievant should be allowed to return to work in the facts as they exist now as opposed to whether she could return to work while the felony charges were pending are two different issues.

Franklin Career Center, and Sgt. L. G. O'Bryan was taken along with identified documentation including information from the West Virginia Board of Pharmacy related to Grievant's purchase of medications containing pseudoephedrine. Grievant entered an exhibit which consisted of documentation of incidents where employees of Respondent had been charged with crimes and the status of their respective employment. Grievant's Exhibit 1. Testimony was taken from William Courtney, Director of Employee Relations for the Board, explaining the documents contained in Grievant's exhibits . This matter became mature for decision on December 3, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Respondent dismissed Grievant from employment as a custodian subsequent to a plea of guilty to the offense of purchasing substances to be used as precursor to manufacture of methamphetamine. Grievant argues that her employment should not be terminated for off duty conduct that has no rational nexus with her job responsibilities. Grievant highlights that a plea of guilty to a misdemeanor does not, in and of itself, demonstrate sufficient cause for termination.

A county board of education is authorized to discipline an employee for one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and action must be exercised reasonably, not arbitrarily or capriciously. Relevant case law demonstrates the requirement that a rational nexus be established between off duty conduct related to a misdemeanor and an employee's job duties to lawfully terminate employment.

Respondent did not meet its burden of proving Grievant's conduct constituted insubordination. Further, it was not established, by a preponderance, that a rational nexus

existed between the off duty conduct of Grievant and her assigned duties and/or that the notoriety of Grievant's actions reached a level sufficient to justify the termination of her employment as a custodian. This grievance is GRANTED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant, until the termination that is the subject of the present grievance, was employed by Respondent as a custodian. Grievant has been employed by Respondent for approximately twenty-six years.

2. As a custodian, Grievant's duties do not involve supervision or formal contact with children. Grievant was employed as a Custodian III at Ben Franklin Career and Technical Center. Grievant's daily shift at the Career Center started at 6:00 a.m. and ended at 2:00 p.m. While Grievant was not assigned duties directly related to the students, she worked in the school while they were present.

3. The Ben Franklin Career Center is a vocational and technical school in which high school aged students receive educational instruction. The school also offers courses for adults seeking vocational education. The Career Center also offers a daycare program for children of students at the school.

4. Between May of 2007 and August of 2010, Grievant purchased large quantities of medications containing pseudoephedrine. R. Ex. 9. Medications containing pseudoephedrine are used in the production of methamphetamine ("meth"). Grievant purchased pseudoephedrine intended for the manufacturing of meth. Resp. Ex. 4.

5. Grievant and her then boyfriend were arrested on August 10, 2010, and charged with the felony offense of conspiracy to operate a clandestine drug laboratory.

6. When Grievant was originally arrested, a number of individuals raised questions and concerns about Grievant with the principal and assistant principal concerning Grievant and the status of her employment. These individuals included students, teachers, parents, business associates, and community members.

7. Sometime after the criminal charges levied became public, Grievant was reassigned to work at the Crede Warehouse where there are no students. Grievant was not formally transferred to the Crede Warehouse, and her official assignment remained at the Ben Franklin Career Center. Grievant had been working at the Career Center for approximately one year.

8. On October 22, 2010, Grievant was indicted by a Kanawha County Circuit Court Grand Jury with the felony charge of operating or attempting to operate a clandestine drug laboratory for the purpose of manufacturing methamphetamine.

9. Respondent elected to suspend Grievant from her employment, without pay, pending the outcome of the felony charges against her. Superintendent Duerring issued a letter to Grievant dated October 26, 2010, informing her that she was conditionally suspended without pay as a result of the felony indictment.

10. Grievant protested her suspension through the grievance procedure. On August 17, 2011, the West Virginia Public Employees Grievance Board issued a decision upholding Grievant's suspension, without pay, pending the outcome of the felony criminal charges against her. Resp. Ex. 3.

11. On November 9, 2011, in the Circuit Court of Kanawha County, Grievant pled guilty to the offense of purchasing substances to be used as precursors to manufacture methamphetamine. Resp. Ex. 4. This is a misdemeanor criminal offense.

12. Grievant was previously addicted to drugs. Grievant is attempting to rehabilitate her life, participating in a structured rehabilitation program and Narcotics Anonymous. Resp. Ex. 4.

13. The felony charges against Grievant were dropped in exchange for her guilty plea to purchasing ingredients to make meth. Grievant was sentenced to one year of probation as well as drug and alcohol testing and substance abuse counseling.

14. Grievant did not report her conviction to the Superintendent of Schools within five days as provided for by Kanawha County Board of Education, "Drug Free Workplace" policy. Resp. Ex. 6.

15. Respondent held a predetermination hearing to collect information and assess if Grievant should be subject to further disciplinary action. The hearing was held on May 15, 2012, where testimony and exhibits were submitted for consideration. The hearing examiner made a recommendation to Superintendent Duerring. *See* Decision of Superintendent's designee dated July 11, 2012. Subsequently, Superintendent Duerring communicated with the Board recommending Grievant's employment be terminated.

16. On July 19, 2012, Kanawha County Board of Education voted to terminate Grievant's employment.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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); *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002). WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-8 provides in pertinent part:

> . . . [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.

In support of its decision to terminate Grievant's employment, Respondent contends Grievant is guilty of insubordination and immorality. In protest of her termination, Grievant correctly points out that she has not been convicted of nor entered a plea to a felony. Grievant highlights that a misdemeanor plea does not, in and of itself, mandate termination of employment. A plea of guilty or nolo contendere to a misdemeanor does not, in and of itself, support dismissal. *Conrad v. Grant County Bd. of Educ.*, Docket No. 2009-1458-GraED (Sept 19, 2009).

Despite Respondent's crafty argument that at the time the actions of Grievant took place, Kanawha County Board of Education had a "Drug Free Workplace" policy, it is not established that Grievant, a recovering drug addict, is guilty of the terminal offense of insubordination. The policy states, in part, that "[a]ll employees must provide written notice to the superintendent within 5 days of any conviction for violation of a criminal drug statute (includes conviction of offenses both at and away from the work place)." Resp Ex. 6.

Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of

insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). "[F]or there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Education Governing Board/Shepherd College, 212* W. Va. 209, 569 S.E.2d 456 (2002); *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va.Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)).

It is not established that Grievant willfully failed to obey a directive or regulation known to her. It is factually accurate that Grievant pleaded guilty to unlawfully purchasing materials to be used in manufacturing of meth. Grievant failed to report this conviction to the Superintendent of Schools within five days as required by Kanawha County Schools' policy. Nevertheless, the infraction of insubordination is not demonstrated to be the accurate violation, in the facts of this matter, applicable for Grievant's failure to dutifully report her misdemeanor criminal plea conviction. Insubordination is not found to be present in Grievant's actions.

Grievant argues that her guilty plea arises from acts which occurred away from her job and, there is no rational nexus between the conduct and her employment mandating she be terminated. Indeed the West Virginia Supreme Court of Appeals has held that:

> In order to [suspend or] dismiss a school board employee for acts performed at a time and place separate from employment, the Board 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). The Supreme Court held that the conduct ceases to be private and a rational nexus exists in at least two circumstances:

> 1. The conduct directly affects the performance of the occupational responsibilities of the employee;
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> 2. 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 particular employee to discharge the responsibilities of his/her position.

Golden, supra. See also Rogliano v. Fayette County Board of Education, 347 S.E.2d 220 (W. Va. 1986).

Grievant engaged in misconduct with serious implications for both herself and society. Grievant's actions are not the type of conduct for which there might be debate as to whether it is immoral or not, the conduct is prohibited by statute and the Grievant violated that statute multiple times. Grievant was an addicted drug user. She acted as a "smurf"[2] gathering materials, likely along with others, in order to acquire sufficient materials to produce a dangerous and addictive drug. Such information is relevant and influential but not decisive. There is no automatic connection between Grievant's misdemeanor plea and her duties as a custodian employed by Respondent. Grievant is a custodian. She does not supervise children or have any contact with them other than to pass them in the hall, if assigned to a school area.

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[2] Term used to describe individuals who find and/or gather the raw material for the dealer to make more drugs. "Smurfer", most commonly used in the methamphetamine trade, where smurfers visit pharmacies and purchase small quantities of cold/flu tablets to provide to a maker of the drug. See Urban Dictionary at www.urbandictionary.com

It is recognized that Respondent had discretion in the circumstance of this case. Ultimately, Respondent chose to discharge Grievant. However, it is not established that Respondent acted in accordance with relevant case law. The requirement that a rational nexus be established between off-duty conduct related to a misdemeanor and an employee's job duties is not optional. *Golden, supra; Rogliano, supra.*

Grievant's arrest in 2010 was the subject of some notoriety. Grievant was not the only individual indicted. Ultimately, Grievant was not adjudicated guilty of the felony charges originally levied. Respondent avers that Grievant's situation gained sufficient notoriety such that her renewed presence at the school would be disruptive and would adversely affect the efficient operation of the school. The facts of the matter are that reliable testimony of record provides that administrative personnel received inquiries and verbalized concerns specific to Grievant from approximately "six" individuals of various standing. Testimony of John Baird, former principal of Ben Franklin Career Center, and Fred McPherson, Assistant Principal of Ben Franklin Career Center. This is not a ground swell of opposition.

There is no doubt school officials were questioned about Grievant's employment status and expressed concern as to whether Grievant would be permitted to return to work, from time to time, whenever there is any publicity related to Grievant. Nevertheless, public interest concerning Grievant's off-duty problems seems to have been a temporary, short-lived affair. Respondent has not established that this concern would greatly impact Grievant's return to work in any way in a permanent fashion, nor truly impede the operations of a facility to which she is ultimately assigned.

While there is an acknowledged code of conduct and recognized standards of behavior for all individuals employed by Respondent, Grievant is a custodian, not a teacher, nor employed in a position routinely held out to be the embodiment of morality standards.[3] Pursuant to the evidence presented, Grievant has acknowledged her prior addiction and is attempting to rebuild some semblance of a normal life. *See* FOF 12.

Grievant alleges termination of her employment was too severe of a punishment.[4] Opinions regarding that issue may vary. Respondent has a recognized duty to educate and protect the students entrusted into its care, of that there is no doubt. Due diligence is a component of that duty. Admittedly, Grievant was participating in a dangerous activity and is guilty of the crime to which she pled, but the issue at hand is limited to whether that past conduct, committed away from work, has existing ramifications — proven by a preponderance of the evidence — which rationally affects Grievant's ability to perform her duties or unduly affects Respondent's ability to operate efficiently. In the fact of this matter, Respondent has not demonstrated a "rational nexus" between the acknowledged conduct performed outside the job and the duties Grievant performs as a custodian.

The undersigned, as the trier of fact, does not find that Respondent established the charges alleged or that Grievant's overall notoriety rose to the level which properly justifies the termination of Grievant's employment. For the reasons discussed above this grievance is granted.

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[3] This statement is not intended to diminish the importance of the service performed by any employee associated with this State's education system. Yet, it is perceived relevant to note that not all job titles bear the same responsibility or are viewed by the public as iconic role models.

[4] In support of her contention, Grievant cites examples of other employees who have committed misdemeanors and retained their employment with Respondent. G. Ex. 1.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges levied against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. An employee of a county board of education may be suspended or dismissed only 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. W. VA. CODE § 18A-2-8.

3. 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); *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999); *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

4. Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). "[F]or there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Education Governing Board/Shepherd College, 212* W. Va. 209, 569 S.E.2d 456 (2002).

5. Respondent did not demonstrate, by a preponderance of the evidence, that Grievant engaged in behavior constituting insubordination.

6. “In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board 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). Conduct outside the workplace ceases to be private and a rational nexus exists in at least two circumstances:

> 1. The conduct directly affects the performance of the occupational responsibilities of the employee;

> 2. 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 particular employee to discharge the responsibilities of his/her position.

Golden, supra. See also Rogliano v. Fayette County Board of Education, 347 S.E.2d 220 (W. Va. 1986).

7. A plea of guilty or nolo contendere to a misdemeanor does not, in and of itself, support dismissal. *Conrad v. Grant County Bd. of Educ.*, Docket No. 2009-1458-GraED (Sept 19, 2009). Grievant was not found guilty of a felony offense. Grievant plead guilty to misdemeanor criminal acts.

8. Respondent has not demonstrated a "rational nexus" between the acknowledged conduct performed outside the job and the duties Grievant preforms as a custodian.

9. Respondent demonstrated sufficient grounds to warrant Grievant's suspension awaiting the outcome of the felony charges levied. *Clark v. Kanawha County Bd of Educ.*, Docket No. 2011-0987-KanEd, (Aug 17, 2011) Respondent did not demonstrate, by a preponderance of the evidence, that the notoriety of Grievant's behavior reached a level which constituted proper justification for termination of Grievant's employment.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to reinstate Grievant to her prior position of employment, full-time custodian employed by the Kanawha County Board of Education. Reassignment to a facility operated by Respondent, such as Crede Warehouse, without students for a time period is not perceived to be unreasonable. Grievant is **AWARDED** back pay and

restored benefits, including seniority, from the date of July 19, 2012, (date of formal dismissal) to the date she is reinstated plus interest at the statutory rate. Any wages Grievant earned between the time she was dismissed and the time she is reinstated shall be deducted from the back pay award.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 27, 2013

Landon R. Brown
Administrative Law Judge