

14-1213

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

Lennie Dale Adkins,

Petitioner,

v.

Cabell County Board of Education,

Respondent.

2014 OCT 21 PM 3:48

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

Case Number 12-AA-60

Judge Jennifer F. Bailey

**Final Order Reversing and Remanding Administrative Order**

Pending before the Court is a petition for appeal, filed by Lennie Dale Adkins, seeking reversal of a final decision of The West Virginia Public Employees Grievance Board (“WVPEGB”), dated April 26, 2012. In the petition for appeal, Mr. Adkins asserts that the WVPEGB erred as a matter of law and was clearly wrong in affirming the Cabell County Board of Education (“BOE”)’s decision to suspend him without pay because there is no statutory authority to permit suspension when a BOE employee is arrested on felony charges.

The Court has studied the petition, the BOE’s brief, the underlying record, and pertinent legal authorities. As a result of these deliberations, the Court orders that the decision of the WVPEGB is reversed and remanded because the decision does not comply with West Virginia Code § 18A-2-8.

**I. Findings of Fact**

Mr. Adkins is employed as a high school teacher or librarian<sup>1</sup> by the BOE. In 2011, after Mr. Adkins was arrested on multiple charges involving child pornography,<sup>2</sup> the BOE suspended

---

<sup>1</sup> The pleadings and administrative record are conflicting as to Mr. Adkins’s official job title. The ALJ acknowledged this uncertainty in note 5 on page 4 of the “Decision.”

<sup>2</sup> The criminal complaints, which were admitted as a joint exhibit into the administrative record, allege that some of the minors involved had been students at the school where Mr. Adkins worked and that at least one minor was Mr. Adkins’s former student.

him until the felony criminal charges were resolved. As of November 1, 2011--the date of the Level III hearing--Mr. Adkins had not been indicted but the felony charges were still pending.

The Court relies on the detailed findings of fact set forth in the "Decision," dated April 26, 2012, by the administrative law judge ("ALJ"). The parties do not dispute the facts. In fact, the ALJ ascertained the facts from the joint exhibits, which include written correspondence between Mr. Adkins and the superintendent of the BOE and the criminal complaints filed against Mr. Adkins in the Magistrate Court of Cabell County. Although given the opportunity by the ALJ, neither party presented additional evidence at the administrative hearing, choosing to rely on the stipulations contained in the joint exhibits.

## II. Standard of Review

This Court reviews a final order of an administrative agency under the standard of review set forth in West Virginia Code § 29A-5-4(g) [1998].<sup>3</sup> "Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syl. pt. 1, Francis O. Day Co., Inc. v. Dir., Div. of Env'tl. Protection of W. Va. Dept. of Commerce, Labor and Env'tl. Resources, 191 W. Va. 134, 443 S.E.2d 602 (1994). "[F]indings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties." Syl. pt. 1, in part, W. Va. Human Rights Commn. v. United Transp. Union, Local

---

<sup>3</sup> West Virginia Code § 29A-5-4(g) states as follows:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

No. 655, 167 W. Va. 282, 280 S.E.2d 653 (1981). Conclusions of law and the application of the law to the facts are reviewed *de novo*. Martin v. Randolph Cnty. Bd. of Educ., 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). “However, these deferential standards have no application if an agency’s decision is based upon a mistaken impression of the legal principles involved. Under such circumstances, the findings and conclusions of an agency will be accorded diminished respect on appeal.” W. Va. Health Care Cost Review Auth. v. Boone Meml. Hosp., 196 W. Va. 326, 335, 472 S.E.2d 411, 420 (1996).

### III. Discussion

Mr. Adkins argues that the BOE lacked the statutory authority to suspend him in response to the pending criminal charges because “being charged with a felony” is not one of the enumerated grounds for suspension listed in West Virginia Code § 18A-2-8 (Suspension and dismissal of school personnel by board; appeal) [2007].

West Virginia Code § 18A-2-8 (emphasis added) states as follows, in pertinent parts:

**(a) 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.**

**(c) The affected employee shall be given an opportunity, within five days of receiving the written notice, to request, in writing, a level three hearing and appeals pursuant to the provisions of article two, chapter six-c of this code, except that dismissal for the conviction of a felony or guilty plea or plea of nolo contendere to a felony charge is not by itself a grounds for a grievance proceeding. An employee charged with the commission of a felony may be reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges.**

“ ‘The authority of a county board of education to dismiss a teacher under W.Va. Code 1931, 18A–2–8, as amended, must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.’ Syl. Pt. 3, Beverlin v. Board of Educ., 158 W.Va.

1067, 216 S.E.2d 554 (1975).” Syl. pt. 4, Maxey v. McDowell Cnty. Bd. of Educ., 212 W. Va. 668, 669, 575 S.E.2d 278, 279 (2002). “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.” Syl. pt. 2, Golden v. Bd. of Educ. of Harrison Cnty., 169 W. Va. 63, 285 S.E.2d 665 (1981).

The ALJ found that, based on WVPEGB precedent, the BOE had the authority to suspend Mr. Adkins indefinitely pending resolution of the criminal charges, provided that there was a nexus between the charge and the employee’s ability to perform his assigned duties. The “Decision” states that the WVPEGB has “upheld the right of a board of education to indefinitely suspend an employee without pay while criminal proceedings are conducted so long as some particular event will eventually bring a conclusion to the suspension (such as completion of a criminal trial).” p. 9. Based on administrative precedent alone, the WVPEGB found that “the fact that [Mr. Adkins] has not been indicted is of no consequence. For these reasons, the undersigned cannot find that [the BOE] exceeded its statutory authority by suspending [Mr. Adkins] indefinitely without pay pending the resolution of criminal actions.” Id. at 9-10.

In the petition for appeal, Mr. Adkins argues that the administrative order upholding the BOE’s decision to suspend him violates the plain language of the statute and Cabell County Schools Bylaws and Policies 3139.01, which mirrors the statutory language, because “being charged or indicted of a crime is not one of the [enumerated] reasons.” Mr. Adkins “does not contest the [BOE] had t[he] right to suspend him with pay or reassign him [ . . . ] and [argues that] the arbitrator [sic] does not have the right to craft an addition to this law to suit the board.” “Petition for Appeal/Judicial Review of the West Virginia Public Employees Grievance Board

Docket No. 2012-0085-CabED,” p. 8. Mr. Adkins further acknowledges that the BOE could have sought suspension under other provisions of the statute, such as immorality,<sup>4</sup> but chose not to; therefore, he argues that there is no legal authority permitting suspension.

In response, the BOE makes a public policy argument that it had significant interests in acting quickly when one of its employees was charged and arrested on multiple felony offenses involving minors. The Court completely agrees and commends the BOE for taking swift action with regard to Mr. Adkins. Nevertheless, according to the applicable statute, the BOE erred with regard to why it suspended Mr. Adkins. As Mr. Adkins highlights, the BOE could have lawfully suspended him for immorality and presented evidence showing a rational nexus between Mr. Adkins’s alleged criminal conduct involving minors performed outside of the job and the duties he is to perform as a BOE employee. Instead, the BOE based the suspension on the criminal complaints alone. See Level III Hrg. Transcr. 7: 21-24 (Nov. 1, 2011).

On page 11 of its brief, the BOE offers an explanation for its actions:

If the Board would have based the suspension on immorality or one of the other causes listed in § 18A-2-8, the Board would have been required to present evidence that could conflict with or hamper potential criminal proceedings, including, no doubt, the evidence possessed by the State Police and the testimony of the students involved. Prudently, the Board sought to avoid this conflict by basing the suspension on the criminal complaint.

Based on administrative precedent alone, the WVPEGB found that the BOE had the authority to suspend Mr. Adkins pending resolution of the criminal charges. West Virginia Code § 18A-2-8(a) clearly requires a conviction of a felony or a guilty plea or a plea of nolo

---

<sup>4</sup> “Immorality is an imprecise word which means different things to different people, but in essence it also 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.’ Webster’s New Twentieth Century Dictionary Unabridged 910 (2d ed. 1979).” Golden v. Bd. of Educ. of Harrison Cnty., 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981).



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. \_\_\_\_\_

THE CABELL COUNTY BOARD OF EDUCATION,

Petitioner,

v.

Civil Action No. 12-AA-60  
Honorable Jennifer F. Balley  
Circuit Court of Kanawha County, West Virginia

Lennie Dale Adkins,

Respondent.

CERTIFICATE OF SERVICE

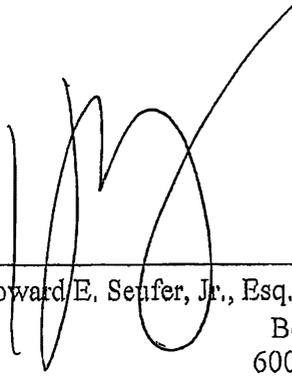
We, the undersigned counsel for Appellant and Petitioner Below, The Cabell County Board of Education, do hereby certify that the foregoing "Supplement to Notice of Appeal Form" has been served, by United States Mail, this 20th day of November, 2014, upon the following persons:

Dennis E. Kelley, Esquire  
Kelley Law Office  
418 Eighth Street, Suite 101  
Huntington, West Virginia 25714

Donald R. Jarrell, Esquire  
Post Office Box 190  
Wayne, West Virginia 25570

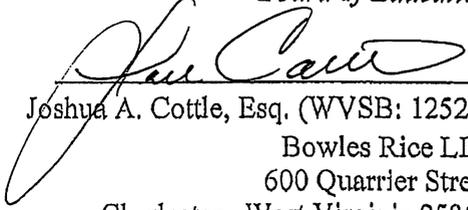
Cathy S. Gatson, Clerk  
Circuit Court of Kanawha County  
Kanawha County Judicial Annex  
111 Court Street  
Charleston, West Virginia 25301

Paula J. Moore  
Paula J. Moore Court Reporters  
223 Nash Lane  
Buffalo, WV 25033



---

Howard E. Seuffer, Jr., Esq. (WVSB: 3342)  
Bowles Rice LLP  
600 Quarrier Street  
Charleston, West Virginia 25301  
(304) 347-1776  
hseuffer@bowlesrice.com  
*Counsel for Petitioner The Cabell County  
Board of Education*



---

Joshua A. Cottle, Esq. (WVSB: 12529)  
Bowles Rice LLP  
600 Quarrier Street  
Charleston, West Virginia 25301  
(304) 347-2116  
jcottle@bowlesrice.com  
*Counsel for Petitioner The Cabell County  
Board of Education*