

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENNIE DALE ADKINS

Grievant,

Case No.14-1213

Kanawha Circuit Case No.: 12-AA-12

v.

Docket No. 2012-0085-CabED

CABELL COUNTY BOARD OF EDUCATION,

Respondent

**GRIEVANTS, RESPONDENTS RESPONSE TO PETITION FOR APPEAL OF THE
DECISION OF THE KANAWHA COUNTY CIRCUIT COURT**

LENNIE DALE ADKINS

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STANDARD OF REVIEW

The issue in this matter is a question of law and the standard of review is de novo.

“Although we accord great deference to the findings of fact of the West Virginia Educational Employees Grievance Board, we review, *de novo*, questions of law.” Syl. pt. 2, *Maikotter v. Univ. of W.Va. Bd. of Trustees*, 206 W.Va. 691, 527 S.E.2d 802 (1999)

“‘School personnel regulations and laws are to be strictly construed in favor of the employee.’ Syllabus Point 1, *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979).” Syl. pt. 1, *Smith v. W.Va. Div. of Rehab. Services*, 208 W.Va. 284, 540 S.E.2d 152 (2000).

§29A-5-4. Judicial review of contested cases.

(g) 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.

STATEMENT OF THE CASE

This is a response to a petition for appeal of the date order of Kanawha County that reversed the Administrative law Judge's decision and granted the petitioners grievance.

This matter was reversed by the Kanawha County Circuit Court Judge Jennifer F. Bailey on October 21 2014.

This matter came forth the 1st day of November for level 3 grievance the same having been duly noticed and appealed. Present were the grievant Lennie Dale Adkins, personally and With Counsel Dennis E. Kelley and Donald R. Jarrell; and the Cabell County Board Of Education Representative Judy Forbush and Counsel Howard E. Suefer.

Grievant, Lennie Dale Adkins, is employed as for the Cabell County Board of Education As a Librarian. By letter dated the 8th day of July 2011 from superintendent William A Smith, Lenny Dale Adkins was suspended without pay from his employment as a result of pending a Felony charges in the Cabell County Circuit Court. Mr. Adkins requested a hearing related to the suspension and hearing was set for November 1, 2011 before Carrie H. LeFevre hearing examiner. Because this matter involves a suspension without pay, the grievant filed directly at level three pursuant to W.Va. Code 6C-2-4(a)(4). Grievant Adkins was represented by counsel Dennis E. Kelly and Donald R. Jarrell. The Respondent Board was represented by Howard E. Suefer.

The parties stipulated that the grievant was charged but not indicted on felony charges. Pursuant to Hearing held on November 1, 2011 the parties stipulated that the "only basis for the unpaid suspension was the pendency at that time of the eleven felony charges, but the School Board does not take a position as to Mr. Adkins's guilt or innocence" R.Page 7/8 line 21 thru24

page 8 line 1. The board took no position as to the guilt or innocence of the grievant as to the charges,

The following exhibits were jointly moved into evidence:

Joint Exhibit 1 contained the following collection of documents:

1. Letter dated July 20, 2011 from Superintendent William A. Smith to Grievant advising him that the Cabell County Board of Education ratified his administrative leave with pay from May 26, 2011 through July 8, 2011 ratified his suspension from employment without pay, and extended his suspension without pay until all pending felony criminal charges are resolved;
2. Letter dated July 8, 2011, from Superintendent William A. Smith to Grievant advising him that he would be suspended without pay until The July 19, meeting of the Cabell County Board of Education.
3. Letter dated June 29,, 2011 from Dennis E. Kelley, Esq. To William A Smith in which Kelley, on behalf of grievant, ask to be heard by the Cabell County Board of Education on June 15, 2011.
4. Letter From Superintendents William A. Smith to Grievant informing him that Smith intended to recommend that the Cabell County Board of Education approve his suspension with pay from May 26, 2011 until June 6, 2011 and that the Board terminate Grievant's employment as of July 6, 2011.
5. Letter dated June 6, 2011, from Superintendent William A. Smith to Grievant informing him that he had received the criminal complaints pending against him and the he had a right to a hearing before Smith, the scheduled to be held on June 13, 2011.
6. Letter dated May 26, 2011, from Superintendent William A.. Smith to Grievant placing him on administrative leave with pay until further notice.

Joint Exhibit 2 contained copies of the criminal complaints filed against Grievant in the Magistrate Court of Cabell County in the following cases: 11F746;11F-747;11F-748;11F-749;11F750;11F751;11F752;11F753; and , 11F754. Also included in this exhibit were copies of Grievant's initial Appearance for cases 11F746 through 11F-753, his Initial Appearance for case 11F-754, and Grievant's Criminal Bail Agreement in cases 11F746 through 11F-756.

These exhibits are included in the appendix in the present appeal.

At the grievance hearing neither party presented any additional evidence, agreeing that the issue to be decided was a question of law. This matter became mature for decision on December 5, 2011 upon the receipt of the last of the parties' proposed finding of fact and conclusions of law.

No testimony was taken and no further evidence was presented. Thereafter the plaintiff made closing argument and parties agreed to submit proposed findings of fact and conclusions of law, both were received at the public employees Grievance Board on December 2nd 2011.

On April 26th 2012 Carrie H. LeFever Administrative law Judge rendered a decision that denied the Grievance. Said decision was received by counsel on the 7th day of May 2012. This matter was appealed timely to the circuit court of Kanawha County and decision was entered on October 21 2014. This order was appealed by the Cabell County Board of Education and is the subject of this appeal.

SUMMARY OF AUGUMENT

The Grievant was suspended without pay simply based on the fact he was charged with felonies concerning alleged actions away from work. The board took no position as to his guilt or innocence to the charges and presented no evidence that the alleged conduct as to a rational nexus between the alleged conduct and his employment.

Pursuant to *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979), it is clear and well established that "school personnel regulations and laws are to be strictly construed in favor of the employee".

The W.V. Statute, W.Va. Code 18A-2-8 and Rules of the Cabell County Board under Cabell County Board of Education Bylaws and Policies 3139.01 are clear and unambiguous as to the reasons and employee can be suspended without pay; and being charged or indicted of a crime is not one of the reasons..

Namely when a statute is clear on its face and without ambiguity it is to be accepted without resorting to the rule of interpretation as set-forth in *Peyton v. City Counsel of Lewisburg*, 182 W.Va. 297, 387 S.E.2d 532 (1932).

The Board does not have the authority to change the plain language of the statute.

ARGUMENT

Grievant cannot be suspended without pay simply because he is charged with felonies for conduct that is away from work; and further that charged with a felony is not a basis for suspension under W.Va. Code 18A-2-8 or Cabell County board of Education Bylaws and Policies 3139.01.

An indictment or charge of a felony is simply a vehicle for initiating a criminal action in the same way a complaint serves to begin a civil suit. In fact a jury in a criminal case is instructed that the person indicted is presumed to be innocent and an indictment is simply a mechanism for bringing the defendant to trial. According to the Administrative Law Judges opinion in this case since the matter will eventually be resolved in the criminal trial the Board may suspend the grievant without pay. In fact the criminal charges were all dismissed against the grievant, Lennie Dale Adkins.

The Legislature specifically expressed the grounds for suspension in plain and specific language and the board has no authority to create a new cause for suspension.

The Board further specifically adopted the same specific grounds under Cabell County board of Education Bylaws and Policies 3139.01 and such plain specific language must be strictly construed against the board and in favor of the grievant, in that the statute and rules are remedial in nature and designed to protect the rights of the employee.

It is well established that “[s]chool personnel regulations and laws are to be strictly construed in favor of the employee.’ Syllabus Point 1, *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979).” Syl. pt. 1, *Smith v. W.Va. Div. of Rehab. Services*, 208 W.Va.284, 540 S.E.2d 152 (2000).

The Cabell County School Board could have sought suspension under other provisions of the statute and bylaws such as immorality but chose not. Therefore the board having the burden of proof cannot meet that burden by electing a nonexistent basis for suspension in contravention of law.

There is no legal authority for this suspension and as such violates the plain language of the statute; violates the constitutional separation of powers; fails to address the remedial nature of the statute and how it should be construed; treated the grievant discriminatory; relies on prior decisions of the board in violation of the statute and law; found that a charge for a crime was evidence of guilt; ignored the burden of proof; was in excess of the statutory authority; was clearly wrong based on the evidence; and in violation of constitutional and statutory provisions.

“To address the issue raised by the plaintiffs, we must first examine the statutory language, bearing in mind that courts should give effect to the legislative will as expressed in the

language of the statute. *Moskal v. United States*, 498 U.S. 103, 111 S. Ct. 461, 112 L.Ed.2d 449 (1990); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S. Ct. 2297, 85 L.Ed.2d 692 (1985). Interpreting a statute is a legal issue, and hence our review of the statute is plenary.

Generally, in examining statutory language, words are given their common usage. If the statutory language is plain and admits of no more than one meaning, and within the constitutional authority of the law-making body which passed it, the duty of interpretation does not arise, and the rules which are to aid ambiguous language need no discussion. *State of West Virginia ex rel. Estes v. Egnor*, ___ W. Va. ___, 443 S.E.2d 194 (1994); *West Virginia Radiologic Tech. Bd. of Examiners v. Darby*, 189 W. Va. 52, 427 S.E.2d 486 (1993); see *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989); *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981); *Caminetti v. United States*, 242 U.S. 470, 37 S. Ct. 192, 61 L.Ed. 442 (1917).

The Board has the burden of proof in this action. "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).

The Board is limited to the specific causes listed in the WV Code 18A-2-8 for suspension. "This Court has previously held that a teacher may be dismissed only for the reasons specifically enumerated in the statute. In syllabus point three of *Beverlin v. Board of Education*, 158 W.Va. 1067, 216 S.E.2d 554 (1975), we held that "[t]he 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." 1. (See footnote 6) Applying that rationale to cases of suspensions, this Court explained as follows in *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994): "In that the causes for suspension are the same as those for dismissal, under W.Va.Code, 18A-2-8 [1990], it follows, then, that a teacher's suspension must also be reasonable and based upon the causes found in that Code section." *Id.* at 544-45, 453 S.E.2d at 378-79. In syllabus point two of *Parham*, this Court summarized as follows: "The authority of a county board of education to suspend a teacher under W.Va. Code, 18A-2-8 [1990] must be based upon the causes listed therein and must be exercised reasonably, not arbitrarily or capriciously."

The board has passed bylaws and policies for suspension that are identical to the state statute, of the reasons set forth, none of which is "being charged with a felony.

CABELL COUNTY SCHOOL BYLAWS AND POLICIES

3139.01 - SUSPENSION

The Superintendent, subject only to approval of the Board, shall have authority to suspend school personnel. The suspension may be with or without pay.

The Superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the Superintendent with the Board of Education and such period of suspension shall not exceed thirty (30) days unless extended by order of the Board.

The Board may suspend or dismiss any person in its employment at any time for:

- A. immorality;
- B. incompetency;
- C. cruelty;
- D. insubordination;
- E. intemperance;
- F. willful neglect of duty;
- G. unsatisfactory performance;

H. the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

Further, the Cabell County Board of education's burden of proof is to set forth not only the specific conduct that is in violation of the statute and proof beyond a reasonable doubt thereof; but in cases which the alleged conduct occurred outside of the school the reasonable nexus thereto. "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 County*, 169 W. Va. 63, 285 S.E.2d 665 (1981).

Appellant immediately informed the county superintendent of schools and the principal of Moorefield High School of the beating incident and subsequent occurrences. The first action taken by the school system occurred after Appellant was charged with a felony offense of child abuse. Upon learning of the felony charge, the county superintendent suspended Appellant with pay on October 15, 2004, pending an investigation. After completing his investigation and learning that Appellant's plea agreement with the State had been accepted by the court, the superintendent suspended Appellant without pay on October 29, 2004. The superintendent then recommended to the Hardy County Board of Education (hereinafter referred to as "Board") that Appellant be discharged pursuant to West Virginia Code § 18A-2-8. 1. (See footnote 5) A hearing was held by the Board on November 16, 2004, at which evidence regarding the matter was adduced. During the hearing, the Board rejected the superintendent's recommendation of dismissal, but did "uphold the superintendent's suspension without pay until a satisfactory comprehensive evaluation by a psychiatrist of our choosing determines that he is not a danger to any Hardy County School students and that he will not return back to school before January 1st."

Admittedly, Appellant committed a serious act and is guilty of the crime to which he pled, but the issue before us is limited to whether that act and that crime, committed in the home, has ramifications proven by clear and convincing evidence which directly affect Appellant's teaching ability and performance in such a manner as to warrant suspension of his license to teach. When we consider all of the evidence and the remedial steps already taken by the county board, the DHHR, and the court under both its criminal and abuse and neglect jurisdiction, this Court believes that the four-year suspension in this case is not supported by clear and convincing evidence, is the result of a fundamental misapplication of the law governing revocation and suspension of teaching licenses, is clearly wrong in light of the "reliable, probative and substantial evidence" and represents the unwarranted exercise of discretion of the State Superintendent of Schools. W.Va. Code § 29A-5-4(g). Accordingly, we find it necessary to reverse the circuit court's order affirming the agency's action suspending the Appellant's certificates to teach.

ORAL ARGUMENT

It is the opinion of the Respondent that the issues is clearly a matter of law and an oral argument would not aid the Court.

CONCLUSION

The decision of the Kanawha County Circuit Court must be upheld and the grievant is entitled to back pay and attorney fees.

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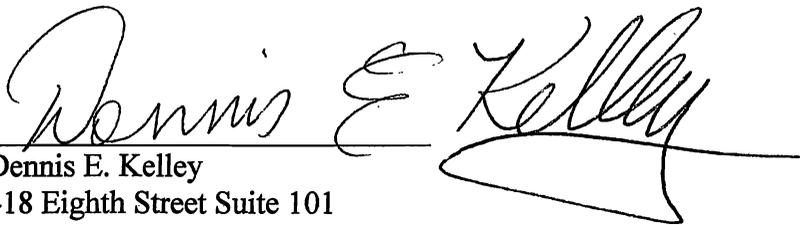
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Certificate of Service

The undersigned hereby certify that on April 4, 2015, we served the foregoing Respondents Brief on counsel for the Petitioner by depositing a true copy thereof in the United States Mail, addressed as follows:

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