GEORGIANNA HURLEY,

Grievant,

v. **Docket No. 97-23-394**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On August 29, 1997, Georgianna Hurley (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging her dismissal by Respondent Logan County Board of Education (LCBE). A Level IV hearing was held in this Board's office in Charleston, West Virginia, on October 1, 1997. As agreed at the conclusion of the hearing, this matter became mature for decision on October 23, 1997, following receipt of post-hearing briefs, and reply briefs, from each of the parties. (See footnote 1)

DISCUSSION

Grievant was employed by LCBE as a classroom teacher at South Man Grade School (SMGS). On August 14, 1997, LCBE Superintendent Ray Woolsey advised Grievant of his intent to recommend her dismissal based upon the following pertinent particulars:

> I have been informed that you have executed a plea agreement with the Logan County Prosecuting Attorney's Office whereby you agreed to plead guilty to contributing to the delinquency of a minor, more specifically, you provided alcohol to a minor in your home.
>
> I am also aware that certain photographs exist that include you and the same minor nude or partially nude together in the same photo. The Prosecuting Attorney's office has agreed to turn over its evidence against you for our use if we should so desire.

> The minor in the present case was a student enrolled in the Logan County School System. I believe that your conduct was unacceptable for a professional educator; therefore, I am recommending that your employment with the Logan County Board of Education be terminated.
>
> West Virginia Code Section 18A-2-8 states in part, [A] board may suspend or dismiss any person in its employment for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or plea or nolo contendere to a felony charge.
>
> I believe your conduct was immoral and in violation of the above mentioned code section and also a violation of Logan County's Policy VI.5.2 Personal Conduct, in that your actions were as such to be (1) gross misconduct unbecoming a school employee, (3) immoral conduct or a criminal act, and (6) participation in any act which would tend to disrupt operation of a school or school services.

J Ex 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; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Landy v. Raleigh County Bd. of Educ.,Docket No. 89-41-232 (Dec. 14, 1989). Moreover, 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). Because the conduct of which LCBE complains occurred while Grievant was at home, and not engaged in the performance of her official duties as a school teacher, LCBE must demonstrate a "rational nexus" between Grievant's off-duty behavior and the duties the employee is to perform. Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986); Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994). See Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976).

Many facts pertinent to resolution of this matter are not in dispute. However, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. See Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See also Harper v. Dept. of the Navy, 33

M.S.P.R. 490 (1987).

Grievant was employed by LCBE for over 15 years, most recently as a Kindergarten classroom teacher at SMGS. During the evening of December 25, 1996, and continuing into the early morning hours of December 26, 1996, M.B., (See footnote 2) then a seventeen-year-oldminor, was a guest in Grievant's home. At that time, M.B. was a student at LCBE's Man High School. While M.B. was in her home, Grievant provided her with beer and wine. In addition, Grievant and M.B. appeared together in photos while nude and partially nude.

On December 27, 1997, one of M.B.'s parents contacted the Logan County Sheriff's Department, which initiated a criminal investigation of these matters. Subsequent to that investigation, Grievant was indicted by the Logan County Grand Jury on January 13, 1997, on three charges, one count of using minors to film sexually explicit conduct in violation of W. Va. Code § 61-8C-2, and two counts of contributing to the delinquency of a minor under W. Va. Code § 49-7-7. Upon learning of the criminal investigation, LCBE Superintendent John D. Myers suspended Grievant with pay on January 5, 1997. Following the indictment, Grievant was indefinitely suspended without pay, effective January 21, 1997. This suspension was appealed directly to Level IV and sustained by this Grievance Board in Hurley v. Logan County Board of Education, Docket No. 97-23-024 (Apr. 14, 1997) (Hurley I).

On June 13, 1997, the indictments against Grievant were dismissed by the Circuit Court of Logan County. Thereafter, Grievant entered a guilty plea to the charge of contributing to the delinquency of a minor, admitting that she provided alcoholic beverages to a minor, in accordance with a plea bargain agreement with the Logan County Prosecuting Attorney. Mr. Woolsey's previously described termination notice followed, and a hearing was conducted before LCBE on August 26, 1997. LCBE voted to terminate her employment. Grievant testified at Level IV that she had invited her boyfriend, John Hinchman, to her home for a "quiet evening." Mr. Hinchman brought along a friend, Randall Bragg, a United States Marine stationed in North Carolina. M.B. had been invited to Grievant's home by Grievant's thirteen-year-old daughter. M.B. arrived approximately one hour before Mr. Hinchman and Mr. Bragg.

Grievant acknowledged that she had been drinking wine coolers before Mr. Hinchman and Mr. Bragg arrived. She also stated that Mr. Hinchman had beer in her refrigerator. Grievant recalled playing "spin the bottle" with M.B., Mr. Bragg, and Mr. Hinchman. According to Grievant, she became ill, went to the bathroom, came back, drank some beer, felt sick, and went to bed in her daughter's

bedroom. She woke up in her own bedroom, but could not recall how she got there. Grievant states that she did not become aware that any pictures had been taken until she was called by M.B.'s mother the following day. Indeed, under questioning by her counsel, Grievant denied remembering anything about the pictures at the time they were taken.

However, on cross-examination she "just barely" recalled being in a photo with M.B., where they are touching their tongues together as if they are kissing. Likewise, she could not explain why she appeared to be awake and smiling in pictures with M.B. lying on the bed while both of them were nude. Grievant reiterated that she passed out from drinking; therefore she had no recollection of the events depicted in those particular photos.

LCBE has the burden of proving the charges in this disciplinary action by a preponderance of the evidence. A preponderance of the evidence is evidence which is 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 moreprobable than not. It may not be determined by the number of witnesses, but by the greater weight of all evidence presented, which means that such factors as opportunity for knowledge, information possessed, and manner of testifying determines the weight accorded to testimony rather than the greater number of witnesses. See Black's Law Dictionary 1344-45 (4th ed. 1968); Petry v. Kanawha County Bd. of Educ., Docket No. 96- 20-380 (Mar. 18, 1997).

Grievant's attempt to minimize her involvement in providing alcohol to M.B., and denying any culpable participation in the nude photographs with M.B., was unsuccessful because her testimony on these issues was not credible. Grievant acknowledged facts which were beyond dispute, simultaneously trying to avoid any personal responsibility for her conduct by claiming she had too much to drink. However, her claim that she was not aware that M.B. was drinking while in her home was inconsistent with the statements of M.B. and Mr. Hinchman, as well as the photograph described by Logan County Prosecuting Attorney John Sims in which Grievant and M.B. are standing in the kitchen while M.B. is holding a bottle of wine.

On cross-examination, Grievant retreated from her earlier statement that she did not recall any photographs being taken, admitting that she had some recollection of a photo where she was partially clothed and standing, but no recollection of a photo where she was unclothed and lying down. Notwithstanding that Grievant was likely intoxicated at the time of the events in question, Grievant's

memory of these events is too selective to lend credibility to her statements. Additionally, the undersigned is not persuaded that Grievant's voluntary intoxication excuses her actions of contributing to the delinquency of a minor by providing alcohol, or her posing in nude and semi-nude photos with the same minor. Immorality is one of the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). In Golden v. Board of Education, 169 W. Va. 63, 285 S.E.2d 665 (1981), the Supreme Court of Appeals of West Virginia observed that 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. Accord, Rosenburg v. Nicholas County Bd. of Educ., Docket No. 34-86-125-1 (Aug. 4, 1986). Although exactly what constitutes immoral conduct may be perceived differently by different people, LCBE's determination that Grievant's actions constituted immorality under W. Va. Code § 18A-2-8 represents a reasonable application of this standard.

The conduct for which Grievant was dismissed involves acts performed at a time and place separate from her employment. Thus, LCBE is obligated to establish a "rational nexus" between the alleged off-duty misconduct and the duties the employee performs. Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986); Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), rev'd, Circuit Court of Kanawha County, No. 94-AA-136 (Mar. 1, 1997), appeal accepted, W. Va. Sup. Ct. (Nov. 4, 1997). A rational nexus for suspension of a teacher exists:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. (citations omitted)

Rogliano, supra, at 224.

In this matter, Grievant is a classroom teacher at the elementary school level. LCBE has shown that Grievant provided alcohol to a minor student in her home, and posed in nude and semi-nude photos with that same student. These actions are inherently inconsistent with the teacher's position as a "role model" expected to set a moral example for her students. (See footnote 3) Hurley I. See Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13- 88-189 (Mar. 31, 1989). See generally, Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Adler v. Bd. of Educ., 342 U.S. 485, 493

(1952); Bd. of Educ. v. Wood, 717 S.W.2d 837 (Ky. 1986). Accordingly, the undersigned finds that LCBE established the first prong of the Rogliano test by demonstrating by a preponderance of the evidence that Grievant's conduct "directly affects the performance of the occupational responsibilities of the teacher." See Rogliano, supra; Golden, supra; Hurley I.

LCBE also introduced a copy of The Logan Banner newspaper for February 2, 1997, which contains a front page article headlined "Man Kindergarten teacher arraigned on porn charge." R Ex 3 at L IV. LCBE submitted a subsequent issue of The Logan Banner, dated August 6, 1997, with the front page headline, "Hurley pleads guilty to misdemeanor." R Ex 2 at L IV. Superintendent Woolsey testified at the pre-termination hearing before LCBE that Grievant's conduct was also the subject of news reports on television and radio.

Further, Superintendent Woolsey and SMGS Principal Juanita Grimmett noted that over the summer a number of parents indicated they wanted to transfer their Kindergarten students out of SMGS, if Grievant was returning to teach there. Superintendent Woolseyalso indicated that some parents had threatened to picket SMGS if Grievant returned to her teaching duties. Grievant claims to have community support from students and parents, based upon her encounters with the public at a sporting event. However, she also complains that she has been unable to obtain employment at two local businesses in Logan County due to notoriety from the incident. (See footnote 4)

A preponderance of the evidence indicates that a number of parents did not want Grievant teaching their Kindergarten-age children if she committed the acts which led to her dismissal. Given the charges, this does not appear to be an irrational reaction by the parents. Accordingly, the undersigned concludes that LCBE also established the second prong of the Rogliano test by demonstrating by a preponderance of the evidence that, as of the time she was dismissed, Grievant's conduct had become sufficiently notorious so as to significantly and reasonably impair her ability to teach the students assigned to her Kindergarten classroom. See Rogliano, supra; Woo, supra. Moreover, there was no evidence of improper contribution to such notoriety on the part of school officials beyond providing factual information in response to legitimate press inquiries.

Having concluded that LCBE established both of the alternative prongs of the Rogliano test, LCBE's decision to terminate Grievant's employment, rather than impose some lesser penalty, was neither arbitrary and capricious, nor an abuse of discretion, despite Grievant's significant tenure and prior unblemished record. See Beverlin, supra. See also Parham v. Raleigh County Bd. of Educ., 192

W. Va. 540, 453 S.E.2d 374 (1994). The sustained charges represent a serious lapse in judgment and significantlyirresponsible behavior inconsistent with the standard of off-duty conduct which a board of education may reasonably expect from a classroom teacher. See Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant was employed by the Logan County Board of Education (LCBE) as a classroom teacher at South Man Grade School (SMGS).

2. Grievant was employed by LCBE for over fifteen years, the past nine teaching Kindergarten. Prior to the incidents which gave rise to this action and related suspensions, Grievant had performed her duties in a satisfactory manner, and had not previously been the subject of any disciplinary action.

3. On December 25, 1997, Grievant invited her boyfriend, John Hinchman, to her home for a Christmas party. Mr. Hinchman arrived with a male friend, Randall Bragg. Grievant's three minor children, ages 13, 11, and 9, were present throughout most of the evening. A minor female, M.B., age 17, was invited to the party by Grievant's eldest daughter, age 13. Also present was Aaron Padgett, age 21, described as the "boyfriend" of Grievant's eldest daughter.

4. During the course of the evening, Grievant, M.B., Mr. Bragg and Mr. Hinchman played various games, including "spin-the-bottle."

5. While M.B. was in her home, Grievant provided beer and wine to M.B. Grievant posed in nude and semi-nude pictures with M.B., taken by Mr. Bragg.

6. At the time of these activities, M.B. was enrolled as a student at LCBE's ManHigh School.

7. On December 27, 1997, the Logan County Sheriff's Department initiated a criminal investigation regarding Grievant, Mr. Hinchman, and Mr. Bragg, after receiving a complaint from one of M.B.'s parents.

8. On January 13, 1997, Grievant was indicted by the Logan County Grand Jury on one count of using minors to film sexually explicit conduct in violation of W. Va. Code § 61-8C-2, and two counts of contributing to the delinquency of a minor under W. Va. Code § 49-7-7.

9. Upon learning of the criminal investigation, LCBE Superintendent John D. Myers suspended Grievant with pay on January 5, 1997. Following the indictment, Grievant was indefinitely suspended without pay, effective January 21, 1997. This suspension was appealed to Level IV, and sustained by this Grievance Board in Hurley v. Logan County Board of Education, Docket No. 97-23-024 (Apr. 14, 1997).

10. On June 13, 1997, the indictments against Grievant were dismissed by the Circuit Court of Logan County. Thereafter, Grievant entered a guilty plea to the charge of contributing to the delinquency of a minor, admitting she provided alcoholic beverages to M.B., a minor.

11. On February 2, 1997, The Logan Banner newspaper contained a front page article with a headline stating, "Man Kindergarten teacher arraigned on porn charge." R Ex 3 at L IV.

12. On August 6, 1997, The Logan Banner contained a front page article with a headline stating, "Hurley pleads guilty to misdemeanor." R Ex 2 at L IV. The criminal allegations against Grievant were also the subject of radio and television news reportsbroadcast in Logan County.

13. Over the summer, a number of parents advised Superintendent Woolsey or SMGS Principal Juanita Grimmett that they wanted their children to transfer out of Kindergarten at SMGS if Grievant was to return to teaching there. Some parents also indicated to Superintendent Woolsey that they would picket SMGS if Grievant returned to her teaching duties.

14. On August 14, 1997, LCBE Superintendent Ray Woolsey notified Grievant of his intent to recommend that LCBE terminate her employment for immorality under W. Va. Code § 18A-2-8, and violation of the Logan County policy relating to employee conduct. Following a hearing before LCBE on August 26, 1997, LCBE voted to terminate Grievant's employment.

CONCLUSIONS OF LAW

1. 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).

2. Immorality is one of the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), rev'd, Circuit Court of Kanawha County, No. 94-AA-136 (Mar. 1, 1997), appeal accepted, W. Va. Sup. Ct. (Nov. 4, 1997). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554

(1975).

3. 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). Accord, Rosenburg v. Nicholas County Bd. of Educ., Docket No. 34- 86-125-1 (Aug. 4, 1986). LCBE properly determined that Grievant's providing beer and wine to a 17-year-old minor, and posing in nude and semi-nude photos with the same minor, constituted acts of immorality under W. Va. Code § 18A-2-8.

4. In order to discipline a school employee for acts performed at a time and place separate from employment, the employer must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986); Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981); Woo, supra. See Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976).

5. A rational nexus for suspension of a teacher exists:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. (citations omitted)

Rogliano, supra, at 224.

6. Grievant's providing alcoholic beverages to a minor who was then a student in Man High School, and posing in nude and semi-nude photos with the same minor, constitute conduct which directly affects the performance of Grievant's occupational responsibilities as a teacher. Hurley I. See Bledsoe v. Wyoming County Bd. of Educ., 183 W. Va. 190, 394 S.E.2d 885 (1990); Rogaliano, supra.

7. LCBE established that the conduct for which Grievant was dismissed was thesubject of such notoriety in the community as to significantly and reasonably impair Grievant's ability to discharge the responsibilities of her Kindergarten teaching position. See Golden, supra; Rogliano, supra.

8. Despite Grievant's previously unblemished record during more than 15 years of teaching, LCBE did not abuse its discretion or act arbitrarily and capriciously in deciding to terminate Grievant's

employment based upon Grievant's proven immoral conduct. See Beverlin, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 11, 1997

Footnote: 1

The parties agreed at the close of the hearing to submit written post-hearing arguments, postmarked not later than October 15, 1997, with optional reply briefs to be similarly filed not later than October 22, 1997. Each party filed a timely initial brief. Thereafter, each party also filed a reply brief in which it was erroneously noted that reply briefs had not been contemplated. The undersigned has considered all arguments advanced in the parties' initial and reply briefs in deciding the issues raised in this matter. However, Respondent attached a piece of correspondence to its reply brief without requesting permission to reopen the record and admit additional documentary evidence. This evidence is excluded and was not considered in this decision.

Footnote: 2

The minor student who was involved in this matter will be identified only by her initials, consistent with this Board's practice respecting the privacy of individuals in such circumstances. See, e.g., Edwards v. McDowell County Bd. of Educ., Docket No. 93-33- 118 (July 13, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23,1994).

Footnote: 3

The fact that M.B. was then a high school student at another Logan County school, and not a Kindergarten student in Grievant's school is a distinction without a difference for purposes of applying the Rogliano tests.

Footnote: 4

Grievant indicated that these employers hired other applicants shortly after informing her that they had no vacancies.