THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TAMMY CONRAD,
Grievant,

v. **DOCKET NO. 2009-1458-GraED**

GRANT COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Tammy Conrad, at level three of the grievance procedure, on April 16, 2009, when she was dismissed from her employment as a custodian by her employer, the Grant County Board of Education ("GBOE"). The statement of grievance reads:

> Respondent terminated Grievant based upon allegations of possession of marijuana at school, specifically in her car. Grievant denies these allegations and contends that she is not guilty of any on duty misconduct. She further denies any off duty conduct with a rational nexus with her duties as a custodian. In addition, Grievant contends that dismissal was too harsh a penalty even if the charges against her were proven. She also alleges disparate treatment. Grievant alleges a violation of West Virginia Code §18A-2-8 & [1]8A-2-7 and that the action of the board of education was arbitrary and capricious.

The relief sought by Grievant is reinstatement to her position with GBOE "with compensation for all lost wages and benefits with interest and expunging of all references to her dismissal from her record with Respondent."

A level three hearing was held before the undersigned Administrative Law Judge on July 31, 2009, in Elkins, West Virginia. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was

represented by Dennis V. DiBenedetto, Esquire, Grant County Prosecuting Attorney. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on September 4, 2009.

Synopsis

Grievant was dismissed from her employment as a custodian at Petersburg High School after marijuana residue was found in her car, which was parked on school property, and a subsequent search of her home, which she shared with her boyfriend, resulted in the authorities finding 44 grams of marijuana. Respondent did not give Grievant notice of the charges against her, resulting in nominal damages being awarded to Grievant. Respondent proved Grievant engaged in immoral conduct by bringing marijuana onto school property, and pleading no contest to the charge of possession of marijuana. Respondent did not demonstrate a rational nexus between Grievant's off-duty conduct and her job as a custodian. The penalty imposed was so clearly disproportionate to the offense proven that it reflected an abuse of discretion. Grievant's dismissal should be reduced to a 15 day suspension without pay.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant was employed as a custodian at Petersburg High School, by the Grant County Board of Education ("GBOE"), for 13 years, and had obtained continuing contract status. Prior to her dismissal she worked from 6:30 a.m. to 2:30 p.m.

2. The Grant County Sheriff's Department periodically takes a trained dog to

Petersburg High School and Union High School, both in Grant County, to scan the schools and parking lots for drugs. Garry L. Moore, Principal of Petersburg High School, had given permission for such scans at that high school.

3. On September 26, 2008, Deputy Sheriff Timothy Thompson, who is a canine officer, took his dog, which is trained to find drugs, to Petersburg High School, and did a scan of the school with the dog. After going through the school, Deputy Thompson moved outside to scan one of the three parking lots at the school. He had not scanned the back parking lot on his previous visits, so he chose that lot to scan. His dog indicated on Grievant's car during the scan of the parking lot.

4. Principal Moore advised Deputy Thompson that the car belonged to Grievant. Grievant was called to Principal Moore's office where Deputy Thompson asked her if there were any drugs in her car, and she responded that there were not. Deputy Thompson then told Grievant he was going to search her car. Grievant's car was locked. Deputy Thompson and Grievant went to Grievant's car, and she unlocked it. Deputy Thompson found a 2" x 2", or smaller, green plastic container, under a pack of cigarettes and inside a cup holder, which he opened. The contained had a strong odor of marijuana, and a few small pieces of leaves, which Deputy Thompson identified as marijuana residue. Deputy Thompson is familiar with marijuana and its smell. The container was never tested by a laboratory to verify the contents as marijuana. Grievant denied that the container was hers, and told Deputy Thompson she did not know it was in her car.

5. Deputy Thompson then asked to see Grievant's purse. Grievant took Deputy

Thompson to the janitor's closet where she kept her purse,[1] and Deputy Thompson proceeded to search her purse. Deputy Thompson found a pill in a prescription bottle which he believed to be hydrocodone. The prescription label was not for hydrocodone, but it was a prescription for Grievant.[2]

7. Grievant has had foot surgery, and has two screws in her foot. She sometimes has pain in her foot because of this, and has a prescription for a pain killer, Vicoden, which contains hydrocodone. She always carries a Vicoden with her in case she needs it at work, as she is on her feet most of the time, and this was the pill Deputy Thompson found which was not in the correct prescription bottle. This prescription for the Vicoden was from April 2008, indicating that she was not abusing this drug.

8. Deputy Thompson then asked Grievant if she had illegal drugs at her home and asked to search her home.[3] Grievant responded that she did not have illegal drugs at her home, and she agreed to let Deputy Thompson search her home. Around noon, Grievant drove her car to her home, and Deputy Thompson followed her. Grievant let Deputy Thompson into her home.

9. At the same time, Deputy Steve Wratchford was trying to obtain a search

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[1] It appears from the record that this area had not previously been scanned by Deputy Thompson and his dog. Deputy Thompson stated this closet is accessed from outside the building.

[2] Principal Moore advised the Superintendent that the pill "may be morphine," and that Grievant had some other medications "that may not have belonged to her." The record does not reflect how Principal Moore arrived at these beliefs, nor is there evidence in the record to support either assertion.

[3] The undersigned finds it difficult to understand how the discovery of a box with marijuana residue in Grievant's car, and one prescription pill not in the proper container in her purse, would generate or support such a request.

warrant to search Grievant's home. Deputy Wratchford arrived at Grievant's home with a search warrant a few seconds after Grievant let Deputy Thompson into her home; however, the description of the premises to be searched on the search warrant was not Grievant's home.

10. Grievant lives with her boyfriend, Thomas VanMeter. They have a child together who is 20 years old, and have lived together for some time. When Grievant and Deputy Thompson entered Grievant's home, Mr. VanMeter was at the table, and had been smoking marijuana, creating a strong odor of marijuana as the door was opened. There were bags of marijuana, a bowl used to smoke marijuana, a crusher, a container with butts, and some pill bottles on the table. Mr. VanMeter was not expecting Grievant to come home at this time of the day.

11. The Deputies proceeded to search Grievant's home. They found, among other things, 44 grams (1.55205 ounces) of marijuana, some packaged in various sizes of plastic baggies, and some in various containers, $550.00 in cash in a box which had marijuana seeds in the bottom, cash in other areas totaling almost $2,000.00, several pills, empty pill bottles, electric scales and digital scales, and some books and magazines on marijuana.

12. Grievant was arrested and was charged with possession of marijuana with intent to deliver. Grievant remained incarcerated for some period of time, and was placed on administrative leave with pay effective September 29, 2008. Grievant understood that she was being placed on administrative leave because she was incarcerated. Grievant

pled no contest to possession of a controlled substance.[4] Prior to this, Grievant did not have a criminal record.

13. Superintendent Marsha Carr-Lambert recommended to GBOE that Grievant be dismissed from her employment. Superintendent Carr-Lambert advised Grievant by letter dated February 12, 2009, that she would be recommending Grievant's dismissal at the next GBOE meeting, on February 24, 2009. This letter did not state the reason for this recommendation. Grievant received this letter on February 17, 2009.

14. Grievant knew that Superintendent Carr-Lambert was recommending her dismissal because of the events of September 26, 2008.

15. GBOE held a pre-termination hearing[5] on the Superintendent's recommendation on April 9, 2009. GBOE voted to terminate Grievant's employment, and Grievant was so notified.

16. At the hearing before GBOE, Grievant stated she did not know the small green container was in her car or what was in it, and she stated she did not know there was marijuana in her house. Grievant was not truthful in her testimony.

17. As a custodian, Grievant's primary job duty was cleaning Petersburg High School. She had some contact with students, and was required to be cordial to students,

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[4] According to Respondent's counsel, the Grant County Prosecuting Attorney's office attempted to develop a criminal case against Grievant for selling drugs, but was unable to do so. Because that office was still attempting to develop the evidence to support such a case in April 2009, nearly seven months after Grievant's arrest, this information was not made known to GBOE, and did not form the basis for the decision to dismiss Grievant. The record does not reflect the charges against Mr. VanMeter, or whether he was convicted of any crime.

[5] Respondent referred to this hearing in its written argument as a Level II hearing, which it was not.

but she was not required to mentor students.

18. Until the 2006-2007 school year, Grievant's work had been rated on her evaluations over the years as satisfactory/meets standards. On her evaluation for 2006-2007, Grievant's supervisor noted that certain work habits, such as adhering to break times and signing in and out, needed attention, as did certain areas of her performance. Grievant's evaluation for the 2007-2008 school year rated her performance as satisfactory in three areas, and "needs attention" in performance, noting Grievant "needs to schedule her time so as to keep the windows clean." Her performance overall was rated as "meets standards." Superintendent Carr-Lambert did not consider Grievant's work record prior to making the recommendation that Grievant be dismissed.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *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). 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 proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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). WEST VIRGINIA CODE § 18A-2-8 provides that "[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."

The first issue raised by Grievant is whether Respondent provided Grievant with the required notice of the charges against her. WEST VIRGINIA CODE § 18A-2-8(b) provides that when a board of education is considering suspending or dismissing an employee, "[t]he charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board." Grievant was given notice on February 17, 2009, that the superintendent would be recommending termination of her employment at the February 24, 2009 GBOE meeting. The notice, however, did not state the charges against Grievant.

An employee, such as Grievant, who has attained continuing contract status is a tenured employee. *Bd. of Educ. of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994).

> There can be little doubt tenured employees have property and liberty interests in their employment. *In State ex rel. McLendon v. Morton*, 162 W. Va. 431, 444, 249 S.E.2d 919, 926 (1978), we stated, with regard to teachers, that tenure is both a "substantial right" and a "valuable property interest." We find such a right and an interest is equally applicable to other school employees who the legislature has granted tenured status. *See also Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 205, 382 S.E.2d 40, 42 (1989) (a tenured teacher was entitled to procedural safeguards).

Id.

"An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Supreme Court of Appeals of West Virginia, in *Wirt, supra.,* determined what due process is required to terminate a continuing contract of employment.

> It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. *An employee is also entitled to written notice of the charges* and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. at Syl. Pt. 3.

Goldstein v. Dep't of Health and Human Res., Docket No. 2008-1061-DHHR (May 23, 2008)(emphasis added).

"Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981), citing Syl. Pts. 4 and 5 of *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 238 S.E.2d 842 (1977).

In this case, Respondent did not include any description of the reason for Grievant's dismissal in the notice to Grievant of the recommendation for termination. There is no

question that this letter does not meet even the basic requirements of WEST VIRGINIA CODE § 18A-2-8(b) regarding notification of the charges. Respondent offered no excuse for this glaring omission. Respondent did, however, elicit testimony from Grievant that she knew why the Superintendent was recommending her dismissal. It is also clear that Grievant was prepared to defend herself at the hearing before GBOE. Nonetheless, this cannot excuse Respondent's conduct. It failed to follow the statutory requirements, and violated Grievant's right to due process. Grievant asserted that "[a] due process violation invalidates a disciplinary action against an employee regardless of the underlying merits of the case," citing *Wines v. Jefferson County Bd. of Educ.*, 213 W. Va. 379, 582 S.E.2d 826 (2003).

In *Wines*, the Supreme Court of Appeals of West Virginia, in a *per curiam* opinion, did not invalidate the disciplinary action; rather, it awarded the grievant back pay for the period between the effective date of her dismissal, and the time she was provided a hearing, where the board of education failed to provide a hearing prior to the grievant's dismissal.

In *White v. Barill*, 210 W. Va. 320, 557 S.E.2d 374 (2001), the employee had not been given a pre-termination hearing. The Court, also in a *per curiam* opinion, remanded the case to the Circuit Court, to remand to the administrative body to conduct a substitute pre-termination hearing to determine whether the employee would have been dismissed had he been given a "full and timely" hearing, and for an award of nominal damages upon a finding that the employee would have still been terminated, even if he had been given a pre-termination hearing. The Court noted:

When official policy results in a person being deprived of property or liberty

> without procedural due process, and such deprivation would have taken place even if a proper hearing had been held, then the person is not entitled to compensatory damages for the deprivation itself. *Carey v. Piphus*, 435 U.S. 247, 260, 98 S. Ct. 1042, 1050, 55 L. Ed. 2d 252 (1978). The person is entitled only to nominal damages for the denial of due process, unless the person demonstrates actual injury attributable to the *denial of due process* rather than to the *deprivation*." 201 W.Va. at 533, 498 S.E.2d at 726, quoting *DeSimone v. Board of Educ.*, 612 F. Supp. 1568, 1571 (E.D.N.Y.1985)).

Id.

While Respondent's conduct cannot be condoned, the undersigned does not find it appropriate, under the facts presented here, to return this matter to GBOE. Grievant acknowledged that she knew her dismissal was being recommended because of the events of September 26, 2008, and she presented no evidence that she was prejudiced by the lack of specific notice of the charges at the pre-termination hearing. The undersigned does not believe that the outcome of the pre-termination hearing would have been any different had notice of the charges been provided. However, it is appropriate to award nominal damages in the amount of $100.00.

The next issue is whether Respondent proved misconduct on the part of Grievant, and if so, whether that misconduct falls within one of the statutory causes for dismissal. GBOE did not state the basis for the decision to dismiss Grievant, nor did it identify which of the statutory causes for dismissal fit this situation. "It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990). Grievant's plea of nolo contendre to possession of a controlled substance

is a misdemeanor, not a felony (W. VA. CODE § 60A-4-401(c)), so this plea could not, in and of itself, support her dismissal. Grievant's possession of marijuana, if proven, would constitute immorality.

The term immorality as used in the statute "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.'" *Golden v. Bd. of Educ. of County of Harrison*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes, [supra], citing Youngman v. Doerhoff*, 890 S.W.2d 330 (MOCC. 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry, supra.* "Possession of marijuana is illegal, and 'not in conformity with accepted principles of right and wrong behavior.' *Golden, supra.*" *Miller v. Wood County Bd. of Educ.*, Docket No. 03-54-376 (Mar. 16, 2004).

Grievant argued that Respondent did not prove that the residue found in the green box in her car was marijuana, noting that it was not tested. "Franklin Cleckley's *Handbook on Evidence for West Virginia Lawyers* . . . states at Volume 2, § 7-1(D)(14) in its section on 'Opinions and Expert Testimony':

> A person who is familiar with the drug in issue and its physical and chemical property is permitted to give an opinion on the identity of the drug, whether the familiarity arises from formal or informal training and experience. . . . Generally, expert testimony is unnecessary to establish the nature of an alleged controlled substance."

Miller, supra.

Deputy Thompson possessed the requisite qualifications to identify the residue in the small box as marijuana. Respondent has demonstrated that it is more likely than not that there was marijuana residue in Grievant's car while it was parked on school property. Respondent did not demonstrate that Grievant knew this box was in her car, and it appears that it was not in plain sight. It is obvious that Mr. VanMeter is a heavy user of marijuana, although there is insufficient evidence in the record from which the undersigned can draw any conclusion about whether Grievant also uses marijuana. Nonetheless, Grievant brought the box with marijuana residue onto school property, and she pled no contest to the misdemeanor charge of possession of a controlled substance, all of which qualifies as immoral conduct.

Respondent also believed the undersigned should consider that 44 grams of marijuana was found at Grievant's home, along with drug paraphernalia. Grievant pointed out that anything which Grievant does at her home is off-duty conduct, and argued there is no rational nexus between the conduct here and Grievant's job as a custodian.[6] Superintendent Carr-Lambert testified that Grievant's job is to clean the facility, but that she is also expected to have cordial interaction with students.

> In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. A rational nexus exists if the conduct

[6] It is impossible for the undersigned to determine whether the no contest plea related to what was found in Grievant's home, or what was found in her car. For that reason, the undersigned must consider it in connection with what was found in Grievant's car, and Respondent need not demonstrate a rational nexus between the plea and Grievant's job.

> performed outside of the job directly affects the performance of the occupational responsibilities of the employee. Misdemeanor criminal acts directly involving a school board employee's occupational responsibilities constitute a rational nexus for which an employee may be dismissed.

Reed v. Summers County Bd. of Educ., Docket No. 06-45-002 (Jan. 26, 2006)(footnotes omitted). In *Reed*, the Administrative Law Judge upheld the respondent's conclusion that there was a rational nexus between the grievant's off-duty misconduct where he had pled guilty to a misdemeanor charge of impersonating a conservation officer, in violation of W. VA. CODE § 20-7-7, and to nine counts of passing worthless checks, totaling $643.92, and his job as a custodian on night shift, where he often worked alone and had keys to the facilities. In *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986), the Supreme Court of Appeals of West Virginia stated that a "'rational nexus' exists in at least two circumstances:

> (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." *Id.* [347 S.E.2d] at 224(citations omitted).

The Court in *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007), further stated:

> The teacher in *Golden* [supra.] had been charged with felony shoplifting and pled no contest to the misdemeanor offense of petty theft. Thus the discipline was for conduct occurring outside of the school setting. We observed in *Golden* it would be an unwarranted intrusion on a teacher's right to privacy to discipline a teacher solely on evidence that statutorily delineated misconduct occurred outside of the school environment. To overcome the privacy interest, a legitimate interest of the school board has to be at stake, that is, there must be additional evidence of a resulting unfavorable impact on the teacher's fitness to teach or upon the school community. *Id.* at 69, 285 S.E.2d at 669. We further observed that dismissal based solely on the

> off-the-job misconduct of a teacher and not its effect on the teacher's fitness to teach or upon the school community would result in a statute which would be void for vagueness under substantive due process constitutional standards. *Id.* at 68-69, 285 S.E.2d at 669.

In this case, there was no evidence that Grievant had become the subject of any notoriety. The remaining inquiry then is whether the conduct directly affected the performance of Grievant's responsibilities as a custodian.

Respondent argued that the undersigned should draw the inference that Grievant was engaging in the distribution of marijuana because scales and packaging materials (baggies and empty pill bottles) were found at Grievant's home.[7] While a reasonable person might draw an inference that someone was dealing drugs out of Grievant's home, Respondent did not establish that it was more likely than not that Grievant was doing so. Were the undersigned to choose between Grievant and Mr. VanMeter as the guilty party, she would choose Mr. VanMeter. Grievant cannot be held accountable for Mr. VanMeter's conduct, nor can Respondent establish Grievant's guilt simply by the mere possibility that she was dealing drugs.

The undersigned cannot see any connection between the discovery of marijuana

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[7] The undersigned declined to take into evidence testimony by Deputy Thompson regarding his observations on this subject, because no such evidence had been considered by GBOE in rendering its decision. One witness offered testimony on this issue, without objection, but this witness did not come forward until after Grievant's dismissal, so this testimony also was not known to GBOE when it rendered its decision. The undersigned will not consider this testimony for the same reason Deputy Thompson's testimony was disallowed. However, the undersigned will note that this witness had not personally seen Grievant or Mr. VanMeter sell marijuana from Grievant's home, nor did he state that Grievant was at home when he made his limited observations. His testimony regarding conversations he overheard between Grievant and students was quite vague, as was his testimony overall. As noted earlier, the Prosecuting Attorney was unable to develop a criminal case against Grievant for selling marijuana.

at Grievant's home, which may or may not have been used by Grievant, and Grievant's cleaning duties and her limited interaction with the students. This leaves as the remaining issue, whether the penalty imposed was excessive for bringing marijuana residue onto school property,[8] and leaving it in her locked car, hidden from sight in a small box which also was not in plain sight.

The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

Jerry Ours, President of the GBOE, testified that his decision to dismiss Grievant

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[8] Respondent believed it was important that, based upon the strong odor emanating from the container when it was opened, that it had recently contained more marijuana. Obviously, Deputy Thompson could not say how much more, and the undersigned cannot speculate on this. Whether it did or not is of no moment, as only residue was found on school property.

from her employment was based upon "our school system's zero tolerance for drugs." No other testimony was offered regarding such a policy. Unlike the situation in *Miller v. Wood County Board of Education*, Docket No. 03-54-376, where the applicable policy was placed into evidence for review by the Administrative Law Judge, and specifically stated that the employee was subject to disciplinary action, "'up to and including termination for the first offense,'" and the evidence showed that the grievant had notice of this policy, no such policy or acknowledgment by the Grievant that she had notice of such a policy, was placed into evidence. The only evidence the undersigned has is Mr. Ours' broad statement.

The Supreme Court of Appeals of West Virginia addressed whether termination was too severe a penalty in connection with off duty possession of marijuana by a teacher, and a charge of possession, and considered the following:

> Since there is no evidence that the Board's contribution to the appellant's notoriety was intentional, it is difficult to quantify its adverse effect. We believe, however, that when that factor is considered along with the fact that the appellant was, by all accounts, an above average teacher who was well-liked by his students, that the misconduct occurred in private and did not directly involve any student or school personnel, and that he was charged only with a misdemeanor for possession of a small amount of marijuana, the evidence was insufficient to warrant the termination of his employment.

Rogliano, supra (footnotes omitted). While this case is not identical to the one before the undersigned, it does lend some guidance.

In *Miller, supra.,* the Administrative Law Judge upheld a 15 day suspension where a drug dog indicated on the grievant's vehicle during a random drug scan of the parking lot, and in the subsequent search, permitted by the grievant, the officers found three marijuana cigarettes in the closed ash tray, marijuana residue on the floor on the passenger side and on the floor and seat on the driver's side, and three roach clips, burnt

on the ends, in the console. The grievant was a teacher at Parkersburg High School.

In this case, marijuana residue was found in a very small box, hidden from view, in a locked car, and Grievant pled no contest to possession of a controlled substance. Grievant had been employed by Respondent for a long time, was a good employee, had no prior criminal record, and had not previously been disciplined, none of which was considered by the Superintendent.[9] The undersigned cannot evaluate Respondent's "zero tolerance policy."

The undersigned must also take into consideration Respondent's argument that Grievant lied at the hearing before GBOE when she stated she did not know the small green box with marijuana residue was in her car, and she did not know there was marijuana in her house.

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

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[9] Grievant also argued that the undersigned should take into consideration that Grievant was awarded unemployment benefits, indicating she did not commit gross misconduct. The undersigned did not find any evidence in the record regarding this issue, but even were such evidence presented, it would have no bearing on this decision, as the undersigned has determined that Grievant's conduct was immoral, not gross misconduct.

In this case, it is easy to see how Grievant may not have known that the small green container was in her car, but it is simply not plausible that she did not know there was marijuana in her home. Even if she did not use it, she had been with Mr. VanMeter long enough to know that he was a regular user, and kept marijuana in her house. She may not have known how much he kept there, but it is difficult to believe that she did not know there was marijuana there at all. Maybe she was afraid to admit anything, fearing this would affect her or Mr. VanMeter in criminal matters. Regardless of the reason, the undersigned must conclude that Grievant lied under oath.

Considering all of the above, the undersigned concludes that the penalty imposed is clearly disproportionate to the offense proven, and the termination will be reduced to a suspension of 15 days without pay.

The following Conclusions of Law support the decision reached.

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 against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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 WEST VIRGINIA CODE § 18A-2-8, 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. WEST VIRGINIA CODE § 18A-2-8 provides that "[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."

4. WEST VIRGINIA CODE § 18A-2-8(b) provides that, when a board of education is considering suspending or dismissing an employee, "[t]he charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board."

5. The Supreme Court of Appeals of West Virginia, in *Wirt, supra.,* determined what due process is required to terminate a continuing contract of employment.

> It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. *An employee is also entitled to written notice of the charges* and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. at Syl. Pt. 3.

Goldstein v. Dep't of Health and Human Res., Docket No. 2008-1061-DHHR (May 23, 2008). (Emphasis added).

6. Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981), citing Syl. Pts. 4 and 5 of *Snyder v. Civil Serv. Comm'n*,

160 W. Va. 762, 238 S.E.2d 842 (1977).

7. Respondent did not comply with the requirement of WEST VIRGINIA CODE § 18A-2-8(b) when it failed to give Grievant, a tenured employee, notice of the charges against her before the hearing. Respondent also violated Grievant's due process rights.

8. Grievant is entitled to nominal damages for the violation of her due process rights.

9. The term immorality as used in the statute "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.'" *Golden v. Bd. of Educ. of County of Harrison*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes, [supra], citing Youngman v. Doerhoff*, 890 S.W.2d 330 (MOCC. 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry v. Kanawha County Bd. of Educ.,* Docket No.96-20-380 (Mar. 18, 1997).

10. "Possession of marijuana is illegal, and 'not in conformity with accepted principles of right and wrong behavior.' *Golden, supra.*" *Miller v. Wood County Bd. of Educ.*, Docket No. 03-54-376 (Mar. 16, 2004).

11. "In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a "rational nexus"

between the conduct performed outside the job and the duties the employee is to perform." *Reed v. Summers County Bd. of Educ.*, Docket No. 06-45-002 (Jan. 26, 2006).

12. In *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986), the Supreme Court of Appeals of West Virginia stated that a "'rational nexus' exists in at least two circumstances:

> (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." *Id.* [347 S.E.2d] at 224." (Citations omitted.)

13. Respondent did not demonstrate a rational nexus between the discovery of 44 grams of marijuana at her home, and Grievant's duties as a custodian, nor did Respondent demonstrate that Grievant's conduct had become the subject of any notoriety.

14. The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct

involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

15. Grievant demonstrated that the penalty imposed was so clearly disproportionate to the offense that it reflects an abuse of discretion.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to reinstate Grievant to her position as a custodian for the Grant County Board of Education, and to pay her back pay from the date of her dismissal to the date she is reinstated, less 15 days, plus interest at the statutory rate; and to restore all benefits, including seniority, as though she had been suspended for 15 days without pay; and to take all steps necessary to ensure that Grievant's employment record reflects a 15 day suspension without pay, rather than a dismissal. Respondent is **FURTHER ORDERED** to pay Grievant the sum of $100.00 in nominal damages.

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).

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BRENDA L. GOULD
Administrative Law Judge

Date: September 30, 2009