THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GEORGE BROCKMAN,

Grievant,

v. **Docket No. 2009-1638-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

George Brockman ("Grievant") challenges the decision of Respondent Kanawha County Board of Education ("BOE") to dismiss him from his employment. The June 4, 2009, "Statement of Grievance" provides as follows:

> Grievant had worked several years for Respondent as a substitute custodian. Shortly before his suspension he had worked as a ½ time custodian at George Washington High School and was scheduled to begin as a full time Custodian at Riverside High School. (Grievant actually worked there one day prior to his suspension.) Grievant was terminated because he had failed to disclose that he a [sic] felony conviction in the early 90's. Grievant admits that he failed to disclose this information. However, he believed that as the conviction had occurred more than 7 years prior to his application for employment with the Respondent, that it was not necessary to disclose the conviction. This was in line with his understanding of other governmental agencies with whom he was applying for employment at the time and Grievant recalled receiving similar information from the Respondent's personnel director at the time. Grievant has good evaluations of his service with Respondent.

As relief, Grievant seeks "instatement as a full time Custodian with regular employment status at Riverside High School with compensation for all lost wages and benefits retroactive to December 2, 2008. Grievant also seeks interest on all sums to which he is entitled. Grievant also seeks removal of all references to his suspension and termination from his file."

This grievance was filed directly to Level Three. W.VA. CODE § 6C-2-4(a)(4). A Level Three hearing was conducted before the undersigned Administrative Law Judge ("ALJ") on August 13, 2009, at the Grievance Board's office in Charleston, West Virginia. Grievant appeared by and through his counsel, John Everett Roush, Esquire, West Virginia School Services Personnel Association. The BOE appeared by and through its counsel, James W. Withrow, Esquire. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about September 11, 2009.

Synopsis

Grievant was convicted of a felony in 1991 and served time in federal prison. Years later, on his initial employment application with the BOE, Grievant failed to disclose his conviction and marked that he had no prior felony or misdemeanor convictions. He began working for the BOE as a substitute custodian. Thereafter, Grievant completed two online employment applications for extracurricular coaching positions. He again failed to disclose his conviction. Grievant subsequently accepted a full-time position as a custodian and while processing his coaching certification, it was learned that the Grievant had a felony conviction that he failed to disclose. Grievant was dismissed and filed this grievance.

The Respondent has established, by a preponderance of the evidence, that the Grievant failed to disclose his conviction. Grievant's non-disclosure constitutes immoral conduct. Respondent's decision to dismiss Grievant was not unreasonable or otherwise arbitrary and capricious. This grievance is **DENIED**.

The following findings of fact are based upon a thorough review of the record

produced in this matter.

Findings of Fact

1. Grievant was employed as a substitute custodian with the BOE from January, 2007, to June 1, 2009.

2. Grievant submitted an application for employment with BOE on September 14, 2006. The application contained the following notation and question:

> A criminal record check by fingerprinting is required by West Virginia State law prior to employment with a county board of education. *Failure to truthfully answer these application questions will result in denial of employment.* Have you ever been convicted of a felony or misdemeanor?

(Emphasis added).[1] Mr. Brockman marked "no" to this question.

3. Subsequently, Grievant submitted applications for at least two extracurricular coaching vacancies. Each application contained the same question as set forth in Finding of Fact 2 *supra*. On the applications, Grievant either marked "no" or left the question unanswered. These applications were completed online and Mr. Brockman received some assistance from another BOE employee when filling out the online applications.

4. Since he is not a certified educator, Grievant was also required to submit an application for a coaching permit from the West Virginia Department of Education ("WVDE"). A criminal background check is performed through the Federal Bureau of Investigation on all applicants for WVDE permits and licenses.

5. Grievant was denied a coaching permit. WVDE subsequently advised the BOE's

[1] There were certain exceptions listed for the question, but none of the exceptions are pertinent to this grievance. Likewise, the question further required the applicant to provide specific information related to the conviction. Grievant simply ignored the portion asking for details.

Human Resources office that Grievant had not answered the application questions correctly and he had failed to disclose some criminal charges.

6. Information was then obtained from the federal court system that revealed Grievant was convicted in 1991 on a felony charge of "conspiracy to possess with intent to distribute cocaine base, a.k.a. 'crack' and 'rock', a Schedule II Controlled Substance." He was sentenced to 21 months in prison and 4 years supervised release time.

7. A criminal record check performed through the West Virginia State Police at the time Grievant initially began his employment did not pick up the federal conviction. Per BOE practice, Grievant would not have been hired if he had disclosed the felony drug conviction.

8. By letter dated December 2, 2008, Superintendent Duerring notified Grievant that he was suspending Grievant without pay pending an investigation of allegations that Grievant had made misrepresentations on various applications for employment by omitting reference to a felony conviction in the early 1990's.

9. Grievant had just been hired for a regular position as a custodian when he was suspended in December 2008.

10. A predisciplinary evidentiary hearing was conducted on January 14, 2009, before a hearing officer appointed by the BOE.[2]

11. By letter dated May 13, 2009, Superintendent Duerring notified Grievant that he had received the recommended decision from the hearing officer. He informed Grievant that he would recommend Grievant's dismissal.

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[2] A transcript of this proceeding has been admitted as part of the record and is hereinafter cited as "BOE Predisciplinary Hearing Transcript."

12. By letter dated June 2, 2009, Superintendent Duerring notified Grievant that the Respondent had dismissed Grievant. Grievant was dismissed for failing to disclose a felony conviction he received prior to his employment with the BOE.

Discussion

Motion to Dismiss

As an initial matter, Respondent BOE has filed a motion to dismiss this grievance arguing that Grievant does not have standing because he was dismissed for a felony conviction.[3] WEST VIRGINIA CODE § 18A-2-8(c) provides that where an employee is dismissed "for the conviction of a felony or guilty plea or plea of nolo contendere to a felony charge" such conviction or plea "is not by itself a grounds for a grievance proceeding." When considering this statute, it must be "strictly construed" in favor of the employee. Syl. Pt. 1, *Morgan v. Pizzino*,163 W.Va. 454, 256 S.E.2d 592 (1979).

Respondent's *Motion to Dismiss* must be denied because Grievant was not dismissed for "the conviction of a felony or guilty plea or plea of nolo contendere." As indicated by the Grievant's dismissal letter and the letters sent to the Grievant by the Superintendent, Grievant was dismissed for his *failure to disclose* a felony conviction he received prior to his employment with the BOE. *See also* BOE Predisciplinary Hearing, KCS Exhibit 1. Grievant was not dismissed for the plea or conviction. He was never convicted of a felony while employed with the BOE. Nor did Grievant plead to a felony

[3] Pursuant to the Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 6.11(2008), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

while employed with the BOE. Accordingly, Respondent's *Motion to Dismiss Grievance* is hereby **DENIED**.

The merits of this grievance are now considered.

Merits

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant 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 of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

The issue in this grievance is whether the Respondent has proven, by a preponderance of the evidence, that its dismissal of the Grievant was appropriate where the Grievant failed to disclose a felony conviction on his application(s) for employment. This ALJ finds that the Respondent has met its burden and its decision to dismiss Grievant

was not unreasonable. WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." WEST VIRGINIA CODE § 18A-2-8 goes on to state, in part, that:

> (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.

(Emphasis added). Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, 675 S.E.2d 907(2009).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

It frequently happens that a board of education does not specifically identify which of the statutory causes apply to a particular disciplinary action prior to the grievance process being initiated. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label, or lack thereof, attached to such conduct. *Ward v. Upshur County Bd. of Educ.*, Docket No. 00-49-101 (Nov. 16, 2000); *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Willis v. Jefferson County Bd. of Educ.*, Docket No. 96-19-230 (Oct. 28, 1998); *Russell v. Kanawha County Bd. of Educ.*, Docket No. 90-20-415 (Jan. 24, 1991). *See Jordan v. Mason County Bd. of Educ.*, Docket No. 99-22-080 (July 6, 1999). In this grievance, Respondent has proven that the Grievant did not disclose his felony conviction on three separate occasions.

Grievant's conduct constitutes "immorality" as the term is used in WEST VIRGINIA CODE § 18A-2-8. The term "immorality" in WEST VIRGINIA CODE § 18A-2-8 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 acceptable sexual behavior." *Golden v. Bd. of Educ.*, 169 W. Va. 63, 69, 285 S.E.2d 665, 669 (1981). *Accord Rosenburg v. Nicholas County Bd. of Educ.*, Docket No. 34-86-125-1 (Aug. 4, 1986). The conduct need not be of a sexual nature. *See James v. West Virginia Bd. of Regents*, 322 F. Supp. 217 (S.D. W. Va. 1971), *aff'd*, 448 F.2d 785 (4th Cir. 1971); *Bledsoe v. Wyoming County Bd. of Educ.*, 183 W. Va. 190, 394 S.E.2d 885 (1990); *Smith v. Kanawha Co. Bd. of Educ.*, Docket No. 2008-0286-KanEd (July 18, 2008); *Powell v. Hardy Co. Bd. of Educ.*, Docket No. 04-16-412 (April 4, 2005).

"'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). In this matter, Grievant's non-disclosure was not accidental or unwitting. He failed to disclose a felony conviction on three occasions when disclosure was required.

Grievant argues that he did not possess the requisite intent to commit an immoral act as his failure to disclose his felony conviction was inadvertent. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health & Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

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); *Perdue, supra*.

The Grievant changed his story midstream and the testimonial current is too strong for his newest story to be found credible. To explain his failure to disclose the felony conviction at the predisciplinary hearing before the BOE, Grievant testified that he did not remember questions about felony convictions on the application. BOE Predisciplinary Hearing Transcript, p. 89, line 24. Then, he testified that he could have overlooked it, marked no, and may have gotten this question confused with other state applications which only asked about felony convictions occurring over the past seven years. BOE Predisciplinary Hearing Transcript, p. 90, line 18. *See also* BOE Predisciplinary Hearing, Employee's Exhibit 1.

At Level Three, the story changed. Grievant testified that he did, in fact, disclose the felony conviction on his initial application. When Grievant was questioned about his prior testimony, he became argumentative and began to testify in logically inconsistent alternatives. Level Three, Testimony of George Brockman. Grievant's Level Three testimony was also inconsistent with his "Statement of Grievance."

Grievant's testimony is inconsistent and there is clear motive for the Grievant to change his story: he wanted to keep his job. This ALJ finds that the Grievant's testimony on this particular point is not credible. Grievant failed to disclose his prior conviction on three distinct occasions and it is more likely than not that it was no accident.[4] But for his

[4] It is clear that the felony conviction was not disclosed on the online applications for the coaching positions. It is noted that Grievant testified he is computer illiterate and had another BOE employee assist him when filling out the online applications. Given Grievant's alleged computer illiteracy, this ALJ finds it difficult to understand why Grievant listed an email address. BOE Predisciplinary Hearing, KCS's Exhibits 4 and 6. Grievant

failure, it seems that Grievant would not have been employed by the BOE. It is not unreasonable for an employer to dismiss an employee in this scenario. *See generally Cosner v. Dep't Health & Human Res./William R. Sharpe Jr. Hosp.*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Smith v. Bureau of Empl./Martinsburg Job Serv.*, Docket No. 03-BEP-043 (July 2, 2003); *Hartley v. Bd. of Trustees/W.Va. Univ.*, Docket No. 99-BOT-512 (May 25, 2000) *aff'd* Circuit Court Monongalia Co. #00-CAP-30, *cert ref'd* Nov. 21, 2001 (No. 011662).

In summation, Respondent BOE has established that Grievant failed to disclose a felony conviction on several employment applications with the BOE. This failure to disclose constitutes immoral conduct. Such conduct impinges upon the Grievant's honesty and trustworthiness inside the school. This grievance must be denied.

The following conclusions of law are appropriate:

Conclusions of Law

1. WEST VIRGINIA CODE § 18A-2-8(c) provides that where an employee is dismissed "for the conviction of a felony or guilty plea or plea of nolo contendere to a felony charge" such conviction or plea "is not by itself a grounds for a grievance proceeding."

2. "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." 156 C.S.R. 1 § 6.11(2008).

3. Respondent BOE has not established that this grievance must be dismissed because Grievant was not dismissed from his employment for the conviction of a felony.

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presumably had someone create this account for him and has someone else check his email account.

4. In a disciplinary matter the burden is upon the employer to prove the charges against the employee by a preponderance of the evidence. *Perkins v. Greenbrier County Bd. of Educ.*, Docket No. 94-13-019 (Aug. 12, 1994).

5. The authority of a county board of education to dismiss 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. Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, 675 S.E.2d 907(2009).

6. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

7. A school employee may be dismissed for immorality. W.VA. CODE § 18A-2-8. The term "immorality" in WEST VIRGINIA CODE § 18A-2-8 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 acceptable sexual behavior." *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).

8. Respondent BOE has proven, by a preponderance of the evidence, that Grievant engaged in immoral conduct. The BOE's decision to dismiss the Grievant was not unreasonable or otherwise arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 15, 2009

Mark Barney
Administrative Law Judge