REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 233-4484

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

WEST VIRGINIA EDUCATION EMPLOYEES GRIEVANCE BOARD
ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

WILLIAM D. HAUGHT

v. Docket No. 52-87-230-3

WETZEL COUNTY BOARD OF EDUCATION

D E C I S I O N

On September 1, 1987 the grievant, William Haught, filed a level four grievance protesting his dismissal of employment as a custodian at Valley High School by the Wetzel County Board of Education. A level four hearing scheduled for October 13, 1987 was continued on grievant's motion and pending the disposition of several pre-hearing motions and responses tendered by both parties at various times. Orders ruling on the motions were issued by the undersigned hearing examiner on October 23 and November 4, 1987, which among other things, allowed the parties a period of time to complete some informal discovery and exchange of information. The level four hearing was rescheduled for and held December 8, 1987 but following the hearing matters were kept open for the further taking of evidence. A post hearing motion and response on evidentiary matters was filed by the parties and an Order addressing the issue was tendered January 20, 1988.

Briefs were received from the board January 22, 1987 and from grievant February 1, 1988.

At the onset of the level four hearing counsel for the board objected to the presence of grievant's father, a school service employee and former board member, but no compelling reason was given which would justify his exclusion, therefore, the elder Mr. Haught was permitted to remain. Counsel then objected to the inclusion of grievant's testimony as he had not been named as a witness by his counsel. Further objections were raised regarding level four procedures as the hearing examiner had deemed that the board must initially go forward with its justification regarding the dismissal action. Counsel argued that grievant's appeal was under W.Va. Code, 18A-2-8 and W.Va. Code, 18-29-1 and he had had a full and fair opportunity to be heard when he appeared and spoke before the board during the termination proceedings of August 25, 1987 and he, therefore, had the burden of proof at level four. Objections raised by the board's counsel were noted for the record.[1]

---

[1] Grievant's counsel argued that W.Va. Code, 18A-2-8 as amended in 1985 no longer required that the board provide an employee an opportunity to be heard prior to its dismissal action but instead provides the employee a post-termination level four hearing and grievant's due process rights were not satisfied by his statement at the dismissal proceedings. As she cited no authority in further support of her position the board's counsel was advised the proceeding would begin. A previous Order entered into in the case had advised both counsel that the level four proceedings would be interrupted at any point if either felt their respective positions to be prejudiced.

Grievant was hired by the Wetzel County Board of Education as a substitute custodian in August 1982 and served as a substitute bus driver from July 1983 until July 1984 when he was hired as a regularly employed custodian (on probationary status) and assigned to Valley High School as a custodian, said assignment in effect until his dismissal from employment. In February 1986 grievant injured himself while on the job and was disabled from work receiving workers' compensation benefits for an extended period of time and was not yet released for work nearly one year later on January 17, 1987. On that date, in the early morning hours, grievant was detained and subjected to a "pat-down" search by police officers outside a New Martinsville bar following a verbal complaint made at the New Martinsville police station by another bar patron that grievant had threatened him with a gun.

Grievant was arrested when a loaded gun was found in his inside jacket pocket (T.37); although three of the five rounds were spent, no attempt was made by the police officers, then or later, to determine if the gun had been fired that night (T.63). An additional "custodial" search conducted at the magistrate's office uncovered three small baggies of marijuana, one of cocaine and a tube-like plastic object, all found in grievant's outerwear leather jacket. Grievant was charged with carrying a dangerous weapon and possession of controlled substances, marijuana and cocaine.

Several witnesses testified about the events which led to grievant's arrest. Ray Thomas, the complainant regarding the gun threat, testified on behalf of the board to that alleged incident. Mr. Thomas initially related that he was currently unemployed as he had lost his license in September on a DUI offense and his last employment required that he drive. He stated that he had never seen grievant before the night of January 16-17, 1987 and that grievant had, without provocation, placed a gun on his forehead, scaring him, while he was exiting and grievant was entering the doorway of the Pink Panther Club in New Martinsville. He related that although no words were exchanged grievant then proceeded to walk backwards and he walked forwards "with the gun pointed at my head til we got out by the cars" whereupon grievant shot the gun into the air three times (T.8).[2] He said he then told grievant that he didn't have to do that, he could see the gun was loaded. Next, he related, each of them got into their cars and he (Thomas) drove home to pick up a shotgun and then immediately went to the New Martinsville police station where he asked for (Officer) Smitley, a personal acquaintance, who he knew to be working the midnight shift. After hearing Mr. Thomas' story, Thomas related, Officer Smitley took

[2] Mr. Thomas related to grievant's counsel that they proceeded in this fashion, grievant walking backwards and he following forwards, while the gun was no more than a foot from his head for a distance of twenty feet yet when grievant stopped, he too (Thomas) had no difficulty also stopping without falling forward or tripping against the grievant (T.18). Grievant's counsel has characterized Mr. Thomas' testimony as "patently incredible." (Grievant's Finding of Facts, No. 12.)

the gun from him and he (Thomas) then drove to the bar and proceeded inside (unarmed but no longer afraid) to seek the grievant and "to bring him out" (T.9,10). Mr. Thomas stated that he and grievant "got into a fight on the inside. Then we come outside" and the police officers "got him (grievant) then" (T.11). Mr. Thomas said that after the gun had been retrieved from grievant and grievant was handcuffed, he (Mr. Thomas) "banged (grievant) off the cruiser a couple of times" until the police officer restrained him (Thomas) (T.12). When asked by the board's counsel, Mr. Thomas said he did not believe grievant should be returned to the school system, "I wouldn't want my kids around him anyhow" (T.15).

When cross-examined about his alcohol consumption on the night in question, Mr. Thomas related he had had only two beers from the time he began his evening at Charlie's bar at 9:00 p.m. and during the entirety of the time spent at the Pink Panther Club beginning at 10:00 p.m. although police logs indicate it was 2:19 a.m. when Mr. Thomas arrived at the station. Mr. Thomas admitted that he had been barred from many establishments and that he had been told that he was nice when sober but a provocator of fights when drunk. Mr. Thomas also said he was now not sure whether grievant was coming in or out the door upon their initial encounter, "because it scared me so bad," but he remembered where the gun was placed because the gun left

the imprint of the barrel on his forehead. A report signed by one of the arresting officers differs: "Statement from Ray Thomas that defendant (grievant) put gun in his ear and threatened him." (Emphasis added -- no mention attributed to Mr. Thomas that grievant fired the gun).

The same report signed by Officer Charles Myers contained another notation: "Statement from Ronald L. O'Neil that he saw defendant fire two shots on the Pink Panther parking lot." Mr. O'Neil's testimony also differs from that account. Mr. O'Neil testified that his front window was approximately 100 feet from the door of the Pink Panther Club. On the evening in question, he said he heard what he believed to be a gunshot and he "looked out the window and seen a man shooting twice, twice after I looked out" but he did not have a good view of the man (T.24). Mr. O'Neil estimated the distance between the door of the Club and where he saw the man to be approximately fifty feet. He said he then called the city police and waited until he saw Officer Myers drive up and then went out to tell Officer Myers that shots had been fired. He stated he could not identify the person who fired the shots as it was dark and a good distance from his sight (T.28) but he did see the police officers retrieve a gun from grievant later. Responding to the board's counsel, Mr. O'Neil said he had never seen or heard of grievant before, but, assuming the drug conviction is true and accurate, he should not be allowed to return to work around school children.

Officer Smitley began his testimony by reading from the dispatcher's entry 0219 of a daily police log reporting Ray Thomas' complaint that "a guy pulled a gun on him and held it to his head." Officer Smitley then read from the 0222 entry, which reported his encounter with the complainant, Ray Thomas, "this guy held a gun to his head. Ray started fighting with him and got away as soon as he could and came to the station." (T.30,31). Officer Smitley verified the accuracy of the police log and when asked to elaborate on his conversation with Ray Thomas, he replied that it was pretty much as he already stated from the log but added the account that Thomas said "the subject fired a gun a couple times into the air." (T.32). Officer Smitley related that he asked for and confiscated Thomas' shotgun but while he was placing the gun in the station, Thomas took off for what he believed to be a return to the Pink Panther Club. Officer Smitley then contacted Officer Myers to back him up and both met at the Club at approximately 2:36 a.m.

Officer Smitley said he then saw Mr. Thomas reenter the Club as the officers approached the Club's parking lot. He said Officer Myers reached the Club first and the subject (grievant) approached Myers, "they (Thomas and grievant) had to have passed almost going in and out" (T.51), and grievant introduced himself to Officer Myers. Shortly thereafter, he related, Mr. Thomas

exited the Club and identified grievant as his assailant and grievant "obliged that we could do the pat down" conducted by Officer Myers (T.36,53).[3] The officer then described grievant's arrest and transport to the magistrate's office and the subsequent discovery of the drugs in grievant's jacket pocket during a custodial search. Officer Smitley related that grievant's handcuffs were removed while in the magistrate's office as per the magistrate's directive that only those persons who were unruly or uncontrollable remain handcuffed (T.45).

In response to the board's counsel, Officer Smitley stated he did not know of grievant by reputation or otherwise until the arrest and he knew of no record on grievant in New Martinsville or elsewhere.[4] He related that he knew of the plea agreement and disagreed with it because he believed the officers had a good case on the charges and the conviction for carrying the weapon alone would have been a six-month mandatory jail sentence

[3] While Mr. Thomas testified that he engaged in a fight with grievant when he reentered the bar to "bring him out", Officer Smitley related that Thomas said he (Thomas) looked for the subject but did not see him and came back out and noticed the officers talking to the subject who pulled the gun (T.52).

[4] Officer Smitley did state that after the arrest he "heard" he had arrested the "cocaine kid and Smithfield drug connection" but could not recall who advised him of this. Grievant's counsel objected to the testimony and a dialogue ensued between opposing counsel regarding the propriety of hearsay reputation testimony. Since Officer Smitley could not recall the source of the sole statement and did not discuss the context in which he heard it--the remark could be merely a reference to the drugs found on grievant and the fact that he lived in Smithfield -- its value as to grievant's reputation in the community is minimal, especially since no other person came forward with a similar statement.

but the brandishing plea bargain agreement resulted in only a 90-day suspended sentence. When asked by the board's counsel whether he believed a connection had been shown between grievant's off-duty conduct and his work (as a school custodian), Officer Smitley said "definitely" and was of the opinion that grievant's admission to the charges "doesn't mean he wouldn't possess it again if he was reinstated...." (T.49).

Officer Myers testified for the board and related that the report he prepared on January 17 was an accurate report of what happened that night. He basically reiterated and corroborated Officer Smitley's testimony saying that when they arrived on the scene, Mr. Thomas entered the Club and grievant came out, approached him, shook his hand and engaged in some general conversation until Mr. Thomas exited the Club saying he had not seen the subject; as Mr. Thomas came closer, he recognized and identified the grievant. Officer Myers also stated that prior to the arrest, he had never encountered or knew of the grievant. When he was asked by the board's counsel whether he felt there was a connection between grievant's off-duty conduct and his work, he replied that if grievant was confident enough to carry the gun and the controlled substances when out for the evening, "he may be drinking or may be partaking of the controlled substance and not be 100% with himself (and) he may feel confident enough maybe to take this into...where he works and have it there with

him at that time." (T.70). Officer Myers related to grievant's counsel that no persons he talked with at the scene stated that they saw grievant using controlled substances and there was no other evidence, including blood tests, for which a determination could be made whether grievant had or had not used drugs that night or any other time.

Grievant returned to work in early February 1987 but took sick leave absence again on March 27, 1987; apparently he performed his duties satisfactorily as no complaint was made by any school official. By board action on April 6, 1987 grievant was reemployed by the board for the 1987-88 school year on a continuing contract of employment and it appears the contract was signed by the parties on or about July 6, 1987. According to magistrate court records, on July 2, 1987 grievant pleaded guilty to possession of marijuana and cocaine and to brandishing a dangerous weapon for which he was fined a minimal amount on each charge and sentenced to concurrent jail sentences of 30 and 90 days. This information appeared in the July 15, 1987 issue of the Wetzel Chronical, "Magistrate Court."

Gerrita Postlewait, superintendent of Wetzel County Schools testified at the level four hearing regarding her decision to recommend grievant's dismissal. She stated that although she had heard of grievant's arrest, it was not until she saw the

newspaper account of grievant's guilty pleas that she obtained the magistrate court records; upon review of the records she then felt she needed to take the dismissal action (T.87).[5]

By letter dated August 10, 1987 the superintendent informed grievant that due to his guilty pleas to criminal charges and pursuant to W.Va. Code, 18A-2-8, she would recommend his dismissal of employment to the board on August 25, 1987. She testified that at the meeting she provided the three attending board members (two were absent according to the August 25, 1987 board minutes) with a copy of the letter sent to grievant, a copy of W.Va. Code, 18A-2-8 and the portion of the magistrate's court records pertaining to grievant's plea agreement explaining to them that she felt grievant's "guilty pleas fell within 18A-2-8 and recommended his dismissal." She responded to the board's counsel that the "necessary proof" and "connection" was explained to and understood by the board members as she had gone through the records page by page indicating each plea bargain and (grievant's) "action conflicting with 18A-2-8" (T.90,91).

---

[5] The superintendent said she sent an administrator to where grievant was incarcerated to inform him of her decision to recommend his dismissal and allow him an opportunity to resign and spare him her intended action but grievant was uncooperative.

The superintendent testified that she believed that "pleading guilty to possession of illegal drugs and brandishing a deadly weapon" were criminal offenses amounting to immorality (T.103). She expressed a belief that all school employees were role models with more than a minimum involvement with impressionable students (T.94) and any adult employed by the board is responsible for upholding the law and setting an example for young people on and off the job (T.104). She said she felt uncomfortable just being around grievant, and his father, at the hearing.

Additionally, she questioned the safety of students who would be exposed to someone "who is operating at an emotional state where he would brandish a deadly weapon in public" and the propriety of retaining an employee whose morality could not be insured while he was at work (T.104,105).[6] The superintendent stated she was not really familiar with a custodian's day to day activities

[6] The superintendent did not speak of having become "alerted...that (grievant's) behavior had become quite bizzare" nor did she speak of his "mental fitness." She absolutely did not question "whether he could safely perform his work which if improperly performed could be hazardous to any and all persons on school property and to school property itself," all of this attributed to her in the board's proposed findings of fact. (Proposed Findings of Fact, No. 10).

but grievant's work hours of 3:00 p.m. until 11:00 p.m. placed him in the school's premises with many students participating in extracurricular activities at a time when they had less adult supervision than during their regularly scheduled classes.[7]

Several witnesses were called by the grievant. The bartender on duty January 16-17 at the Pink Panther, Lynn Smith, testified that Ray Thomas had been drinking before he arrived there as his speech was slurred and he was loud and verbal when drinking and she had to keep her eye on him. She said that she became aware that he and the grievant had a scuffle sometime during the evening and at some later point that Thomas said his life had been threatened and he needed the police; she said she did not see an imprint of a gun barrel on his forehead at that time or any other time. The owner of the Pink Panther, Carl Butcher, testified that he knew the grievant from several occasions

[7] The superintendent did not know of grievant's work hours at the time of the dismissal and was subsequently directed by the board's counsel to research the extracurricular activities for students occuring in the school building after school. A mind boggling list of extracurricular activities was compiled, but it is apparent that all could not be ongoing at one time due to the seasonal nature of some of the various activities nor was any evidence produced which documented a "pupil-teacher ratio" for the activities individually or collectively nor to what extent adult supervision actually occurred. Seemingly a custodian would not normally be working in a specific area where after-school activities were being conducted but regardless of whether one teacher was working with five or fifty students, it is inconceivable to think that students would be permitted to roam about the school at will and not be attending to the specific purposes which required the after hours school attendance.

when they drank together; that grievant was a "happy drunk" and he (Butcher) had never observed any misbehavior on grievant's part. Based on a long standing acquaintance with Ray Thomas, he stated that Thomas' drinking caused him to act like a "turkey" who cannot get along with others and he had to bar him from the Club on several occasions because of his fighting and excessive drinking.

Michael Baker, a lifelong friend of grievant's, had accompanied grievant to the Pink Panther on the night of January 16-17. He testified that grievant had been drinking and dancing with his jacket off in the dance hall for a while then returned to the bar for a drink. After they talked for a few minutes, Mr. Baker related, grievant started back to the dance hall and Ray Thomas came behind him (grievant) and started choking him with a cue stick and the two got into a fight. Afterward, he said, things went back to normal for about thirty minutes then somebody said the law was coming and grievant had walked outside and was talking to the law. He said grievant had been drinking that night but he never saw him use drugs.

Cindy Swigart accompanied grievant and Mr. Baker to the Pink Panther. She said she had not seen a fight that night as she remained at the bar upon Mr. Baker's advice, but she had seen everybody run to the back when the fight erupted. She said grievant then came back into the bar from the dance hall

and told her he could not understand why the guy, Thomas, tried to choke him. She related that someone brought grievant's jacket to him and he sat down at a table, laid his head down for a while and then got up and left. She said she had not seen a gun that evening nor had she seen grievant use drugs.

Grievant testified on his own behalf. He stated that his former job duties as a school custodian entailed cleaning, sweeping and mopping in four different buildings at Valley High School and his work was satisfactory as evidenced by his evaluations. He discussed his injury in February 1986 and said he was pushing bleachers in the gym and slipped on some spilled pop and debris beneath. He said he had ruptured a disk in his back that necessitated surgery. After his hospitalization, he stated, he was required to remain "flat on his back" for a time but his wife left him, started divorce proceedings and would not care for him so he had to recouperate with a relative in Ohio.

Grievant stated that he had always been interested in guns and collecting guns used to be a hobby -- at one time he had over a dozen rifles and handguns. He admitted to having the gun on his person on the evening of January 16-17, 1987. He testified that several days earlier it had been fired for demonstration and that he subsequently bought it earlier in the evening of January 16 and placed it in an inside jacket pocket where it was unaccessable unless his jacket was unzipped. He

claimed that he and his friends then went drinking at several bars in New Martinsville that night and he was probably intoxicated when they reached the Pink Panther at midnight. Grievant related that during the course of the evening he drank with some acquaintances at the bar then went into the dance hall where he removed his jacket, placing it over a chair, and danced with some girls. He stated that he returned to the bar for another drink and when he attempted to return to the dance hall and place money into the juke box, Ray Thomas came up behind him and choked him with a pool stick at his neck. After talking about the incident with Cindy (Ms. Swigart) and Mike (Mr. Baker), grievant said he left the bar and saw the two police officers who he thought were after Mr. Thomas.

Grievant said he did not brandish a gun on the evening in question and he had no knowledge of how the drugs got into his pockets but he plead guilty to the charges of brandishing the gun and possession of the drugs because of advice from his counsel, his inability to pay extensive attorney fees and fines, his knowledge that the original gun charge would result in a six-month jail sentence and his belief that he would not be fired from his job for conviction of misdemeanor charges. He related that he no longer owns any guns because of the terms of his probation. He said he will be on probation for eight more months, meeting with his probation officer monthly. He stated that he regretted what happened the evening of January 16-17 and said he should have stayed home, instead.

With respect to grievant's dismissal, until counsel for the school board presented her opening statement at level four, the particularized grounds upon which the board predicated its W.Va. Code, 18A-2-8 dismissal of grievant were not known.[8] At that time counsel stated that grievant "was dismissed procedurally and sensitively in a proper manner" in the best interests of the school system. She then asserted that grievant's conduct rendered him "unfit to work around children...(or) anyone on school premises" and concluded that the safety, moral and image of the school system was at stake.

---

[8] W.Va. Code, 18A-2-8 in relevant part provides that:

> A board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty, but the charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals.

Counsel's filed proposed findings and conclusions (pages unnumbered) listed fifteen proposed Findings of Fact, fifty-two "Law of the Case" citations and thirteen proposed Conclusions of Law.[9] The significant and relevant contentions and arguments proposed by counsel for the school board in support of grievant's dismissal are:

> a) Grievant's custodial position brought him into regular contact with students at a time when those students had less supervision than during regular school hours. (For some discussion of this see footnote 6, supra.)
>
> b) Evidence of grievant's off duty mental state, criminal conduct and behavior show him to be very unstable and volatile, prone to unpredictable outbursts of uncontrolled temper and acts of violence, and to have serious emotional problems and mental impairments which affects the safety and welfare of students, staff or others on school premises and renders him unable and unfit to render consistent, effective and safe services as a school custodian possibly causing disruption of the educational processes.

---

[9]Many of the fifty-two "Law of the Case" entries, absent analysis, argument, or application of the particular facts of this case to those of the authorities cited, can be of little value in the instant determinations. For example, counsel, for the first time, brought to light the term "incompetency" not mentioned previously in the statement of charges against grievant nor during the level four proceedings. ("Law of the Case," Nos. 17 through 20.") Here counsel substitutes the word custodian for that of teacher in an out of context citation of Higginbotham v. Kanawha County Board of Education, Docket No. 20-87-087-1. Higginbotham's dismissal as a teacher was upheld by this Board upon a finding that her repeated outbursts of anger and temper in front of students and staff and other on-the-job offenses toward a particular student brought to question the teacher's emotional stability and that her demonstrated deficiencies would have a detrimental effect upon her students and rendered her incompetent to perform her teaching duties. The factual circumstances herein are vastly different, thus the cited case is inapposite.

c) Grievant has not entered a drug rehabilitation center or received counseling.[10]

d) Grievant has attained notoriety in the community for his criminal conduct.

e) That a sufficient connection exists between grievant's conduct and mental state and the requirements of his employment to find a rational nexus.

f) That the evidence in the case fails to rebut the presumption that school authorities acted reasonably, fairly and in good faith in exercising their authority.

g) That grievant's convictions for brandishing a deadly weapon and possession of cocaine and marijuana constituted grounds for his dismissal as a matter of law (no citation given) and the hearing examiner should not substitute her judgment for that of school officials whose dismissal of grievant had a rational basis in law and fact.

---

[10] The board's assertion that grievant has not sought drug rehabilitation or counseling was not supported by any evidence nor was it an issue with respect to the board's decision to terminate him as the superintendent stated it would not matter whether he underwent periodic voluntary drug testing to prove he was drug free (T.109). Rather, what would appear to be important is whether grievant has abided by the terms of his probation and he asserts he has done so and has not been cited for infraction of his probationary status.

Despite the non-specificity of the board's charges or basis for grievant's dismissal, his counsel concludes that grievant was dismissed for per se immorality in accordance with the testimony of the school superintendent that the dismissal was based upon grievant's guilty plea for brandishing a weapon and possession of controlled substances, marijuana and cocaine and her personal belief that the conduct was immoral. Grievant's counsel asserts that the personal views of the superintendent and board that grievant was immoral was insufficient to support grievant's dismissal, relying on the leading case of Golden v. Board of Education, 285 S.E.2d 665 (W.Va. 1981).

Counsel argues that the board has not shown a direct nexus between grievant's off-duty conduct and his ability to perform the custodial duties of sweeping, mopping and cleaning school rooms before or after his arrest. As no showing was made of grievant having attained adverse notoriety in the community, counsel contends, the board has failed to establish an indirect nexus impairing grievant's ability to perform his occupational duties. Back pay is not an issue as grievant has not been released for work as a result of his work-related injuries, but his counsel urges that the adverse extenuating circumstances involving grievant's recuperation from those injuries as it relates to the isolated event of January 17, 1987 be also considered in a request for grievant's reinstatement.

W.Va. Code, 18A-2-8 authorizes a board of education to dismiss any person in its employ for immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty, but the specific charges shall be stated in writing served upon the employee. Guine v. Civil Service Commission, 149 W.Va. 461, 141 S.E.2d 364 (1965), Alice Higginbotham v. Kanawha County Board of Education, Docket No. 20-87-087-1. The authority to dismiss must be exercised reasonably and for good cause shown by a preponderance of the evidence. DeVito v. Board of Education, 317 S.E.2d 159 (W.Va. 1984); Grob v. Taylor County Board of Education, Docket No. 48-86-349-2. Disciplinary action for off-duty conduct is proper only when there is a proven "rational nexus" between the conduct and the duties to be performed, Golden v. Board of Education, supra, Rogliano v. Board of Education, 347 S.E.2d 220 (W.Va. 1986), and any doubt must be resolved in favor of the employee. Hedrick v. Board of Education, 332 S.E.2d 109 (W.Va. 1985), Wigal v. Pocahontas County Board of Education, Docket No. 38-86-069-2.

An application of Golden to the instant case finds the board wanting as there was no evidence that the grievant's misconduct directly affected his performance of his occupational responsibilities before or after his arrest, or became a subject of widespread, adverse community reaction. While the conduct and misdemeanor convictions cannot be condoned, grievant's conduct

did not involve students or school personnel nor does the evidence indicate a potential for future off-duty or private misconduct or misconduct directly involving school students and personnel and grievant has been sufficiently punished by society for his transgressions. Hedrick v. Board of Education, supra, Rogliano v. Board of Education, supra, Waugh v. Board of Education, 350 S.E.2d 220 (W.Va. 1986).

The foregoing recitation and the following specific findings will serve as the findings of fact and the conclusions of law of this decision. Proposed findings and conclusions of the parties have been analyzed and considered and are incorporated herein to the extent that they are consistent with the probative evidence and the determinations of the undersigned hearing examiner.

FINDINGS OF FACT

1. Grievant was hired by the Wetzel County Board of Education as a substitute custodian in 1982 and regularly employed on a probationary contract in July 1984 as a custodian assigned to Valley High School. Over the years of his substitute and regular probationary employment, grievant has had satisfactory evaluations, some commending his work effort. On April 6, 1987 grievant was reemployed by the board for the 1987-88 school year on a continuing contract of employment as no adverse recommendation to not employ him had been tendered by grievant's immediate supervisors (T.86).

2. In February 1986 grievant injured his back while at work at Valley High School and sought medical attention. After conservative treatment for a period of time it was determined that he would need surgery to correct the problem; during his extensive work absence, grievant received workers' compensation benefits. Grievant returned to work on a 3:00 p.m. to 11:00 p.m. shift in early Feburary 1987 and worked without incident until March 27, 1987 when he found himself in too much pain to continue.

3. Grievant had not yet returned to work on January 16-17, 1987 and in the early morning hours of January 17 he was detained by Officers Smitley and Myers of the New Martinsville police department following a complaint by Ray Thomas that grievant had threatened him with a gun. Grievant was searched outside of a New Martinsville bar, the Pink Panther Club, and the police officers found a loaded gun with three spent shells in the inside pocket of grievant's leather jacket for which grievant was arrested. Three baggies of marijuana (13.2 grams total), a baggie of cocaine (2.4 grams) and a small plastic tube were later found in grievant's jacket during a custodial search at the magistrate's court. Grievant was charged with carrying a dangerous weapon and possession of controlled substances, marijuana and cocaine.

4. Mr. Thomas testified that until the evening in question he had never before seen the grievant and in fact had not encountered him earlier in the bar, the Pink Panther Club, until he became aware of grievant thrusting a gun on his forehead while he was exiting and grievant was entering the door of the bar. He related that grievant walked him a distance, grievant going backwards, he going forwards, all the while pointing the gun not more than a foot from his head until he (grievant) stopped and fired three shots in the air (to let him know the gun was loaded, he supposed). His testimony differed from the account he told to Officer Myers who duly wrote in a January 17, 1987 report that Thomas had been threatened with a gun placed in his ear.

5. There were no witnesses to the incident described by Mr. Thomas, but Mr. Ron O'Neil, who lives near the Pink Panther Club, called the police on the night in question because he saw a man shooting a gun in the Club's parking lot. However, Mr. O'Neil could not identify the man he thought was firing the shots due to darkness and distance, but, after the police arrived, he witnessed Officer Myers retrieving a gun from grievant.

6. According to the entirety of their testimony, neither Officers Smitley nor Myers observed grievant behave in any other than a cooperative, compliant manner immediately prior to, during and after his arrest.

7. The board has not shown, by competent medical testimony or otherwise, any basis for its stigmatizing accusation that grievant was mentally impaired or had serious emotional problems. A finding that grievant was "very unstable, volatile and prone to unpredictable outbursts of temper and violence" as the board asserts must be supported by reliable evidence and Ray Thomas was the board's only witness who could establish behavior on grievant's part leading to those conclusions.

8. Ray Thomas' testimony regarding his sole encounter with grievant was not reliable as demonstrated by the discrepancies found in his account of the events that occurred on the night in question and the testimony of others, including the police officers; the evidence which tends to show that Mr. Thomas himself to be an alcohol abuser prone to violence, bad judgment and memory loss when drinking; that Mr. O'Neil spoke of seeing only one person with respect to the gunshots he thought he saw being fired; and that no conclusive police evidence was obtained to verify the gun found on grievant's person had been recently fired.

9. On July 2, 1987 grievant pleaded guilty to the "lesser offense" of brandishing a dangerous weapon and possession of cocaine and marijuana for which he received minimal fines and incarceration and an extended probationary period. Grievant

admitted to possession of the gun explaining that he had purchased it earlier in the evening, adding to his gun collection, but he denied brandishing the gun and knowledge of how the drugs got into his pocket. His testimony that he agreed to the guilty pleas and plea bargain because he could not afford extensive legal fees and fines and his belief that the misdemeanor conviction would not be cause for discharge from his employment seems plausible in light of his knowledge that he would also avoid a mandatory six-month jail sentence for the original gun charge to which he fully admitted.

10. After the school superintendent, Gerrita Postlewait, read of the July 15, 1987 newspaper account of grievant's guilty pleas, she reviewed the magistrate's court records and deemed grievant's conduct to be immoral. She opined that she needed to initiate proceedings for grievant's dismissal as his emotional state in publicly brandishing a weapon precluded him from being exposed to school children whose safety she must insure and grievant's morality could not be insured when he was on the job. She expressed personal discomfort being near someone like him or his father.

11. Grievant declined an opportunity extended to him to resign and upon the superintendent's recommendation that grievant's actions conflicted with W.Va. Code, 18A-2-8 and warranted his dismissal, the three present board members unanimously voted to dismiss him from the board's employment at the August 27, 1987

board meeting. The specific statutory charges upon which grievant was dismissed were not made known to him nor were they made clear in the board's submitted proposals.

12. The factual evidence in this case provides mitigating circumstances in grievant's favor in that he has no record or history of previous unlawful or disruptive behavior; that the misconduct for which grievant plead guilty occurred off the school's premises while grievant had been absent from work for nearly a year on a work-related injury and did not directly involve any student or school personnel; that grievant continues to meet the terms of his probation following his period of incarceration for the misdemeanor charges to which he plead guilty and he will continue to be monitored for eight more months; and that grievant expressed regret for the events which led to his arrest.

13. Although grievant could possibly have some exposure to students while performing his duties at Valley High School, a custodian does not interact with students as a teacher does and is hardly a person high school students would emulate or hold as an exemplar of morality and, without evidence to the contrary, a presumption exists that students in attendance during or after regular school hours are under some degree of supervision and are engaged in school related activities in areas where custodians would not ordinarily be performing occupational tasks while the curricular or extracurricular activity was in session.

14. The board has not established that grievant's misconduct, as evidenced by his guilty pleas, directly affected his ability to perform his occupational duties of sweeping, mopping and cleaning the school building either before or after his arrest. Further, the testimony of the four persons living in New Martinsville who were directly aware or involved in grievant's arrest, including the two officers disappointed over the plea bargain, who all expressed disapproval that grievant should be reinstated, does not establish that grievant has gained wide-spread school or community notoriety adverse to his continued employment causing indirect impairment for grievant to properly perform his occupational duties.

CONCLUSIONS OF LAW

1. W.Va. Code, 18A-2-8 provides that a school board may suspend or dismiss an employee at any time for stated reasons, which include immorality, incompetency, cruelty, insubordination, intemperance and willful neglect of duty. This authority is to be exercised reasonably and for good cause shown by a preponderance of the evidence. DeVito v. Board of Education, supra.

2. The board of education has failed to establish a rational nexus between the one-time isolated event of grievant's life which occurred off-duty, did not directly involve any student

or school personnel or potential to do so but resulted in misdemeanor convictions against the grievant for which he has paid his debt to society, and the duties which he performed as a custodian. Golden v. Board of Education supra; Rogliano v. Board of Education, supra; Waugh v. Board of Education, supra; Wigal v. Pocahontas Board of Education, supra.

The evidence in this case was insufficient to warrant the termination of this grievant's employment; accordingly, the grievance is **GRANTED** and grievant is to be reinstated as a custodian with the Wetzel County Board of Education.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the court.

DATED: March 31, 1988

Nedra Koval

NEDRA KOVAL
Hearing Examiner