

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SIMONA SOUTHALL,  
Grievant,**

**v.**

**Docket No. 2018-0658-CONS**

**DIVISION OF CORRECTIONS/  
PAROLE SERVICES,  
Respondent.**

## **DECISION**

Grievant, Simona Southall, was employed by Respondent, West Virginia Division of Correction (“DOC”), as a Probation/Parole Officer 1. Ms. Southall filed an expedited grievance form<sup>1</sup> dated July 7, 2017, contesting a ninety-day suspension without pay pending the results of an investigation. As relief she seeks “to be returned to work and be paid all back wages.” A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on September 15, 2017. Grievant appeared personally, and was represented by Alan L. Pritt, Esquire, Pritt and Spano, PLLC. Respondent DOC was represented by John H. Boothroyd, Assistant Attorney General. The parties agreed to file Proposed Findings of Fact and Conclusions of Law on or before October 16, 2017.

Officer Southall filed a second expedited grievance dated October 11, 2017, contesting the termination of her employment. The termination resulted from the

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<sup>1</sup> See W. VA. § 6C-2-4(a)(4) for circumstances where an employee may initially file a grievance at level three.

investigation during which she was previously suspended. As relief, Grievant seeks “to be returned to work with back pay and attorney’s fees paid for.”

On November 7, 2017, a telephonic hearing was held to consider consolidation of the two grievances for hearing and decision. The parties agreed to the consolidation and an Order of Consolidation was entered the next day.

A second level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on March 14, 2018. All the parties and their attorneys were the same as in the prior hearing. Grievant’s counsel elected to make an oral closing statement and the parties were given the option of also submitting Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on April 20, 2018, upon receipt of Respondent’s post-hearing submission.

### **Synopsis**

Respondent suspended and dismissed Grievant after her home was raided and searched by Federal Bureau of Investigation (“FBI”) Agents as part of a drug related investigation. Grievant’s domestic partner, and more than a dozen other people, were arrested and charged related to drug activity. A large stash of illegal drugs, cash and firearms were seized in the raid. Grievant was not arrested, charged, or interrogated concerning any of this activity. Respondent dismissed Grievant arguing that she knew or reasonably should have known about the illegal activities and did not report them to law enforcement.

Respondent did not prove by a preponderance of the evidence that Grievant participated in, or knew about the illegal activities of her domestic partner, or that she knew about the contraband in her home. Accordingly, the grievance is GRANTED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in both hearings held in this matter.

### **Findings of Fact**

1. Grievant, Simona Southall, lives with her domestic partner, Jonathon Brockman, in a house located in Kimberly, West Virginia. She has lived with Mr. Brockman for seven years and they have a young son.

2. Grievant has been employed by Respondent DOC for three years as a Parole Officer in the Probation/Parole Officer 1 classification.

3. Her immediate supervisor was Michael Brown, Regional Director for Region 2. All Grievant's evaluation scores have been very good. In fact, she received the highest EPA score of all the officers in Region 2. She was also selected "employee of the year."

4. Unbeknownst to Grievant, her home had been under surveillance and her telephones were tapped by the FBI. At approximately 6:00 a.m. on June 28, 2017, an FBI entry team<sup>2</sup> entered Grievant's home while she and Mr. Brockman were in bed and executed a search warrant. This team searched the house and surrounding areas including a large garage behind the house.

5. When asked, Grievant told the agents the locations of two of the firearms located in the house: one on a microwave in the kitchen; and one in a dresser drawer in the bedroom. While the search was completed, Grievant was allowed to leave the premises, but Mr. Brockman was arrested and detained.

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<sup>2</sup> This group was also called a SWAT team. They wore helmets and body armor and were heavily armed.

6. Grievant's house is a four-bedroom ranch-style with vinyl siding. It sits on a cinder block foundation with a crawl space. There is a front porch that is about a third of the length of the house and is in the center. It is a concrete slab supported by the block foundation and has a crawl space below. There is a large wooden deck that extends across the length of the back of the house.

7. Behind the house is a large detached garage with siding to match the house. Facing the garage, there is a single vehicle garage door on the left side and house-style door to the right. There is a large shed attached to the back which runs the full length of the garage. The shed is divided into two separate rooms by a frame wall. Each side has a door which provides the only access to the two rooms. The shed addition cannot be accessed from the garage.<sup>3</sup>

8. The house is protected by a remote camera security system with cameras mounted on the eaves to cover the area around the house.

9. The FBI entry team produced a drawing of the floor plan of the house and labeled the rooms alphabetically. The rooms where drugs, cash, or firearms were located were: the kitchen, marked room B; the master bedroom, marked D; and, a smaller bedroom/storage room, marked H. (Respondent Exhibit 18.)

10. When the FBI agents came into the house they entered an open space consisting of a living room, kitchen and dining area. The kitchen was in the back of the area opposite the front door. There was a microwave oven on the kitchen counter. On top of the microwave was a handgun<sup>4</sup> and a man's watch. There was a shelf above the

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<sup>3</sup> The FBI entry team produced a drawing with the attached shed and marked the garage area J, the left side shed K, and the right side shed L. (Respondent Exhibit 18).

<sup>4</sup> A Sig Sauer P938 pistol.

refrigerator. On that shelf was a handgun<sup>5</sup> and a plastic sandwich bag containing four blue pills. Also, on the shelf was a small metal canaster with a closed lid<sup>6</sup> containing approximately fifty pills. There were cereal boxes and other boxed goods on top of the refrigerator in front of the shelf.

11. Grievant was not aware of the gun and pills on the shelf above the refrigerator.

12. In the bedroom shared by Grievant and Mr. Brockman, additional items were found. A man's bathrobe was hanging on the back of the door leading into the bathroom. A clear plastic bag was in the pocket of the robe which contained several small round pills.<sup>7</sup> There is a dresser with a mirror and two sets of four drawers which are parallel, up and down. In the top drawer on the left side the agents found a handgun,<sup>8</sup> a "boxer brief" bag with a large amount of cash, and an envelope containing cash. There is also a small personal safe in the bedroom which is roughly two feet tall, as well as a foot and a half wide and deep. On top of the safe was a black bag with cash inside. Inside the safe were a green bag and small plastic bags containing United States currency, as well as miscellaneous personal papers including tax forms and social security cards.

13. Mr. Brockman was the only person to use the safe. Grievant knew the combination years earlier but had forgotten it since she never used the safe. Grievant was not aware of the amount of cash in the safe or the dresser drawer. She was aware of the hand gun in the dresser which she said was Mr. Brockman's favorite.

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<sup>5</sup> A Springfield XDS pistol.

<sup>6</sup> The canaster was a hexagon about six inches across and three inches tall.

<sup>7</sup> There were 270 pills in the bag, but they took up the amount of space about equivalent to two adult male thumbs.

<sup>8</sup> A Sig Sauer five seven pistol.

14. To the left of the entrance and living room are two small bedrooms. Mr. Brockman used the last one to store his clothes and other belongings. The FBI's photograph of this room from the doorway shows roughly eighteen shoes boots and sandals scattered around the floor amid open boxes and duffle bags, as well as, various bags and articles of clothing. On each side of the room are rods with hangers of clothes which appear to be in storage and a shelf unit with several shoe-boxes on top. The room was in disarray, while the rest of the house was reasonably neat. Grievant rarely entered that room because she had no reason to.

15. On the floor of this room was an automatic money counter, and a plastic case containing a hand gun.<sup>9</sup> On a small freezer by the window was another hand gun which had a bi-pod attached.<sup>10</sup> On a shelf in the top of the closet was a Bushmaster assault-style rifle and ammunition clips.

16. Also, on the closet shelf was a blue Polo duffle bag containing a large number of one-dollar bills, some in stacks wrapped with rubber bands and some loose. Mr. Brockman has been putting any one-dollar bills he has at the end of the day in that bag for several years, much like many people put their pocket change in a jar. There was a Remy-Martin Cognac tin on the shelf as well containing bundles of United States currency.

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<sup>9</sup> This gun was an "FN five seven" which is the type of gun used by the United States Secret Service and is also available for public sale for personal protection or target shooting.

<sup>10</sup> This was a Ruger Charger pistol.

17. The garage was Mr. Brockman's "Man Cave."<sup>11</sup> The room contains a couch, a stair-climber, two wooden chairs and matching wooden couch, a table, a television, a refrigerator and a freezer. The walls are lined with University of Florida collectable items. Also, in the garage was a gun safe containing, five hand guns, two plastic Cabela's bags of assorted ammunition, and a case of 5.7 x 28 mm ammunition. On a shelf in the room there was a plastic bin<sup>12</sup> containing a "Cen-Tech" scale under which was a plastic bag of marijuana buds. A bottle of white powder roughly the equivalent of a quart of milk was also found in this room. The substance in the bottle was Inositol which FBI Special Agent Jennifer Wilson stated is often used to cut narcotics such as cocaine or heroin.

18. A small bicycle, and two toy riding vehicles were stored in the garage. Grievant rarely entered the garage. Her son did not play in the garage. The stored toys were taken out for him to ride in the yard or paved driveway.

19. The two sheds which ran across the back of the garage/man cave were marked by the FBI as rooms "K" and "L". Mr. Brockman kept a large riding lawn mower in shed L, and his construction tools in shed K. He kept both sheds locked with pad locks, ostensibly to prevent theft, and Grievant did not have a key to either lock.

20. In shed K the officers found a large storage bag that had been opened and was about half full of marijuana with a weight of 12.98 pounds. When the officers entered the shed they did not detect any odor of marijuana.<sup>13</sup>

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<sup>11</sup> In fact, there is a large flag size banner on the wall on which was written in large letters "MAN CAVE" and featured the University of Florida Gator logo. On the FBI chart this was marked room "J."

<sup>12</sup> Approximately sixteen inches long, twelve inches wide and eight inches deep.

<sup>13</sup> Level three testimony of FBI Special Agent Jennifer Wilson. Special Agent Wilson testified that when the bag was brought in the house the smell of marijuana permeated the room. This is not relevant because the bag was not in the house while she was living

21. A large bag of marijuana was found under the back deck. The bag was sealed in what appeared to be its original packing and was about the size of a large feed bag. It was placed against the foundation of the house under the most remote corner of the deck. It could not be seen without going under the deck and crawling toward that corner. Nothing else was stored under the deck and Grievant had never been under it. The bag was sealed and did not give off any odor from its contents.

22. Eleven firearms and variety of ammunition were confiscated. All the firearms were properly purchased and registered. \$182,166 of United States currency and approximately 133 grams of OxyContin in pill form were also seized in the raid.

23. Mr. Brockman is a construction contractor who regularly employs ten workers. He earns roughly \$70,000 per year as personal income from that business. He is sometimes paid for jobs in cash and it would not be uncommon for him to have cash from a job in the house.<sup>14</sup> Mr. Brockman worked long hours and served as a referee for high school sports. When he was not involved in those activities, he would spend time by himself in his “Man Cave.”

24. Grievant and Mr. Brockman did not have visitors to their home who were not family or close friends. There were not visits by people Grievant did not know which might be expected if drugs were being sold at her residence.

25. Due to differences regarding laundering, Grievant has not done Mr. Brockman’s laundry for years. She washes the laundry for her and their son, and Mr.

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there, and it was sufficiently closed in the shed that it did not give off an odor that the FBI agents or Grievant could detect.

<sup>14</sup> Level three testimony of Grievant, these payments might be as much as a thousand dollars or more.



Brockman washes his own cloths. Likewise, Mr. Brockman is responsible for his storage room H and his man cave in the garage J. Grievant rarely entered either of those spaces. Additionally, Grievant had no access to the shed where a large bag of marijuana was found, nor the safe where much of the cash was recovered. Grievant was aware of Mr. Brockman's enthusiasm for guns and knew that there were several firearms on the premises.

26. Notwithstanding, the surveillance, raid and search of the house, Grievant was never detained, searched or questioned by the FBI.

27. On the morning of Wednesday, June 28, 2017, Grievant telephoned her Supervisor, Michael Brown, to tell him that "Jonathon was arrested" and she would not be at work that day. Grievant missed work on Thursday, and reported to work on Friday, June 30, 2017.

28. Upon return to work, Grievant filled out an incident report describing in detail the raid on her residence. She described that Mr. Brockman was arrested at gun point and handcuffed when he opened the door for the SWAT team. She and her son were escorted at gun point to an area outside the house away from Mr. Brockman. Grievant consented for her car to be searched by the agents and drug detection dogs. The search was conducted, and no trace of any controlled substance was found in her vehicle. Upon completion of the vehicle search, the FBI Agents told Grievant that she and her son were free to leave the premises. Grievant and her son went to Mr. Brockman's mother's home which was a few houses away from hers. She returned to her home several hours later after the FBI Agents had finished their search. (Respondent Exhibit 2).

29. Regional Director Brown also completed an incident report on the morning of June 30, 2017. In his report he noted that Grievant reported to work at 8:30 a.m. and they had a meeting regarding the raid on her house. She was very upset and crying when discussing the incident. Grievant told Director Brown that she knew that Brockman kept cash related to his contracting business in the safe but had not idea that there was anywhere near as much as was found in the house. "She further stated that if she knew he had that much money, their electricity wouldn't have been shut off the previous month."<sup>15</sup> When asked about her service weapon she stated that it was in the office safe where she kept it rather than taking it home. Otherwise this incident report reflected the same events set out in Grievant's incident report. (Respondent Exhibit 3).

30. Director Brown reported the incidents to his supervisor. Grievant was asked to return to the office after she picked up her son from daycare. By telephone conference she was suspended for ninety days while an investigation was conducted to determine if any disciplinary action was appropriate. The suspension was unpaid and was to run from June 30, 2017, through September 28, 2017.

31. Subsequent to the suspension, efforts were made to determine from the FBI whether Grievant had involvement in the drug operation or would be charged. The FBI responded that they would not discuss anything related to the investigation.

32. At the hearing related to the suspension, Regional Director Brown testified that no additional investigation was done inside the agency related to the incident. He

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<sup>15</sup> Respondent Exhibit 3, incident report prepared by Regional Director Brown.

stated that he would have no reservations about Grievant returning to work as a Probation Officer.<sup>16</sup>

33. A predetermination conference was held with Grievant on September 26, 2017. In addition to Grievant, Director Robert Arnold and District Supervisor Doug Workman were present.

34. Grievant was dismissed from employment by a letter which was originally dated September 26, 2017. The letter was revised and sent to Grievant by certified mail on October 2, 2017. The letter was signed by Paul Simmons, Acting Deputy Commissioner, for the Division of Corrections. Mr. Simmons repeated a description of the seizure of money, firearms and drugs, from her residence, as well as the indictment of Mr. Brockman, as the reason for her dismissal. He further wrote:

I believe the nature of your misconduct and your failure to perform and act as expected of a Probation/Parole Officer I regarding events in your own home is sufficient to cause me to conclude that you did not meet the acceptable standard of conduct of performance as an employee of West Virginia Division of Corrections, thus warranting your dismissal.<sup>17</sup>

Mr. Simmons did not specify the nature of Grievant's misconduct but noted that the agency expects employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees or create suspicion regarding an employee's capability in discharging their duties and responsibilities.

35. At the time the Grievant was dismissed, Respondent had not received any property seizure logs or the photographs of the search and seizure of property that were

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<sup>16</sup> Level three suspension hearing testimony of Regional Director Michael Brown. Director Brown was not called to testify at the level three hearing related to the termination of Grievant's employment.

<sup>17</sup> Respondents Exhibit 13.

taken by the FBI. These items were not considered in the decision to dismiss Grievant, but were the bulk of the evidence submitted by Respondent at the level three hearing.

### **Discussion**

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”) . . .

*W. Va. Dep’t of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent state employee in the classified service. Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep’t of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv.*

*Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). See also *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). *Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a technical violation of a statute or official duty it must be done with wrongful intent. *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam). "Good cause" for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety. *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

Respondent alleges that Grievant failed "to report or any action regarding an on-going drug trafficking operation in her home."<sup>18</sup> Respondent notes that, as a parole officer, Grievant has a basic duty to "avoid and action which might result in, or create the appearance of, affecting adversely the confidence of the public in the integrity of the Division or the State." DOC Policy Directive 129.00, Subdivision V (A) (1). Respondent avers that this policy requires when Grievant has knowledge of circumstance which could undermine the public confidence in her performance she is obligated to bring that to the attention of her supervisor.<sup>19</sup>

Grievant argues that she and Mr. Brockman generally stayed out of each other's business. She knew about his collection of guns, and that he kept some cash on hand, but she had no idea about the drugs or large sums of cash stored on their property.

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<sup>18</sup> Respondent's *Proposed Findings of Fact and Conclusions of Law*, pg. 11.

<sup>19</sup> *Id.*

Respondent has no direct evidence that Grievant knew that Mr. Brockman was engaged in a criminal exercise and relies solely on circumstantial evidence. The Grievance Board had consistently held that “[c]ircumstantial evidence alone may be sufficient to meet an employer’s burden to prove the charges against a disciplined employee by a preponderance of the evidence. *Galloway v. W. Va. Bd. of Trustees*, Docket No. 90-BOT-388 (Nov. 22, 1991). See *Bailey v. Logan County Bd. of Educ.*, Docket No. 93-23-383 (June 23, 1994); *Kirk v. Mingo County Bd. of Educ.*, Docket No. 89-29-99 (Sept. 12, 1999).” *Shannon v. Workforce W. Va.*, Docket No. 2012-0959-DOC (Jan. 29, 2013).

The West Virginia Supreme Court of Appeals has held that circumstantial evidence “is intrinsically no different from testimonial evidence.” *State v. Guthrie*, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995). “In both, the [trier of fact] must use its experience with people and events in weighing the probabilities.” *Id.* In *State v. Guthrie, supra*, the trier of fact was a jury. In public employee grievances it is the presiding Administrative Law Judge who must apply experience with people and events in weighing the evidence.

At the time the decision to terminate Grievant’s employment was made, the circumstantial evidence Respondent had was that the FBI had raided Grievant’s home and arrested her domestic partner on drug trafficking charges. Found in on the premises were 11 registered firearms, \$182,166.05, a large quantity on OxyContin tablets, a partial bag of marijuana, a sealed twenty-seven-pound bail of marijuana under the back deck, and an automated money counter.

Weighed against that was the fact that Grievant immediately notified her supervisor of the event, filed a detailed incident report, admitted to knowing about the guns on the

premises. That the firearms were all legally obtained and properly registered. That she had no idea that there were large sums of money and drugs on the premises. Additionally, Grievant had an exemplary performance record which included an “employee of the year” citation and her supervisor’s endorsement that he had no reservations about Grievant returning as a Probation Officer. FOF 32, *supra*.

There was proof that drugs and cash hoards were found on the property but no evidence, circumstantial or otherwise, that Grievant was aware of them. Respondent only had speculation that it would be impossible for that much money and drugs to be hidden in a way to avoid detection by Grievant. This speculation does not mesh with the experience that determine people can hide nefarious activities from their spouses, much less stores of contraband.

At the level three hearing, Respondent put on the testimony of FBI Special Agent Jennifer Wilson, who oversees a special drug interdiction task force out of Huntington, West Virginia. She testified extensively, explaining how the raid and search was implemented, and providing photographs of the items seized as well as the locations where those items were found. This was additional circumstantial evidence introduced to indicate that Grievant knew about the criminal enterprise and failed to report it. Grievant again testified that she had no knowledge of the drugs or large currency caches and offered explanations of how she was ignorant of their presence referring to the photographic evidence.

In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, 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 and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

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' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant's demeanor was consistently composed and appropriate in both hearings. She demonstrated appropriate awareness of the seriousness of the allegation but was calm, consistently made eye contact, answered questions without equivocation or obfuscation and was not combative under cross examination.

Grievant has a reputation of honesty and diligence with her immediate supervisor, who was the only witness who had extensive experience working with her. Her testimony



in both hearings was consistent without appearing rehearsed and the testimony was consistent with her prior incident report.

As in all discipline cases, Grievant has a significant interest in the outcome of the case which could bias her testimony. Most importantly, her testimony was plausible and consistent with the known facts.

A handgun and some pills were found on a shelf above the refrigerator in the kitchen. Visibility of these items were obscured by boxes of cereal and other food items, and the vast majority of the pills were in a rather generic canister. Additionally, there was a handgun on the microwave which Mr. Brockman had apparently left there with his watch. Grievant was aware of that gun. Grievant stated that she was unaware of the pills and the gun on this shelf. This is reasonable. Given the placement of the refrigerator, the items were likely out of Grievant's reach and definitely not where she would see them.

In the shared bedroom a handgun and plastic bags of cash were found in a dresser drawer containing men's clothing and personal items.<sup>20</sup> Mr. Brockman's robe was hanging on the back of the bathroom door with a plastic bag of small pills in the pocket which were not visible without looking into the pocket.

A zippered canvas bag with cash was found on top of a small safe and more money was found in the safe. Grievant was aware of the handgun in the dresser drawer noting that it was Mr. Brockman's "baby". She was also aware that Mr. Brockman kept money and personal papers in the safe. She was not surprised to know that there was a banker's

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<sup>20</sup> Special Agent Wilson testified that female clothing items were found in the drawer indicating that it was shared. However, the picture showing the contents of the drawer did not show women's apparel, leading to the conclusion that the witness was mistaken on this point.

bag with cash on the safe in as much as Mr. Brockman was often paid in cash for small jobs and may have money in the bag for deposit or business use.

Grievant was not aware of the cash in the dresser drawer, or the pills in the pocket of Mr. Brockman's bathrobe. This testimony was consistent with the uncontested testimony that Grievant had not done Mr. Brockman's laundry for years as is the case with many working couples. She had no reason to go through the pockets of his robe or rummage through his dresser drawer. She knew that Mr. Brockman often had cash and it was not unusual to see a banker bag on top of the safe. She had not used the safe in years and had long forgotten its combination.

There was a number of items in room H that Mr. Brockman used to store his clothes shoes and personal belongings. Two handguns were apparent, and an assault rifle was in the shelf in the closet of the room. There was also an automatic money counter on the floor. Additionally, there was a duffle bag with a large number of one-dollar bills in it and a cognac cannister with copious large bills also locates on the closet shelf under the assault rifle. Grievant testified that this was "Jonathan's storage room" and she had no need to go into it.

It is apparent from the picture at the doorway that Grievant spent no time there. The remainder of the house was neat and orderly. There were a few small toy trucks on the couch and floor in the living room, but the remainder of the room was straightened. Grievant's bed was unmade and there was a couple of items of clothing it the bedroom but nothing else was clearly out of place. The remainder of the house was the same except room H. In that room the floor was so strewn with shoes, boot, boxes and bags that one could hardly walk through it without stepping on thing or kicking them out of the

way. Likewise, every surface of the room was littered with clothes or other various items which included a handgun on top of a small freezer. It is obvious that the person who cares for the rest of that house would not want to spend a single minute in room H and would likely not even open the door. This is also consistent with Grievant's testimony that she had her places and things in the house and Mr. Brockman had his. She stayed out of his room and man cave and he did not make a mess of the rest of the house. Once again this appears to be a very reasonable arrangement for two people who both work demanding jobs and have their own interests after work.

The same thing holds true for the garage where Mr. Brockman had his man cave. Almost everything in that room was related to watching television, sports paraphernalia, or other stereotypical "manly" pursuits. There was a couch and chairs in front of the television, a refrigerator for refreshments and a standard gun safe containing an assortment of firearms and ammunitions. The scale and small bag of marijuana in the room were in a small plastic bin. One would have to have been searching for something to have noticed them.

Finally, the shed K, where a larger bag of marijuana was found was padlocked. Mr. Brockman kept his work tools in that shed. Grievant had no reason to go in there and could not have without getting the key from Mr. Brockman. Special Agent Wilson testified that no odor of marijuana was detected in the shed and there was no testimony of odor in the "Man Cave." No one could have known there was a tightly sealed bale of marijuana hidden under the back of a large ground level deck without crawling under the deck for some distance. In short, Grievant's explanation of not knowing about the drugs and money was very plausible and Grievant's testimony was credible and convincing.

Respondent argues that Mr. Brockman's leaving pills in his bathrobe pocket and significant amounts of cash in the dresser drawer were indications that he was not concerned with Grievant finding these items because she already knew about them. It is just as reasonable that these are the actions of a man who has lived seven years with someone and knows she is unlikely to show any interest in going through his pockets, drawers or other personal belongings.

Respondent also argues that an important part of Grievant's job is to visit parolee's residents and detect if they are hiding contraband. In fact, she can make a warrantless search of those areas. Respondent opines that if she was not aware of the drugs and currency in her own home she cannot be trusted to monitor parolees. This logic is fatally flawed. When Grievant is monitoring know felons she is on guard and suspicious. She would look for hiding places and root out contraband. She would also be wary of self-serving statements her charges would make. Most telling is that she has been trained and observed performing her job and her performance has been exemplary. She should not be expected to carry the same wariness and suspicion into her own home.<sup>21</sup>

Respondent did not prove by a preponderance of the evidence that Grievant was guilty of any of the misconduct with which she was accused and was the basis of her suspension and dismissal.<sup>22</sup> Accordingly, the grievance is GRANTED.

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<sup>21</sup> Sadly, many relationships are ruined by a partner's inability to leave work at work.

<sup>22</sup> Even if it could be said that there was sufficient evidence to support both sides, Respondent has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). However, given Grievant's credible testimony that is not the case.

## Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. “Circumstantial evidence alone may be sufficient to meet an employer’s burden to prove the charges against a disciplined employee by a preponderance of the evidence. *Galloway v. W. Va. Bd. of Trustees*, Docket No. 90-BOT-388 (Nov. 22, 1991). See *Bailey v. Logan County Bd. of Educ.*, Docket No. 93-23-383 (June 23, 1994); *Kirk v. Mingo County Bd. of Educ.*, Docket No. 89-29-99 (Sept. 12, 1999).” *Shannon v. Workforce W. Va.*, Docket No. 2012-0959-DOC (Jan. 29, 2013).

3. Circumstantial evidence “is intrinsically no different from testimonial evidence.” . . . “In both, the [trier of fact] must use its experience with people and events in weighing the probabilities.” *State v. Guthrie*, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995). In public employee grievances it is the presiding Administrative Law Judge who must apply experience with people and events in weighing the evidence.

4. In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, 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 and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

5. 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' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

6. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning 'misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980) 7.

7. *Oakes v. W. Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent.' *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam).

8. Grievant is a permanent public employee with an exemplary work history. Respondent did not establish good cause for the termination of Grievant's employment.

9. Respondent did not prove by a preponderance of the evidence that Grievant was guilty of any of the misconduct with which she was accused and was the basis of her suspension and dismissal.

10. The Division of Personnel Administrative policy states that if an employee is cleared of the allegations which are the reason for an investigatory suspension, the employer must provide retroactive wages or restore annual leave for the period of suspension. W. VA. CODE ST. R. § 143-1-12.3.b.2.

Accordingly, the grievance is GRANTED.

Respondent is Ordered to immediately reinstate Grievant to her position of Probation/Parole Officer 1, and restore all pay, plus interest, and all benefits she has lost during the entire time of her suspension and dismissal. Respondent is further ORDERED to remove all evidence of these disciplinary actions from Grievant's employment record.<sup>23</sup>

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

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<sup>23</sup> It is well established that the Grievance Board does not have the authority to award attorney fees in the absence of a finding of extreme bad faith. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). Accordingly, that remedy cannot be granted herein.

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).

**DATE: May 30, 2018.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**