ROBIN M. BAILEY, .

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Grievant, .

.

v. . DOCKET NO. 93-23-383 .

LOGAN COUNTY BOARD OF EDUCATION AND .

WEST VIRGINIA DEPARTMENT OF EDUCATION, .

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Respondents. .

D E C I S I O N

This is a grievance by Robin M. Bailey (hereinafter Grievant) submitted at Level IV in accordance with W. Va. Code §18A-2-8, on September 20, 1993, challenging her dismissal from employment by the Logan County Board of Education (hereinafter LCBE or Board)/State Department of Education (hereinafter Department) (See footnote 1) on September 10, 1993. Following several continuances that were granted for good cause, an evidentiary hearing in this matter was held in the Board's office in Charleston, West Virginia, on March 29, 1994. Upon expiration of the agreed time limit for post-hearing submissions, this matter became mature for decision on April 15, 1994.

Grievant was advised by John D. Myers, Superintendent of Schools for LCBE, of her suspension and proposed dismissal in a letter dated May 20, 1993, the pertinent text of which follows:

> Please be advised that you are hereby suspended from your employment as an instructor at Man High School effective immediately, Thursday, May 20, 1993. This suspension will be without pay until June 10, 1993. I will recommend your dismissal to the Logan County Board of Education/State Department of Education at the June 10, 1993, regular meeting. Should the Board act upon your dismissal and discharge you, all benefits and pay will be ceased. You are entitled to a hearing on this action. If you desire a hearing on this matter you must contact my office upon receipt of this letter, or no later than 10 days prior to the June 10, 1993, Board meeting.

> I am suspending you in accordance with West Virginia Code §18A-2-8. In accordance therewith I am advising you that your suspension is based upon charges of wilful neglect of your duties as an instructor and chaperon at a school sponsored function, insubordination for the violation of County Policies, and intemperance at a school function. These charges are based upon the incident that occurred at the Man High School Prom and "Lock in" on May 14, 1993.

B Ex 1. (See footnote 2)

In accordance with Superintendent Myers' letter, a hearing was held on June 10, 1993. Thereafter, on September 10, 1993, a decision approving Grievant's dismissal was issued by Victor A. Barone, who had been designated to act on behalf of the State Board of Education. Mr. Barone concluded:

> 1. By her acts and omissions during the evening and early morning hours in question, Robin Bailey was guilty of willful neglect of duty as alleged in the county superintendent's letter of May 20, 1993.
>
> 2. Robin Bailey was guilty of intemperance as alleged in the superintendent's letter. (R Ex 4 at 7.)

Mr. Barone made no finding in regard to Superintendent Myers' charge that Grievant was guilty of "insubordination for the violation of County Policies." (See footnote 3) Accordingly, the undersigned finds that the insubordination charge was not sustained and is not part of the basis for termination under review at Level IV. (See footnote 4) See Morgan v. Pizzino, 256 S.E.2d 592 (W. Va. 1979).

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989);

Beverlin v. Bd. of Educ., 216 S.E.2d 554 (W. Va. 1975). The available evidence, much of which is disputed and contradictory, (See footnote 5) will be examined to determine if the charges of intemperance and willful neglect of duty are supported under the foregoing legal framework.

Grievant, an English teacher at Man High School (hereinafter MHS), was one of several teachers and parents who volunteered to serve as chaperones at a "lock-in" for MHS students following the MHS prom on May 14, 1993. The lock-in was sponsored in conjunction with the Board's Drug Free Schools Program. The purpose of the lock-in was to keep the participants in a controlled environmentwhere they could have an enjoyable time without involvement with drugs or alcohol. In particular, the program was intended to deter students from drinking and driving since, unfortunately, multiple student deaths had occurred on a similar occasion in years past, before the lock-in project was initiated.

The chosen location for this lock-in, as in previous years, was the Southern Entertainment Center near Chapmanville, West Virginia. This is a commercial complex which includes a restaurant, game room, bowling alley and two theaters. T at 20-21, 57. Although the bowling alley includes a bar which normally serves alcoholic beverages, no alcohol was served on this occasion. Indeed, there was no evidence that a more suitable location was available anywhere in Logan County. T at 143-144. The site of the lock-in is approximately 27 miles from where the prom was held at MHS. T at 121.

On the way from the prom to the lock-in, Grievant was stopped around midnight by a Chapmanville Police Officer, Darrell Lambert, for driving left of center. R Ex 1. Officer Lambert detected alcohol on Grievant's breath and asked her if she had been drinking that evening. Grievant stated that she had three wine coolers earlier that evening. (See footnote 6) Grievant submitted to a field sobriety test outside her vehicle and a preliminary breath test. Officer Lambert indicated that Grievant passed the sobriety test and the breath test result was a .066. R Ex 1. Officer Lambert determinedthat Grievant was not impaired at that time. (See footnote 7) Grievant then drove behind Officer Lambert to the Southern Entertainment Center, since she was not familiar with the area.

Deborah Holley, another teacher who was chaperoning the lock-in, was at the bowling alley when Grievant and her husband arrived to deliver food left over from the prom. Ms. Holley testified that she saw about a dozen empty beer bottles in one of the bags Mr. Bailey was carrying. She handed the bag back to Grievant's husband and was unable to say what he did with the bottles. Significantly, there was no testimony that Grievant saw these bottles.

Approximately two to three hours later, Mr. Gene Hiroskey, the proprietor of the entertainment complex, approached Linda Cline, an MHS teacher who was responsible for supervising the lock-in. He requested Ms. Cline's assistance in getting a student, Roger M., (See footnote 8) and Grievant's husband, Johnson Bailey, to leave the premises, as they had been drinking and creating a disturbance. (See footnote 9) Afterreceiving Mr. Hiroskey's complaint, Ms. Cline observed Mr. Bailey and noted that he was obviously intoxicated at that time. Ms. Cline asked another teacher, Patsy O'Brien, to have Grievant take her husband and leave the lock-in.

Ms. O'Brien testified at the pre-termination hearing that she subsequently approached Grievant in the rest room of the bowling alley and asked her if she could get her husband to leave with her. Ms. O'Brien recalled Grievant responding, "Oh, we've just been having it all evening." T at 84. Ms. O'Brien indicated that Grievant did not seem to comprehend her request. T at 84. Grievant's version of this conversation was that Ms. O'Brien told her, "You'd better check on your husband." T at 218. Grievant apparently understood Ms. O'Brien's request as Ms. Cline observed Grievant leaving the bowling alley with her husband shortly after her request to Ms. O'Brien.

Ms. Cline called Roger M.'s parents to come and take him home. Upon learning that Grievant and her husband were taking Roger M. home in their truck, Ms. Cline went outside and told Grievant that she could not take Roger M. home as his parents had already been called. Ms. Cline indicated that this was based on an established policy that parents, not teachers, would transport students home. Ms. Cline testified that she still had no indication that Grievant had been drinking.

At the Level IV hearing, Perry Cook testified that she was assisting her sister, Mary Hale, an MHS teacher who was chaperoning at the lock-in. Ms. P. Cook saw Grievant for the first time when she entered the bowling alley and commented to Ms. O'Brien that Grievant appeared either "high or drunk." Ms. O'Brien recalled telling Ms. P. Cook, "That's just Robin. ... She's kind of high strung." T at 82.

Later that night, Ms. P. Cook saw Grievant back a pickup truck into a red sports car belonging to an MHS student attending the lock-in. Ms. Cook testified that she and someone else yelled at Grievant telling her to stop, that she had struck another car. Ms. P. Cook recalled that Grievant's response was "I've got all the damn insurance I need and I can hit every vehicle in this parking lot." Thereafter, Grievant calmly exchanged insurance information with the student who owned the vehicle. Ms. Cline was also present at the time of the accident, having just removed Roger M. from

Grievant's vehicle, but made no mention of such comment by Grievant.

Another witness at the pre-termination hearing, Elizabeth White, testified that she overheard a similar comment by Grievant in regard to insurance but that Grievant was responding to a comment by Mr. Hiroskey, the owner of the bowling alley, who had come outside after the accident. T at 123-24. Ms. White also testified that Ms. P. Cook initially thought Grievant might have backed into her car (or possibly her sister's car, which was also red).

Natalie Cook, another MHS teacher serving as a chaperone at the lock-in, testified that she helped Grievant carry food into the bowling alley. Later, she was sitting at a table eating with Grievant. She did not notice anything unusual in regard to Grievant's behavior. Although Ms. N. Cook was outside when Grievant backed into the student's car, she did not recall any aberrant comments by Grievant. Kathy Keck, a parent chaperone, spoke to Grievant at the lock-in regarding some problems with Roger M., and Grievant agreed to speak with him. (See footnote 10)

Ms. Cline, as the MHS teacher responsible for supervising the prom and lock-in, testified that she worked with Grievant throughout the evening at those events. Although Grievant seemed more "jubilant" than usual, Ms. Cline did not smell alcohol on her breath. If Ms. Cline had any reason to suspect that Grievant had been drinking, she would have asked her to leave.

Following an altercation with Mr. Hiroskey subsequent to her vehicle accident in the parking lot, Grievant and her husband were arrested by a Logan County Deputy Sheriff for public intoxication (See footnote 11) and transported in a patrol car to the Public Inebriate Shelter for Logan County in Logan, West Virginia. Grievant wasadministered a breath test at about 3:25 A.M. by Robert Brewer. (See footnote 12) That test indicated that Grievant's blood alcohol content was .06. R Ex 2. Grievant indicated to Mr. Brewer that she had two wine coolers at 4:00 P.M., nearly twelve hours earlier. R Ex 2.

Beatrice Orr, LCBE's Director of Student Services, testified that LCBE has adopted a drug-free work place policy which prohibits use of alcohol or drug abuse on school premises or at any school activity. Significantly, Ms. Orr, as LCBE's expert witness on the Drug-Free Schools Program, did not indicate that there was an established rule against an employee having a drink prior to reporting for work or attending a school function. The Logan County Policy Manual lists among the specific causes for suspension or dismissal of a school employee, "[c]onsumption of alcoholic beverages or taking drugs on the job, or reporting to work under the influence." B Ex 1.

It is well established that in order to prove "willful neglect of duty," the employer must establish that Grievant's conduct constituted a knowing and intentional act, rather than a negligent act. See Board of Educ. of County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

While W. Va. Code §18A-2-8 includes "intemperance" among the causes for dismissal of school personnel, the Code does not include a definition of intemperance. Similarly, neither party cited anycase law in this state defining intemperance. The dictionary definition of "intemperance" includes: "1 a lack of temperance or restraint; immoderation; 2 excessive drinking of alcoholic liquor." Webster's New World Dictionary, 2d College Ed., at 732 (1976). In Copenhaver v. Raleigh County Board of Education, (See footnote 13) this Board held that a teacher's conviction for driving under the influence constituted intemperance under W. Va. Code §18A-2-8. Likewise, in Rowan v. Upshur County Board of Education, (See footnote 14) this Board found that a custodian's twice reporting to work under the influence of alcohol established intemperance under 18A-2-8 as a basis for dismissal.

Superintendent Myers testified that he thought it was "inappropriate and poor judgment" for Grievant, as a school chaperone, to drink alcohol before reporting to a function that was intended to prevent young people from using alcohol or drugs. T at 166-167. The undersigned agrees that Grievant's judgment was questionable and inappropriate. However, questionable judgment and actions that are inconsistent with the spirit and purpose of the Drug-Free Schools Program do not necessarily equate to intemperance or willful neglect of duty. This is particularly true where a board of education has adopted clearly stated standards of conduct for its employees which prohibit reporting to work "under the influence" or drinking alcohol while on duty. Where a school board elects to terminate a teacher under W. Va. Code §18A-2-8 forintemperance, the Board is required to prove more than that the employee had some amount of alcohol before reporting for duty.

The testimony of Officer Lambert established that Grievant was not intoxicated when she arrived at the lock-in and there was no credible evidence to indicate that Grievant was intoxicated or behaved in an improper manner earlier that evening at the MHS prom. (See footnote 15) Whether Grievant had two or three wine coolers before the prom is immaterial, since there was no showing that she reported for duty as a chaperone while under the influence of alcohol. Accordingly, the undersigned finds that Grievant's admission to having two wine coolers during dinner around 4:30 P.M. on May 14, 1993, prior to reporting to chaperone the MHS prom at 6:00 P.M. and subsequent

lock-in at 12:00 P.M., does not constitute misconduct supporting her termination.

Moreover, there was no credible evidence that Grievant was intoxicated at the lock-in. There was evidence that Grievant's husband was drinking at some point during the lock-in and was intoxicated by the time Mr. Hiroskey asked Ms. Cline to remove Mr. Bailey and Roger M. The Board's witnesses generally established that Grievant was socializing with other teachers, none of whomperceived her as being intoxicated or smelled alcohol on her breath.

Although Grievant was separated from her husband during much of her time at the lock-in, there was evidence that she was in his presence to the extent that she knew or should have known that he was drinking. In this regard, Ms. O'Brien's version of her conversation with Grievant regarding getting her husband to go home was more credible. If, as Grievant testified, Ms. O'Brien simply asked her to "check on your husband," a normal reaction would be, "Why?" It appears more credible that Grievant and her husband had, indeed, been "having a time of it" and Grievant was already aware of Mr. Bailey's intoxicated state.

Grievant must also bear responsibility for her husband's conduct because Mr. Bailey was there under her sponsorship. Granted, there was no direct evidence that Grievant was aware of her husband's conduct until she was asked to remove him from the premises. Nonetheless, where her husband was drinking with a student at a lock-in conducted under the Drug Free Schools Program, Grievant was derelict in failing to monitor the conduct of the one person she was most responsible for at the lock-in, the person she brought with her as her guest.

Although the Board failed to prove that Grievant was intoxicated during the lock-in, it must also be determined if she consumed alcoholic beverages while serving as a chaperone. The Board's evidence on this point is essentially circumstantial but nonetheless compelling. Grievant was tested by Officer Lambertaround midnight with a resulting .066 blood alcohol content on a preliminary breath test. (See footnote 16) Approximately three and one-half hours later, Grievant was tested by Mr. Brewer at the Public Inebriate Shelter in Logan County and registered a .06 blood alcohol content.

This .06 test result at 3:25 a.m. reinforces the finding that Grievant was not intoxicated at the lock-in. However, when compared with the slightly higher reading of .066 obtained over three hours earlier around midnight, this reading creates an inference that Grievant consumed some alcohol while serving as a chaperone at the lock-in. (See footnote 17) Moreover, this evidence is wholly inconsistent with Grievant's testimony that she only consumed two wine coolers at 4:00 to 4:30 P.M. before going

to the prom. Givenher duties as a chaperone, including her own admission that she could not indulge in alcohol while attending a school function, such conduct constitutes willful neglect of duty.

Grievant introduced a letter from Dr. James W. Coleman which stated the following:

> It is my opinion based on the metabolism of alcohol that the recorded level of .05 acquired from the individual, Robin Bailey, is not inconsistent with the known metabolism of alcohol regarding these factors which can alter the absorption, distribution and elimination of alcohol from the body. The social enviroment (sic) described by Robin Bailey and the time duration from absorption of the alcohol, the content of alcohol in the described beverage as well as the time the breath analyser (sic) test was administrated (sic) is certainly consistent with the facts stated by Ms. Bailey.
>
> I find no inconsistency with the results of the breath analyser (sic) test and the facts regarding the manner and amount of the alcohol consumed as revealed in the testimony of Robin Bailey.

G Ex 3.

Although this document was admitted at the Level IV hearing, Dr. Coleman did not personally appear to testify as to the basis for his opinion or to establish his qualifications for rendering such an opinion. Moreover, it is impossible to tell if the facts on which he based his opinion are consistent with the facts adduced in this particular case. In particular, Dr. Coleman was not provided an opportunity to clarify where the .05 alcohol level was "recorded" since the evidence indicates Grievant was .066 around midnight and .06 at 3:30 in the morning. (The .05 appears in Mr. Barone's Findings of Fact at page 5 but is inconsistent with the credible evidence adduced at Level IV.) Likewise, his opinion does not address the results from two separate tests less than fourhours apart. Accordingly, the undersigned has accorded no weight to Dr. Coleman's opinion.

After consideration of the foregoing evidence and factual determinations, the undersigned concludes that Grievant was properly charged with willful neglect of duty for (1) consuming alcoholic beverages while serving as a chaperone at a school-sponsored function and (2) failing to properly monitor the conduct of her husband, whom she brought to the function as her guest, thereby permitting him to consume alcoholic beverages with a student at a lock-in conducted under the Drug Free Schools Program. The law in West Virginia, as developed by the Supreme Court of Appeals, provides that, "in order to dismiss a school board employee for acts performed at a time and

place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside of the job and the duties the employee is to perform." Rogliano v. Fayette County Bd. of Educ., 347 S.E.2d 220, 224 (W. Va. 1986), citing Syllabus Pt. 2, Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). See Thurmond v. Steele, 225 S.E.2d 210 (W. Va. 1976). Grievant argues that under Golden and Rogliano, the Board failed to establish a nexus between Grievant's conduct and her fitness to teach. Rogliano specified two possible scenarios where a rational nexus may be found:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilitiesof the teaching position. (citations omitted) Rogliano, supra, at 224.

Here, Grievant volunteered to serve as a chaperone for the prom and lock-in. By definition, a "chaperone" is:

> a person, esp[ecially] an older or married woman, who accompanies young unmarried people in public or is present at their parties, dances, etc. for the sake of propriety or to supervise their behavior. Webster's New World Dictionary, 2d College Ed., at 238 (1976).

Grievant readily acknowledged that she understood that as a chaperone she was bound by the rules of the prom and lock-in, to include not drinking alcohol during those events. By volunteering to serve as a chaperone and thereby accepting responsibility for enforcing the rules of behavior at a school-sponsored function, Grievant's actions at that function directly related to her "occupational responsibilities" under Rogliano's first alternate basis for establishing nexus. See Bledsoe v. Wyoming County Bd. of Educ., 183 W. Va. 190, 394 S.E.2d 885 (1990).

Once Grievant was asked to take her husband from the premises, her duties as a chaperone ceased and she fell under the general rule of law established in Rogliano and Golden for off-duty conduct by a school teacher. Thus, her auto accident (See footnote 18) was not such an event as would warrant disciplinary action.

Once the proprietor of the entertainment center, Mr. Hiroskey, inserted himself into the discussion surrounding the vehicle accident, he asked Grievant and her husband to leave the premises. (It does

not appear that Mr. Hiroskey thought Grievant was unfit to drive at that point.) When Grievant turned the wrong way driving to the back of the parking lot rather than the exit, Mr. Hiroskey approached her vehicle on foot and sprayed Grievant with mace through the driver's window. While the propriety of Mr. Hiroskey's conduct was not a matter directly at issue in this case, a preponderance of the evidence presented indicated that Mr. Hiroskey overreacted to the situation by spraying Grievant with mace. (See footnote 19) Accordingly, the undersigned has not considered any of the evidence relating to Grievant's conduct after she was maced in support of the charges. Since Grievant was not prosecuted for public intoxication or any other offense, the events outside the entertainment center do not support her termination under Rogliano and Golden.

Grievant graduated summa cum laude from Bluefield State College in 1992 with a 3.84 grade point average. T at 199. (See footnote 20) She was ranked third in a class of over 500 graduates. T at 199. Grievant's "mentor" at MHS, a teacher with over twenty-seven years of teaching experience, testified that Grievant was as enthused about teaching as any new teacher she had ever observed. T at 190. This is not surprising, given Grievant's academic accomplishments. Indeed, Grievant's academic achievements are more remarkable because she commuted over a rural highway seventy-five miles one way five days a week for two years to attend college and complete her degree. Since Grievant was then married and raising an infant daughter at the same time, Grievant's dedication to obtaining her college education and teaching credential is no routine achievement.

All of Grievant's teacher evaluations during her first year at MHS were uniformly favorable. Indeed, none of the teachers and administrators who reviewed her teaching performance had any significant negative comments. Naturally, LCBE did not rely upon Grievant's work performance as a basis for her termination. Grievant was a first-year teacher who had not yet attained a continuing contract of employment under W. Va. Code §18A-2-2. It could be argued that a lesser standard of proof is required of an employer seeking to terminate an employee in Grievant's status, i.e. a probationer. See Camiolo v. McDowell County Bd. of Educ., Docket No. 92-33-245 (Jan. 26, 1993); Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991). (See footnote 21) However, that issue need not be decided here since Grievant's dismissal in these circumstances does not violate the standard normally applied to discipline of tenured school employees by this Board. Hoover v.Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb 24, 1994); Best v. Univ. of W. Va. Bd. of Trustees/W. Va. Univ., Docket No. 91-BOT-216 (Oct. 11, 1991).

In reviewing the penalty imposed, it is noted that the charge of intemperance was not sustained. Nonetheless, Grievant was guilty of willful neglect of duty by consuming alcohol at an alcohol-free school function and allowing her husband to consume alcohol with a student. It is indeed regrettable that this incident resulted in Grievant's removal from her chosen career as a teacher, given Grievant's academic achievements and superior performance as a first-year teacher. However, the sustained charges represent a serious lapse in judgment and lack of responsibility, falling well short of the standards of conduct the Board has a right to expect from its classroom teachers.

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

FINDINGS OF FACT

1. Grievant was employed by the Logan County Board of Education (LCBE) as a classroom teacher from August 1992 to May 1993.

2. On August 5, 1992, pursuant to W. Va. Code §18-2E-5, LCBE was placed under the control of the West Virginia State Board of Education (Department).

3. Following a hearing on June 10, 1993, Grievant was dismissed from employment with LCBE on September 10, 1993 by VictorBarone, the Department's designee, based upon charges of intemperance and willful neglect of duty under W. Va. Code §18A-2-8.

4. Prior to May 14, 1993, Grievant's performance of her duties as a classroom teacher, teaching high school English and remedial reading at Man High School (MHS), was consistently lauded.

5. Grievant volunteered to serve as a chaperone for the MHS prom which was held at MHS on the evening of May 14, 1993, as well as a lock-in held at the Southern Entertainment Center in Chapmanville, West Virginia, during the early morning hours of May 15, 1993. Grievant was aware that since the lock-in was sponsored under the Drug Free Schools Program, chaperones had to refrain from using alcohol during the event.

6. Grievant was accompanied to the prom and lock-in by her husband, Johnson Bailey. While driving from the prom to the lock-in, shortly after midnight, Grievant was stopped for driving left of center by a Chapmanville Police Officer, Darrell Lambert. Officer Lambert detected an odor of alcohol on Grievant's breath and administered a field sobriety test and a preliminary breath test. Grievant passed the sobriety test and registered a .066 blood alcohol content on the breath test. Thereafter,

Officer Lambert permitted Grievant to drive her vehicle and follow him to the site of the lock-in.

7. Grievant served as a chaperone at the MHS lock-in from approximately 12:15 to 12:30 A.M. until approximately 2:30 to 3:00 A.M.

8. During the lock-in, Mr. Bailey drank alcoholic beverages with a student, Roger M. After Gene Hiroskey, the proprietor of the entertainment center, observed Mr. Bailey and Roger M. inside the bowling alley in an intoxicated state, he asked Linda Cline, who was coordinating the lock-in for LCBE, to have the two individuals removed.

9. At Ms. Cline's request, Patsy O'Brien, another chaperone, approached Grievant in a rest room and asked her to take her husband home.

10. Shortly thereafter, Grievant spoke to her husband and they left the entertainment center and went to their vehicle with Roger M.

11. Ms. Cline called Roger M.'s parents to come after him. When Ms. Cline learned that Grievant was intending to take Roger M. home, she asked Roger M. to get out of Grievant's vehicle and remain at the entertainment center, based upon an established policy that teachers would not transport students under such circumstances.

12. Thereafter, Grievant accidentally backed into a student's parked vehicle causing minor damage. Grievant was then asked to leave the premises by Mr. Hiroskey. Grievant initially drove to the end of the parking lot where there was no exit. Mr. Hiroskey approached Grievant at that point and sprayed her with mace through the driver's window.

13. Following a non-violent altercation that resulted from the mace incident, Grievant and her husband were arrested forpublic intoxication by a Logan County Deputy Sheriff and transported to the Public Inebriate Shelter for Logan County. While at the shelter, Grievant was administered a breathalyzer test at approximately 3:25 A.M. by Robert Brewer. Grievant's test result indicated a .06 blood alcohol content. Grievant was not prosecuted for any criminal offense.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. A county board of education is authorized to dismiss a teacher under W. Va. Code §18A-2-8

for willful neglect of duty, so long as such authority is exercised reasonably and not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ. of Lewis County, 158 W. Va. 1067, 216 S.E. 2d 554 (1975).

3. "In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside the job and the duties the employee is to perform." Rogliano v. Fayette County Bd. of Educ., 347 S.E.2d 220, 224 (W. Va. 1986), citing Syllabus Pt. 2, Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). See Thurmond v. Steele, 225 S.E.2d 210 (W. Va. 1976).

4. A rational nexus for dismissal of a teacher exists:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. (citations omitted) Rogliano, supra, at 224.

5. Where Grievant, a classroom teacher, volunteered to serve as a chaperone for the MHS prom and lock-in, her conduct at those events involved the performance of her occupational responsibilities as a teacher under the first alternative basis for establishing nexus in Rogliano. See Bledsoe v. Wyoming County Bd. of Educ., 183 W. Va. 190, 394 S.E.2d 885 (1990).

6. In order to prove "willful neglect of duty" under W. Va. Code §18A-2-8, the employer must establish that Grievant's conduct constituted a knowing and intentional act, rather than a negligent act. See Bd. of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

7. The Board established, by a preponderance of the evidence, that Grievant consumed alcohol while serving as a chaperone at a school-sponsored lock-in under the auspices of the Drug Free Schools Program. Under these circumstances, Grievant's conduct constituted willful neglect of duty under W. Va. Code §18A-2-8. See Chaddock, supra.

8. The Board further established that Grievant failed to properly monitor the conduct of her husband, Johnson Bailey, who accompanied her to the lock-in as her guest, thereby permitting himto become intoxicated while consuming alcoholic beverages with a student attending the lock-in. Grievant's disregard for her responsibility toward her duties as a chaperone in these circumstances

constitutes willful neglect of duty under W. Va. Code §18A-2-8. See Bell, supra.

9. The Board failed to sustain the charge of intemperance under W. Va. Code §18A-2-8 since there was no persuasive evidence that Grievant was intoxicated or under the influence of alcohol while attending the lock-in. Rowan v. Upshur County Bd. of Educ., Docket No. 91-49-193 (Dec. 31, 1991); Copenhaver v. Raleigh County Bd. of Educ., Docket No. 41-86-175-1. See Kiser v. Kanawha County Bd. of Educ., 90-06-127 (July 27, 1990); Landy, supra.

10. Notwithstanding that the Board failed to sustain the charge of intemperance, Grievant's dismissal, given the circumstances of the sustained charges of willful neglect of duty under W. Va. Code §18A-2-8, was not such an excessive penalty to be arbitrary or capricious. See Hoover, supra; Bell, supra.

Accordingly, this Grievance is **DENIED** .

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: June 23, 1994

Footnote: 1The Logan County Board of Education was placed under the control of the W. Va. State Board of Education pursuant to W. Va. Code §18-2E-5 on August 5, 1992. Grievant's counsel challenged the authority of Victor Barone to act on behalf of the State Board of Education at Grievant's pre-termination hearing and noted this issue at Level IV without argument. The undersigned finds that the procedure followed provided Grievant appropriate due process under applicable law.

Footnote: 2Exhibits admitted at Grievant's pre-termination hearing on August 17, 1993, will be cited as "B Ex " for Board's

(LCBE) Exhibit and "E Ex " for Employee's (Grievant) Exhibit. Exhibits admitted at the Level IV hearing will be cited as "G Ex " for Grievant's Exhibit and "R Ex " for Respondent's (LCBE) Exhibit. The pre-termination hearing transcript will be cited as "T at ."

Footnote: 3Mr. Myers testified at the pre-termination hearing in an effort to identify those policies contained in the Logan County Policy Manual at Section VI, subsection 5.2, entitled "Personal conduct" (B Ex 1.) which Grievant had purportedly violated. In particular, he testified that Grievant's being asked to leave the premises where she was serving as a chaperone constituted "gross misconduct unbecoming a school employee." T at 133; See B Ex 1. He further stated that when Grievant backed into Brad Adams' car, Grievant engaged in "willful acts that would endanger the lives and property of others." There was also some "concern" that Grievant might be endangering a student they were going to transport home from the activity. T at 134-135; See B Ex 1. Finally, he concluded that Grievant violated the prohibition against "consumption of alcoholic beverages or taking drugs on the job, or reporting to work under the influence." T at 135; See B Ex 1.

Footnote: 4Accordingly, this opinion is limited to examining evidence in regard to the charges of intemperance and willful neglect of duty under W. Va. Code §18A-2-8.

Footnote: 5Grievant's counsel noted that several of the witnesses who testified at the pre-termination hearing and opined that Grievant was intoxicated on the evening in question were unable to identify Grievant at the hearing. However, there was no evidence that any other individual remotely resembling Grievant, identified or unidentified, was observed anywhere in the vicinity of the events in question. Moreover, numerous other witnesses to various events were able to identify Grievant. In any event, these witnesses did not testify at Level IV and their testimony on salient issues of fact was credibly contradicted by Grievant at Level IV. See Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). In addition, Grievant established a motive for these witnesses to modify their testimony in order to protect themselves or their employer from a potential civil suit for assault and battery. One witness recalled that Grievant had urinated on herself while in the parking lot of the bowling alley. However, this condition was not noted by any other witness, including the Deputy Sheriff who arrested Grievant and transported her to the Public Inebriate Shelter in a patrol car.

Footnote: 6Grievant testified that she was nervous when pulled over by the police officer and may have erroneously told Officer Lambert that she had "two or three" wine coolers.

Footnote: 7A blood alcohol content of .10 or greater is presumptive evidence of driving under the influence of alcohol in West Virginia. See W. Va. Code §17C-5-2(d)(1)(E).

Footnote: 8As Roger M. was a juvenile, this Board will follow the practice of the W. Va. Supreme Court of Appeals by not using the student's last name, given that underage drinking was involved. See Bd. of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120, 121 at F.N. 1 (W. Va. 1990).

Footnote: 9Mr. Hiroskey testified at the pre-termination hearing that Grievant and her husband were staggering and he personally asked them to leave. T at 59. Mr. Hiroskey's testimony on this point was contradicted by Patsy O'Brien at the

pre-termination hearing (T at 82-83), by Linda Cline at Level IV and by Grievant at both hearings. Mr. Hiroskey was not called as a witness at Level IV so there was no opportunity to directly assess his credibility. See Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec.14, 1989). Accordingly, Mr. Hiroskey's testimony that Grievant was staggering while inside the bowling alley was completely discredited.

Footnote: 10It does not appear that Grievant had an opportunity to speak with Roger M. as Mr. Hiroskey soon thereafter became involved, asking Roger M. and Mr. Bailey to leave the premises.

Footnote: 11Deputy Walls testified at the pre-termination hearing that he found a partially consumed open container, a "fifth of liquor," in Grievant's vehicle. T at 44. While Deputy Walls could smell the odor of alcohol, he was unable to say that it was coming from Grievant since it could have been emanating from her husband. T at 47-48.

Footnote: 12Mr. Brewer is not related to the undersigned.

Footnote: 13Docket No. 41-86-175-1 (Aug. 15, 1986).

Footnote: 14Docket No. 91-49-193 (Dec. 31, 1991).

Footnote: 15As noted earlier at F.N. 5, several witnesses who appeared at the pre-termination hearing were not called by the Board to testify at Level IV. As previously noted by this Board in Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989), failure to call essential witnesses at Level IV prevents determinations as to their credibility. Likewise, a transcript of a pre-termination hearing may not be sufficient to meet the employer's burden of proof.

Footnote: 16It is noted that Grievant testified at her pre-termination hearing that her husband drove from Man to Chapmanville (T at 243) and that they did not make any stops between the prom and the lock-in (T at 214-15), omitting any mention of the traffic stop by Officer Lambert. Grievant's explanation of this discrepancy under cross-examination by Respondent's counsel at the Level IV hearing was not convincing.

Footnote: 17According to the "Blood-Alcohol Chart" printed in W. Va. Code §60-6-24, since Grievant weighed 117 pounds and had two drinks, a blood alcohol content of .066 or .06 would be expected shortly after such consumption. (The chart predicts a .063 reading for a 120 pound individual.) However, the chart further indicates that a certain percentage of alcohol is "burned up" during the time which elapses after the first drink. It is noted that this statute simply requires posting of this chart in certain establishments where alcohol is sold. Thus, it is not "law" in the sense that it establishes a legal presumption of evidence. Nonetheless, the undersigned finds that the information in the chart estimating the dissipation of alcohol after consumption is based upon generally accepted scientific knowledge and supports taking administrative notice of this information. In addition, there was no credible evidence presented to show that Grievant's metabolism or ability to "burn off" alcohol was somehow different from average.

Footnote: 18The evidence supports a finding that this accident resulted from simple negligence, not from driving while intoxicated or any other legally prohibited conduct.

Footnote: 19The effects of the mace tended to nullify any testimony characterizing Grievant's subsequent behavior as exhibiting signs of intoxication since each observed condition was as likely to have resulted from being maced as consuming alcohol.

Footnote: 20Grievant's transcript, which is contained in E Ex 2, actually reflects an overall GPA of 3.87, covering courses taken at Bluefield State College, Concord College and Southern West Virginia Community College.

Footnote: 21In Cordray, supra, this Board determined that boards of education are not constrained to employ W. Va. Code §18A-2-8 as the exclusive means for terminating probationary employees for cause. However, since LCBE here elected to proceed under 18A-2-8, it is appropriate to hold the employer to standards of proof consistent with that statute.