MATTHEW J. WOO, .

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Grievant, .

.

v. . DOCKET NO. 93-40-420

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PUTNAM COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Matthew J. Woo (hereinafter Grievant) submitted at Level IV in accordance with W. Va. Code §18A-2-8, on October 8, 1993, challenging his dismissal from employment by the Putnam County Board of Education (hereinafter PCBE or Board) on October 4, 1993. Following two 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 December 16 and 17, 1993. (See footnote 1) Upon receipt of timely post-hearing submissions from both parties, this matter became mature for decision on March 15, 1994.

Grievant was advised by Sam P. Sentelle, Superintendent of Schools for PCBE, of his proposed dismissal for "immorality and intemperance" in a letter dated September 24, 1993, (See footnote 2) the text of which follows:

> Apparently, the efforts of the Putnam County Board of Education to provide you with a less severe exit from our school system have been to no avail.
>
> Your status with the Putnam County Board of Education is that you are currently on medical leave-of-absence. This was granted by the Putnam County Board of Education upon your request and your attorney's request. Even though we have not received any request that you be reinstated to your position and to be removed from medical leave category, I feel it is appropriate to advise you that I will recommend to the Putnam County Board of Education at its meeting on October 4, 1993, that you be

dismissed for cause from your employment as a school teacher with the Putnam County Board of Education.

In accordance with WVC 18A-2-8, I do hereby charge you with immorality and intemperance. The specifications of those charges are as follows:

1. During school year 1992-93 or longer, you engaged in the use of marijuana on a daily basis. Marijuana is an illegal substance under the laws of the State of West Virginia.

2. During school year 1992-93 or longer, you had in your possession and obtained marijuana for your use and the use of others.

3. During school year 1992-93 or longer, you engaged (sic) interaction with high school students at your assigned school for the purpose of contacting or establishing a relationship which involved the use of marijuana.

4. During school year 1992-93 or longer, you were/are addicted to the use of marijuana.

I further believe that a rational nexus exists between this conduct and your employment with the Putnam County Board of Education. While in my personal opinion, I believe that a person addicted to the use of marijuana on a daily basis is not capable of performing his or her job duties, that is not the basis for my determination that a rational nexus exists.

Your testimony at your trial has become well-known throughout Putnam County, and, in particular, by your students, their parents, and concerned citizens of Putnam County. The essence of their concern is that this school system should not permit a public school teacher who admits to drug use and addiction to drugs to teach the students of Putnam County. A ground swell of opposition has developed against your return to the classroom and has resulted in a petition with over 700 names being submitted to me opposing your return to teaching in Putnam County. This petition was unsolicited by the Putnam County Board of Education and exemplifies the notoriety of your conduct.

> I find that without contribution by school officials, your conduct has become the subject to (sic) such notoriety as to significantly and reasonably impair your capability to discharge the responsibilities of your teaching position.
>
> Therefore, on October 4, 1993, I will recommend to the Putnam County Board of Education that your contract with Putnam County Schools be terminated for cause of immorality and intemperance. You may be present to present any evidence you deem appropriate to these charges. Furthermore, after the Board of Education acts, if it acts adversely to you, you may appeal within five (5) days this decision to the Level IV Hearing Examiner pursuant to WVC 18-29-1, et seq. (A Ex 1.)

Most of the facts giving rise to this dismissal are uncontroverted even though certain matters surrounding the dismissal are the subject of considerable dispute. Ultimately, the outcome of this grievance hinges on the issue of whether there is a rational nexus between Grievant's admitted misconduct and his employment as a classroom teacher.

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 Beverlin v. Bd. of Educ. of Lewis County, 158 W. Va. 1067, 216 S.E.2d 554 (1975). 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). In Rogliano, the court identified two scenarios where this 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 responsibilities of the teaching

position. (citations omitted) Rogliano, supra, at 224.

Grievant has been employed by PCBE since 1986 as a classroom teacher at Hurricane High School (hereinafter HHS), teaching mathematics and computer science. In addition, he has held an extracurricular assignment as a high school volleyball coach, and worked as a Dial-A-Teacher for Putnam County, assisting students with their mathematics homework. He further served as a track coach and advisor to the student council. He has also been employed as a mathematics teacher by a private tutoring firm in the Charleston area. A Ex 2 at 2.

The evidence of Grievant's use of marijuana, on a regular and protracted basis, is clear and uncontroverted. PCBE introduced a transcript of Grievant's sworn testimony at his criminal trial in the Circuit Court of Putnam County at his pre-termination hearing. Portions of that transcript pertinent to the charges at issue include:

> Q [By James Cagle, Grievant's defense attorney] Matt, tell the jury with what frequency you have personally used marijuana in the time span we are talking about end of '92 or in '93?
>
> A [By Grievant, Mr. Woo] What do you mean by "what frequency?"
>
> Q Did you use a lot?
>
> A I would smoke when I got home every night.
>
> Q Would you call yourself a regular user?
>
> A Yes. A regular recreational user, whatever term you want to put on it. (A Ex 2 at 7.)

* * *

Q [By Roger Williams, Assistant Prosecuting Attorney] Now, it's your testimony that you're a daily user of marijuana, is that right?

A Yes. sir.

Q And you suspect you have an abuse problem, sir?

A Yes, sir.

A Ex 2 at 15.

Consistent with his testimony at his criminal trial, Grievant testified at Level IV regarding his use of marijuana. Grievant stated that his regular use of marijuana started two to three years earlier but he also used marijuana on occasion while in college. Grievant admitted that he had been a daily user for a year or two prior to his arrest in February 1993. Grievant would smoke marijuana either in a pipe or in a "joint." Grievant usually purchased his marijuana from a "friend" in quantities of about one-eighth of an ounce at a time.

Grievant's defense to the criminal charges of delivery of a controlled substance focused upon an entrapment theory. Grievant, through his testimony, indicated that he had not had a "relationship" with a woman since college and that he had not dated for an extended period of time prior to meeting Amy Williams, a young woman who, unbeknownst to Grievant, was a police informant. Although Grievant acknowledged that he was predisposed to the use of marijuana before he met Ms. Williams, he essentially indicated that he simply obtained marijuana from his normal source at cost and furnished it to Ms. Williams in an effort to impress her, gain her friendship and continue the relationship. A jury acquitted Grievant of delivering a controlled substance.

Nonetheless, this testimony substantiated PCBE's first two charges relating to the use and possession of marijuana. (See footnote 3) The fourth charge, citing Grievant's being addicted to

marijuana, was not substantiated in that there was no explanation or expert evidence to support PCBE's theory that protracted daily use of marijuana equates to being "addicted." The third charge relating to "interaction with high school students at his assigned school for the purpose of contacting or establishing a relationship which involved the use of marijuana" requires more detailed analysis.

Apparently, Respondent drafted this charge to support a nexus between Grievant's conduct with Ms. Williams and his position as a classroom teacher since Grievant first met Ms. Williams through her younger sister, who was a student in one of Grievant's classes at HHS. In that regard, Grievant testified at his criminal trial as follows:

> Q [By Mr. Cagle, Grievant's defense attorney] Matt, how did you come to meet Amy Williams?
>
> A One day Angel was in my class and she was looking at some pictures. I told her to put them up and in the process I first went over to find out what she was looking at because I knew it wasn't her work. I noticed they were pictures. I told her to put them up and in the process I noticed a picture of her sister. I just ask (sic) who it was and she told me it was her sister.
>
> Q And, I take it you expressed some interest in meeting her, is that correct?
>
> A I said she was pretty and that was all I said at the time. And then later on Angel came back to me and said that she had mentioned to her sister that I had said that I thought she was pretty and that maybe I could call her up or something.
>
> Q Do you recall when you first went out with Amy?
>
> A Yes, approximately. Not the exact date. It was in December, the early part to middle of December.
>
> Q Of 1992?

A Yes, sir.

Q How many times did you go out with Amy?

A Four to five times.

Q Do you recall recall (sic) the sequence of the time frame?

A The first date was before -- like I said in the middle part of December and then a couple of weeks later we went out again. We went ice skating the second time. The third time she came to one of my -- I had got started (sic) coaching volleyball and she came to one of our matches[.]

Q Do you know approximately when that was?

A That was in the middle of January right before I left to go down south to play golf. She come (sic) to the match and then we went out afterwards after the match was over and everything. My duties were fulfilled and then we went out. And, the fourth time was after I came back being down south. It was that week after approximately the 19th. I'm pretty sure it was the 19th.

A Ex 2 at 2-4.

Grievant further testified at his trial regarding his possession of marijuana in Amy Williams' presence:

Q Had she seen you with marijuana?

A Yes, sir.

Q How early on in your relationship did you have marijuana in her presence?

A On our first date when we were eating at Steak & Ale, she told me that she was a partier; that she use (sic) to smoke pot; that she liked smoking pot. So, I thought maybe she was wanting some then.

Q Did you happen to have some?

A I had a joint a friend had given me for just that date cause I was out myself. So, when she got in the car I asked her if she wanted to smoke before we went to the movie.

A Ex 2 at 6-7.

There was also testimony in regard to Amy Williams' efforts to contact Grievant at school through her younger sister:

Q Was she acting like that with you back in January of this year, that is friendly?

A Right. Before I left for South Carolina she was. Between December and that time, we wouldn't talk that much except for the fact she would call me or she would have her sister come up to me in school, in the hallways or something. She would have her sister come up and say something like, Amy is asking how you're doing, or something like that.

Q How many times do you remember the younger sister coming up to you and saying things like that?

A Well, in January it got to the point where I had to quit -- tell her to quit coming up. Because a lot of time she'd try to come up and talk to me during class while I was teaching the other class. And, I had to pull her aside and say, you can't come up and talk to me like that during the class while I'm trying to teach class.

A Ex 2 at 13.

The forgoing testimony demonstrates that while Grievant was engaging in illicit drug use (See footnote 4) on a daily basis, one of Grievant's students spoke to him regarding a purported romantic interest on the part of her older sister, a non-student. Clearly, PCBE failedto prove that Grievant initially established contact with Amy Williams for any purpose relating to the use of marijuana. Likewise, Grievant's admissions regarding communications with Ms. Williams through her younger sister, a student at his assigned school, did not support PCBE's third charge by a preponderance of the evidence. In any event, this connection is simply too tenuous to comply with the first basis for dismissal under Rogliano: conduct directly affecting the occupational responsibilities of a teacher. Rogliano, supra, at 224.

PCBE further presented testimony by Jean Allen, a resident of Hurricane, West Virginia. Ms. Allen has children attending HHS and serves as a member of the School Improvement Council at HHS. (See footnote 5) Ms. Allen became aware that Grievant had been indicted by the grand jury for delivery of a controlled substance by reading a newspaper article. Later, Ms. Allen was at the school when one of the teachers announced that Grievant had been acquitted at his criminal trial. Ms. Allen and other parents of students at HHS initiated a petition to the Board requesting that Grievant not be allowed to return to "the public school system as a teacher" and "that he be encouraged to seek professional help for his drug addiction." A Ex. 3 at 1. Ms. Allen indicated if Grievant were to return to teaching at HHS, the children would be "cruel" to him in that Grievant had been the subject of cruel jokes and that the childrenand some of the teachers would not give him respect. Ms. Allen questioned Grievant's effectiveness as a teacher, given his involvement with marijuana.

Ms. Allen solicited a teacher at HHS to type the petition form for her on June 7, 1993, the day before school ended. With assistance from several other parents, signatures of well over 700 people were gathered in the community during the summer. (See footnote 6) Although Ms. Allen read newspaper accounts relating to the Grievant's status at HHS in the Charleston Gazette, (See footnote 7) she indicated that the petition was initiated based upon concerns that Grievant might return to teach at HHS, concerns that existed independent of the newspaper articles. Dr. Sentelle testified that he was not aware of the existence of the petition until Ms. Allen and a group of Putnam County citizens asked to get on the Board's agenda to submit the petition. (See footnote 8) Dr. Sentelle even advised against submitting the petition to the Board.

Another petition was presented to Dr. Sentelle by Deanna Cunningham. Ms. Cunningham and her husband were described by Dr.Sentelle as parents with children attending Winfield Middle School and Winfield High School. This latter petition (A Ex 4) was presented to Dr. Sentelle on the afternoon of October 4, 1993, and it was subsequently introduced at Grievant's pre-termination hearing that day. This petition contains over 250 signatures. (See footnote 9) Dr. Sentelle indicated that he had no knowledge of this petition until it was presented to him. Dr. Sentelle also testified that several parents had called him prior to October 4, 1993, requesting that their children not be placed in Grievant's class.

Grievant introduced clippings of eight newspaper articles published by the Charleston Daily Mail and the Charleston Gazette between May 29, 1993 and September 27, 1993 which discussed Grievant's employment status at PCBE. Dr. Sentelle testified that he had never contacted the press or solicited publication of any of these articles. However, he did acknowledge upon cross-examination by Grievant's counsel that when contacted by the press, he never declined to answer questions by indicating that this involved an internal personnel matter on which he did not wish to comment. Dr. Sentelle further agreed that he was under no compulsion to speakwith the press and that he voluntarily responded to such inquiries with factual information or his honest opinion.

Grievant also argued that some of the information contained in these articles could only have been obtained from internal documents circulated between Dr. Sentelle, the members of the Putnam County Board of Education, and their counsel. Dr. Sentelle essentially acknowledged that fact, but denied having released the documents in question. (See footnote 10) See G Ex 1 at 4-7. No investigation was undertaken by PCBE to determine how these documents were "leaked" to the press.

Under the second alternative basis for dismissal recognized in Rogliano, a teacher's off-duty conduct ceases to be private "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." Rogliano, supra, at 224, citing Golden, supra, at 669 (emphasis added; citations omitted). Just what conduct constitutes improper "contribution" on the part of school officials is not further defined. In Rogliano, the court attributed responsibility for a substantial portion of the notoriety surrounding the employee's status to the board's actions which "unnecessarily protracted the proceedings," thereby increasing the publicity

surrounding each stage of the events. See Rogliano, supra, at 225.

Although PCBE delayed from the time of Grievant's acquittal in late May until late August 1993 before notifying Grievant of its intent to terminate his employment, such delay was not unreasonable, given that school was not in session during the summer months. (See footnote 11) Moreover, from the time of his acquittal in May, Grievant's status as a school employee was the subject of significant media interest. While PCBE did not contribute to the publicity surrounding Grievant's case by contacting the media or holding a press conference, Dr. Sentelle admittedly provided more information in response to legitimate press inquiries than he was under any legal compulsion to release. (See footnote 12) Indeed, Dr. Sentelle agreed that he was properly quoted in all of the press clippings introduced by Grievant. G Ex 1. Likewise, quotes attributed to members of the Board of Education appear to have been reported accurately.

The limited facts in Rogliano do not paint a particularly bright line for determining when a Board of Education has improperly crossed into the realm of contributing to the notoriety of an employee's off-duty misconduct. Certainly, Rogliano does not indicate that elected public officials, such as the members of aboard of education, or their appointed Superintendent, should refrain from answering pertinent media inquiries. Contribution to notoriety clearly implies an unfair effort to influence public opinion against the employee.

In the instant case, it appears that a certain amount of notoriety was inevitable, given Grievant's status as a high school teacher and the criminal charges of distributing a controlled substance. Grievant should not be surprised that, in an era when a presidential candidate's experimentation with marijuana as a college student over twenty years past becomes the subject of intense scrutiny, the press takes an interest in a high school teacher who admits to using marijuana on a daily basis. Accordingly, the undersigned finds that Dr. Sentelle and PCBE did not violate the Rogliano "contribution" rule by responding to inquiries from the press since factual information released by the Board was of legitimate public interest, was not shown to infringe on Grievant's protected privacy interests and any opinions conveyed were not intended to incite or inflame the public against the Grievant.

However, the apparent unauthorized release of internal board documents, including correspondence between the Superintendent of Schools and the Board's statutory attorney, the Putnam County Prosecuting Attorney, as well as their outside counsel for personnel matters, is more

problematic. These documents must, of necessity, have been obtained from officials with a duty not to "stir up" the local community. Moreover, the fact that no inquirywas initiated to determine the circumstances under which these documents were released to the press indicates a certain indifference on the part of PCBE to its obligations under Rogliano. Accordingly, the undersigned finds that PCBE "contributed" to the notoriety surrounding Grievant's status as a classroom teacher, contrary to the holding in Rogliano, by allowing certain internal documents to be released to the local press.

Rogliano's anti-contribution rule requires an analysis of the particular facts in each case to measure the adverse affect of unwarranted publicity. See Rogliano, supra, at 225. In proposing Grievant's termination, Dr. Sentelle did not purport to rely on the notoriety surrounding Grievant's misconduct generally, but referenced the petition which opposed Grievant's return to teaching in Putnam County. Moreover, PCBE presented evidence from Ms. Allen that her petition was developed and circulated without the assistance of school officials. While it is likely that some individuals elected to sign this petition only after reading the information that was improperly released by PCBE officials, that does not begin to account for the over 700 signatures which Dr. Sentelle characterized as a "ground swell of opposition." A Ex 1 at 2. Unlike the situation in Rogliano, significant publicity was generated regarding Grievant's status before the Board's actions improperly contributed to this notoriety. Thus, the undersigned finds that Ms. Allen circulated her petition without regard to any publicity which PCBE improperly generated. Moreover, based upon the testimony of Dr. Sentelle and Ms. Allen, there was significantsentiment in the community adverse to Grievant well before PCBE "leaked" any internal documents to the press. Accordingly, PCBE did not violate Rogliano by considering the Allen petition in its decision to terminate Grievant.

As for the second petition from parents in the Winfield area (the Cunningham petition), Grievant presented evidence that the fact that he was being considered for reassignment to a teaching position in one of the Winfield area schools was not a matter of public knowledge. Unlike the Allen petition, there was no evidence presented as to how this petition was initiated and circulated, other than Dr. Sentelle's denial of any involvement in its generation. Accordingly, the undersigned finds that the subject of this petition (reassigning Grievant to a school in the Winfield area) substantially resulted from a leak of internal information from PCBE contrary to Rogliano. Thus, the Cunningham petition will not be considered in support of PCBE's position.

In Rogliano, the court further considered the factor that the appellant was "by all accounts, an above average teacher, who was well-liked by his students" (See footnote 13) in balancing the interests at stake in dismissing a teacher for misdemeanor possession of marijuana. Likewise, in Golden the court considered the "favorable testimony of Mrs. Golden's fellow teachers and of the principal and assistant principal at her high school" regarding her fitness to teach. (See footnote 14) Thus, it appears that due consideration must be givento Grievant's performance of his professional duties up until the time of his arrest. (See footnote 15)

Grievant's teacher evaluations from 1986 through 1990 are generally favorable. Indeed, his initial evaluation dated November 20, 1986 notes under Employee Strengths: "Good rapport with students and faculty. Stays on task. Interested in working with students beyond the classroom." G Ex 12 at 8. Grievant's evaluation dated January 17, 1990 similarly notes: "Concerned about improving math dept and math skills - Good Teacher." G Ex 12 at 2. An evaluation of Grievant's performance as Girls Volleyball Coach dated May 2, 1990 is likewise complimentary: "Works well with athletes. Concerned about making improvements in program." G Ex 12 at 1.

However, Grievant's evaluation dated March 4, 1991, by the same administrator who rendered the favorable 1990 comments, HHS Principal Ron Chambers, contained negative comments under Employee Weaknesses: "Needs to use classroom time more wisely (time management) - Understanding role as teacher." R Ex 1. Under Suggestions for Improvement, Mr. Chambers stated: "Better time management and setting a better example as a professional." R Ex 1. While the forgoing 1991 evaluation and all previous evaluations stated Grievant "meets performance standards," Grievant's next evaluation by Mr. Chambers, dated January 31, 1992, was an unsatisfactory rating, marking Grievant as "does not meet performance standards." R Ex 2. This evaluation noted under Employee Weaknesses: "Does not use time wisely in classroom. Inappropriate language towards students. Unwillingness to help students who are having difficulty in class." R Ex 2. Under Suggestions for Improvement, Mr. Chambers stated, "Needs to set a better example for students to follow." R Ex 2. Finally, under Additional Comments, Mr. Chambers noted, "Needs to get more serious about teaching and the commitment involved." R Ex 2.

At the hearing, Grievant testified that he had never been given an evaluation rating his performance as not meeting standards and that the signature on this January 1992 evaluation was not his. Through the testimony of Harold Hatfield, Assistant Superintendent of Schools for Personnel,

and Ron Chambers, former HHS Principal, PCBE demonstrated by a preponderance of the evidence that the 1992 evaluation was properly discussed with Grievant and placed in his personnel records in the normal course of business. In his post-hearing submission, Grievant's counsel appeared to abandon this claim, arguing that Grievant had taken this evaluation to heart and improved his performance.

Although Grievant's testimony was otherwise candid, forthright and consistent with the evidence, the evidence of record does not support Grievant's claim at the hearing that his signature on the January 1992 evaluation was somehow "forged." In particular, Mr. Hatfield's testimony recalling discussions between Mr. Chambers and the Acting Principal at HHS regarding the need to follow throughwith an improvement plan for Grievant corroborated the validity of this document.

Mr. Chambers testified expounding on his comments on the January 1992 evaluation, stating that his observations of Grievant's classes on various occasions indicated that Grievant was not pushing or motivating his students to excel in mathematics. Mr. Chambers also testified that students had come to him on more than one occasion complaining that Grievant was using profanity in the classroom. Mr. Chambers further noted that students had come to him "many times" complaining that they had asked Grievant for assistance and Grievant had refused to help them. Mr. Chambers observed that Grievant was more concerned about being a friend of his students than being a good teacher. Thus, he indicated on the evaluation that Grievant needed to get serious about his commitment to teaching. Mr. Chambers stated that Grievant was capable of being a good teacher and was extremely knowledgeable in the subjects he taught, but Grievant was not functioning as a good teacher as of the time of the 1992 evaluation.

Although an assistance plan could have been developed to assist Grievant in meeting performance standards, no plan was ever implemented. See W. Va. Code §18A-2-12. Since Mr. Chambers left employment with PCBE sometime before the end of the 1991-92 school year, Grievant's assistance plan may have fallen victim to neglect. A subsequent observation of Grievant's classroom performance by Bill Sanders, Mr. Chambers' successor as Principal at HHS, dated December 16, 1992, noted generally favorable comments regardingGrievant's performance. However, Mr. Sanders also noted under Classroom Climate: "Class control is pretty good but better time on task will help." G Ex 6. (See footnote 16) Likewise, regarding Maximizes Student Time-On Task, Mr. Sanders noted, "Need to work on this a little." (See footnote 17) While Mr. Sanders'

observations appear to document an improvement over the substandard performance observed by Mr. Chambers, PCBE demonstrated by a preponderance of the evidence that Grievant's teaching performance had deteriorated to a marginal level.

Despite Grievant's contention that there was insufficient nexus between his off-duty misconduct and his position as a teacher to support disciplinary action, Grievant also presented mitigating evidence to suggest that he had discontinued such conduct and had been rehabilitated. D. Lynn Lewis, a licensed psychological counselor and clinical social worker, testified that Grievant had been referred to him by Grievant's minister. Mr. Lewis testified that he primarily dealt with Grievant regarding his low self-esteem, but he also worked with Grievant in regard to his anxiety over pending criminal charges and his "chemical dependency" on marijuana.

Starting in April 1993, Mr. Lewis counselled Grievant in three monthly sessions, with a good portion of their discussion involving Grievant's problems with developing male-female relationships. Mr. Lewis opined that Grievant's use of marijuana was due, at least in part, to feelings of emptiness, loneliness and frustration arising from those concerns. Mr. Lewis stated that Grievant had been engaged in habitual use of marijuana. Thus, Mr. Lewis indicated that Grievant would be considered "psychologically habituated" to marijuana rather than "addicted" since someone who is addicted cannot refrain from use of the chemical in question.

Mr. Lewis noted that, although he personally believed that Grievant was not using marijuana during the time he was counseling him in April to June of 1993, he had no way of confirming that. Grievant did not submit to any chemical test, such as a urine drug screen, in the course of his counselling with Mr. Lewis. After three sessions with Mr. Lewis, Grievant canceled his fourth session and did not schedule any further counseling sessions until September of 1993. (See footnote 18) Thus, Mr. Lewis never formally "treated" Grievant for his psychological habituation to marijuana. Following one further session in September, Mr. Lewis provided Grievant witha letter stating that he saw no mental problem that would prevent Grievant from returning to his employment. (See footnote 19) G Ex 2.

Grievant's minister, David Sutton, pastor of the First Presbyterian Church in South Charleston, West Virginia, also testified regarding Grievant's efforts to find new directions in his life. Rev. Sutton offered his pastoral counseling services shortly following Grievant's arrest and, soon thereafter, Grievant met with Rev. Sutton for pastoral counseling on at least fourteen occasions. Grievant

admitted to Rev. Sutton that up until his arrest, he had been using marijuana on a daily basis. After meeting with Grievant on at least three occasions, Rev. Sutton referred Grievant to Mr. Lewis for the benefit of more experienced and professional counseling services. (See footnote 20) During and after meeting with Mr. Lewis, Grievant continued his pastoral counseling with Rev. Sutton. Rev. Sutton indicated that he did not see any evidence that Grievant was continuing to use drugs after his arrest.

Although there was no evidence to suggest that Grievant continued to use marijuana after his arrest on February 14, 1993, given Grievant's persistent abuse of marijuana over a protracted period of time, PCBE's concern that Grievant might revert to theuse of marijuana at some future time is not unreasonable. Grievant did not complete a course of rehabilitative treatment to overcome his psychological habituation to marijuana. Therefore, Grievant remains at risk to revert to such misconduct.

There was considerable evidence presented regarding conversations between Grievant, his attorney and the Board concerning possible alternatives to Grievant's dismissal. While it is apparent that the Board was uncertain how to proceed until it ultimately voted to dismiss Grievant based on the charges levied by Dr. Sentelle, Grievant has not established that there was any binding agreement reached which would serve to bar his dismissal. (See footnote 21) To a large extent, these various statements and conversations are closely akin to discussions of settlement and compromise. Ultimately, the evidence demonstrates that the Board was not unanimous in regard to its decision to discharge Grievant, voting3 to 2 to dismiss Grievant from employment. (See footnote 22) However, unanimity is not a prerequisite to sustaining the Board's action. (See footnote 23)

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 Putnam County Board of Education (PCBE) as a classroom teacher from September 2, 1986 to October 4, 1993.

2. Grievant was dismissed from employment by PCBE on October 4, 1993, based upon charges of intemperance and immorality.

3. Grievant was arrested in February 1993 and charged with delivery of a controlled substance. At his trial, which resulted in acquittal of the criminal charges, Grievant testified under oath that he had

used marijuana on a daily basis.

4. Grievant further admitted during his trial that he obtained marijuana for Amy Williams, who was working unbeknownst to Grievant as a police informant. Grievant met Ms. Williams through her younger sister who was a student in one of Grievant's classes at Hurricane High School (HHS).

5. Subsequent to meeting Ms. Williams and learning of her interest in using and/or obtaining marijuana, Grievant continued to communicate with Ms. Williams through Ms. Williams' younger sister during school hours.

6. There was no evidence that Grievant used or possessed marijuana during working hours, on school property or in the presence of students.

7. Following his arrest, Grievant obtained pastoral counseling from his minister, Rev. David Sutton, and further psychological counseling from Mr. Lynn Lewis with Process Strategies, Inc. Grievant did not participate in a formal course of treatment to directly address his drug abuse.

8. Both Rev. Sutton and Mr. Lewis opined that Grievant refrained from drug use while undergoing counseling. Grievant denied any drug use subsequent to his arrest in February 1993. Grievant has never submitted to a test for the presence of drugs, such as a urine screen.

9. On January 31, 1992, Grievant was evaluated by Ron Chambers, Principal at HHS, as not meeting performance standards. All of Grievant's previous evaluations were satisfactory, indicating that Grievant met performance standards. Subsequent to this January 1992 evaluation, school administrators did not follow up by implementing an assistance plan to improve Grievant's performance as a teacher.

10. Sam Sentelle, PCBE Superintendent of Schools, and various PCBE members responded to media inquiries regarding Grievant's employment status providing factual information or their personal opinion.

11. Some person or persons unknown provided internal correspondence of a confidential nature (directly relating to the potential termination of Grievant's employment status) between PCBE's Superintendent of Schools and the Board's statutory attorney, between the Superintendent and the Board, and between the Superintendent and the Board's outside counsel for personnel matters, to an unidentified newspaper reporter. Portions of these documents were subsequently quoted in published news reports. PCBE did not conduct an inquiry to determine how these documents were released to the press.

12. Immediately following Grievant's acquittal, Jean Allen, a resident of Hurricane and parent of students attending HHS, initiated a petition urging that Grievant not be permitted to return to teaching in the public school system. A Ex 3. Without any assistance or encouragement from PCBE officials, Ms. Allen andother concerned citizens obtained over 700 signatures on the petition.

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 in accordance with W. Va. Code §18A-2-8 for immorality and intemperance, 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. Use and possession of marijuana on a daily basis for a period in excess of one year constitutes immorality within the meaning of W. Va. Code §18A-2-8.

4. "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).

5. 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.

6. By demonstrating that certain internal and confidential correspondence relating to Grievant's employment status within PCBE was somehow provided to the press and published in local newspapers, Grievant established that PCBE "contributed" to the notoriety of Grievant's conduct. See Rogliano, supra.

7. Notwithstanding that PCBE "contributed" to the notoriety of Grievant's conduct contrary to Rogliano, PCBE satisfactorily established that a petition asking that Grievant "not be allowed to come back into the public school system as a teacher" was initiated and circulated by Jean Allen and a group of concerned citizens, obtaining over 700 signatures based upon notoriety that existed independent of PCBE's improper "contribution."

8. Through the Hurricane (Allen) petition, Ms. Allen's testimony, and the testimony of Dr. Sentelle, PCBE established sufficient notoriety, unrelated to any improper contribution by PCBE, to "significantly and reasonably impair" Grievant's capability to discharge the responsibilities of his teaching position at HHS. See Rogliano, supra.

9. Given Grievant's daily use of marijuana over an extended period of time exceeding one year, Grievant's unsatisfactory evaluation as a teacher in January 1992, and the community reaction to Grievant's misconduct, PCBE lawfully dismissed Grievant from hisemployment. See Rogliano, supra. See also Chicago Bd. of Educ. v. Payne, 430 N.E.2d 310, 315 (Ill. App. 1981); Dominy v. Mays, 257 S.E.2d 317 (Ga. 1979).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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.

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LEWIS G. BREWER

Administrative Law Judge

Dated: June 2, 1994

Footnote: 1In addition, on December 28, 1993, counsel for Respondent PCBE filed a Motion to Supplement the Record. After receiving a response from counsel for Grievant opposing Respondent's motion, the undersigned issued an Order dated February 17, 1994, denying Respondent's motion. Accordingly, none of the documents submitted with that motion

have been considered in rendering the instant decision.

Footnote: 2Documents admitted at Grievant's pre-termination hearing conducted by PCBE on Oct. 4, 1993, will be referenced as "A Ex " for Agency (PCBE) Exhibits and "K Ex " for Kelly (Grievant's) Exhibits. Documents from the Level IV hearing will be referenced as "R Ex " for Respondent's (PCBE) Exhibits and "G Ex " for Grievant's Exhibits.

Footnote: 3While such charges support a finding of prohibited "immorality" under W. Va. Code §18A-2-8, PCBE has not proffered any theory under which this conduct would further constitute "intemperance" as prohibited therein. For purposes of this decision, it is not necessary to determine whether Grievant's involvement with marijuana also amounted to intemperance.

Footnote: 4Possession of marijuana (spelled "marihuana" in the statute) is a criminal misdemeanor under W. Va. Code §60A-4-401(c).

Footnote: 5Such councils are specifically authorized by W. Va. Code §18-5A-2 to promote local involvement in school operation. See W. Va. Code §18-5A-1. Grievant's conduct was never discussed by this Council.

Footnote: 6As noted by Grievant, there was no attempt to verify the age or residence of the individuals who signed the petition or to audit the petition to identify duplicate signatures. However, there is no requirement for such efforts to be undertaken as a prerequisite to establishing "notoriety" within the meaning of Rogliano and Golden.

Footnote: 7Ms. Allen testified that she read an article dated June 4, 1993, which was published before the petition was prepared. That article contained comments indicating that some parents had already asked that Grievant be fired. See G Ex 1 at 2.

Footnote: 8Dr. Sentelle indicated his general opposition to such petitions, opining that employment decisions should not be rendered based upon popularity contests.

Footnote: 9The text of the petition states: "We the undersign, (sic) parents of Winfield Middle School students, oppose the hiring of Matt Woo as a teacher in our school. The hiring of Mr. Woo would adversely affect the learning environment of our children. We feel very strongly that due to the recent publicity surrounding Mr. Woo, that his hiring would cause additional problems and concern for our children." (A Ex 4.) Assuming that these signatures are valid, no evidence was presented regarding the student census at Winfield Middle School or what percentage of the students' parents is represented by these signatures.

Footnote: 10It is clear that the information published in certain newspaper accounts was in no way attributable to the Grievant as he was not privy to these documents at that time.

Footnote: 11Based upon Grievant's indictment by the grand jury for selling marijuana, PCBE reassigned Grievant to a non-teaching position in the central office without loss of pay. Subsequent to his acquittal late in the school year, PCBE

took no immediate action to change Grievant's status in that he would not be returning to the classroom until the fall.

Footnote: 12It is noted, while Dr. Sentelle's comments were not obligatory, they were generally favorable to Grievant and do not appear intended to arouse public opinion against Grievant.

Footnote: 13Rogliano, supra, at 225.

Footnote: 14Golden, supra, at 669.

Footnote: 15The date of Grievant's arrest is the preferred point of reference since subjective ratings of performance rendered after that point might be influenced by that event. In this particular case, Grievant was not evaluated subsequent to his arrest.

Footnote: 16This document is entitled "Teacher Observation/Data Collection" and is used in documenting performance for a teacher's annual evaluation under Board of Education Policy 5310.

Footnote: 17Dr. Sentelle noted in his testimony at Level IV that "time on task" as commented upon in the December 1992 observation appears comparable to the "does not use time wisely" comment in Grievant's unsatisfactory evaluation dated January 31, 1992. Cf. G Ex 6 and R Ex 2.

Footnote: 18Grievant attributed his decision to discontinue his sessions with Mr. Lewis after June of 1993 to the fact that he had lost his health insurance when he was fired. However, Grievant's employment was not terminated until October 1993. Further, Grievant acknowledged on cross-examination that he had canceled an appointment with Mr. Lewis to attend the funeral of a friend's father but had difficulty rescheduling an appointment since he was unwilling to cancel previously made "personal obligations," which included playing golf with friends.

Footnote: 19This letter represented a "mental status evaluation" by Mr. Lewis.

Footnote: 20On cross-examination, Rev. Sutton acknowledged that he referred Grievant to Mr. Lewis for assistance in dealing with Grievant's "chemical dependency" while noting that this referral involved the Grievant as a "whole person" and not for one particular problem.

Footnote: 21For example, on August 30, 1993, the Board granted medical leave to Grievant as suggested by Dr. Sentelle. This medical leave was not based on any determination that Grievant had a medical problem but simply allowed Grievant to remain on the payroll while the Board reviewed its options with its counsel (who was not present at the August 30 meeting).

Footnote: 22Grievant presented testimony from the dissenting Board members, Paul Knapp and Sidney Linville. Mr. Linville testified that he considered Grievant's use of marijuana as an "illness." Grievant did not advance this theory as a defense to his dismissal. Mr. Linville indicated that he was aware that some people in the local community opposed employing a teacher who had used drugs. However, he did not think it would be impossible for Grievant to perform his

duties satisfactorily, even though his drug use might cause problems with some parents. Mr. Linville indicated that there was an effort at the August 30 Board meeting to work out an agreement that would allow Grievant to return to work under circumstances where the Board could verify that Grievant remained drug-free, such as random drug testing. However, a majority of the Board members changed their position by the September 20th meeting. Mr. Knapp indicated that he learned of the Hurricane (Allen) petition at the September 20th meeting while Mr. Linville denied ever having ever seen either of the petitions. The three Board members who voted to discharge Grievant were not called as witnesses. Therefore, it is not clear what impact, if any, the Hurricane area (Allen) petition had on the Board members.

Footnote: 23While Grievant may have been disappointed that PCBE went through a "Jekyll and Hyde" transformation between the August 30 and September 20 Board meetings, the undersigned is constrained to decide the merits of Grievant's dismissal on the basis of the reasons adopted by a majority of the Board on October 4, 1993.