STATE BOARD OF EDUCATION

STATE OF GEORGIA

VICKI SHERLING,	:	
	:	
Appellant,	:	
	:	**CASE NO. 1989-21**
v.	:	
	:	**DECISION**
COLQUITT COUNTY BOARD OF EDUCATION,	:	
	:	
Appellee.	:	

This is an appeal by Vicki Sherling ("Appellant"), a teacher, from a decision by the Colquitt County Board of Education ("Local Board") to dismiss her on charges of immorality upon finding that she had been in possession of marijuana in violation of state law. Appellant maintains that there was no evidence to support the Local Board's decision. The decision of the Local Board is sustained.

On May 19, 1989, the Moultrie Colquitt County police department conducted a search of the residence owned jointly by Appellant and her husband pursuant to a search warrant issued against Appellant's husband. The police found marijuana growing in the back yard and marijuana, marijuana residue and paraphernalia in the house. Appellant's husband was arrested and charged with violation of criminal law because of his possession of marijuana. Later that same day, Appellant was also arrested and similarly charged.

Upon learning of the charges, the Local Board suspended Appellant on May 22, 1989. Appellant was charged by the Local Board with immorality and other good and sufficient causes because of the manufacture or possession of marijuana in violation of the laws of the State of Georgia. A hearing was then held on June 27, 1989. At the conclusion of the hearing, the Local Board found that Appellant was guilty of possessing or manufacturing marijuana and dismissed

her because of immorality and other good and sufficient causes. A timely appeal was then made to the State Board of Education under the provisions of O.C.G.A. § 20-2-1160.

The Local Board did not enter any findings of fact. If, however, there is any evidence to support the Local Board's decision, then that decision will not be reversed on appeal. See, Ransum v. Chattooga County Bd. of Educ., 144 Ga. App. 783 (1978); Antone v. Greene County Bd. of Educ., Case No. 1976-11.

When the hearing before the Local Board began, Appellant's counsel moved to continue the proceeding until the criminal charges against Appellant could be decided. The Local Board denied the motion and proceeded with the hearing. At the hearing, testimony was received from three policemen who searched Appellant's house, Appellant's husband, Appellant, a physician, and two character witnesses.

There was testimony that Appellant's husband had been a long-time user of marijuana. Appellant had been aware of his usage, but during the past twelve years, he had taken steps to hide his usage from her.

When the police arrived at the house, they found a makeshift greenhouse located in the rear yard of the house that was jointly owned by Appellant and her husband. Twenty-two one-foot tall marijuana plants were growing in the greenhouse. The greenhouse gate had a padlock. The padlock key was kept on a keyholder located inside the house beside the front door of the house. In the master bedroom of the house, the police found materials they thought was marijuana and marijuana seeds stored in a chifforobe, but the materials tested negative for marijuana in a state laboratory analysis. A pipe containing marijuana residue and additional marijuana residue was found in a chest of drawers located in a utility room.

Appellant testified that she did not know that marijuana or marijuana paraphernalia was located in the house or that marijuana was growing in the back yard. She had not seen her husband use marijuana for several years, but she was suspicious that he still used it. She testified that she never entered the chifforobe; her husband maintained his clothes there and she maintained hers in a separate closet. She also did not go into the chest of drawers in the utility room.

Both Appellant and her husband testified that she had never smoked marijuana or used any other drugs. Her abstinence also included cigarettes and alcohol. A physician, who performed a drug analysis of Appellant's blood on May 22, 1989, testified that his tests showed that Appellant had not used any drugs for at least ten to fourteen days prior to the test.

According to Appellant's testimony, she was aware that the greenhouse existed, but she did not investigate it. She did not do any yard work or gardening because of allergic reactions. Additionally, she was devoting considerable time, effort, thought, and concentration on her duties as a schoolteacher and science fair advisor.

Appellant's husband testified that he made every effort to hide his usage from Appellant because she opposed it when they first married. He said he placed the marijuana in locations where he thought Appellant would not discover its presence. He testified that she had no part in, or knowledge of, his possession, growing, or usage of marijuana. There was no direct evidence that Appellant knew about the marijuana.

O.C.G.A. § 20-2-940 provides that a local board of education can dismiss a teacher for immorality and other good and sufficient causes. Appellant maintains that in order to sustain a dismissal for immorality, there has to be a criminal conviction.

In Dominy v. Mays, 150 Ga. App. 187, 257 S.E.2d 317 (1979), a teacher pleaded guilty to a misdemeanor charge of possession of marijuana and was dismissed on the charge of immorality. The Court of Appeals stated that possession of dangerous drugs is evidence from which immorality may be inferred, and there does not have to be any showing of criminal purpose or intent. In the instant case, Appellant contends that since she did not enter a guilty plea, the Local Board could not draw any inference about her arrest and the Local Board was without authority to determine if she was guilty of a crime. In the absence of an adjudication of guilt, Appellant maintains that there is no basis for drawing an inference of immorality.

The Local Board argues that Dominy does not require a plea or adjudication of guilt. Instead, Dominy recognizes that a local board can prove facts of an underlying criminal charge. The Local Board then argues that the standard of proof in a dismissal proceeding is "preponderance of evidence" rather than the strict "beyond a reasonable doubt" standard of a criminal proceeding. Thus, the Local Board contends that the only issue is whether there was sufficient evidence from which it could conclude that Appellant 11-legally possessed marijuana.

In Dominy, the Court of Appeals said that when it is established that a teacher was in possession of drugs, then "it is for the board of education as fact finders to determine whether the authorized inference of 'immorality' is to be drawn from the proven facts." The inference to be drawn is whether the acts constitute immorality, and not, as Appellant contends, whether she committed a criminal act. The Local Board could determine whether Appellant possessed drugs based upon a preponderance of the evidence, as presented in a hearing before the Local Board. There is no violation of due process if an administrative hearing is conducted prior to a criminal proceeding. See, Peiffer v. Lebanon School District, 848 F.2d 44 (3d dr. 1988). The Local Board was thus fully empowered to make an inquiry into the relevant facts and make a determination based upon the evidence presented.

Appellant then contends that the evidence was insufficient to establish that Appellant was guilty beyond a reasonable doubt in light of the presumption that contraband found in a home belongs to the husband. This argument, however, fails for two reasons. First, the presumption that the husband possessed any contraband was based upon O.C.G.A. § 19-3-8, which was repealed in 1983. Secondly, the standard of proof before a local board is "preponderance of evidence" rather than "beyond a reasonable doubt". The standard for review by the State Board of Education then is whether there is any evidence to support the decision of the local board.

The record shows, and it is undisputed, that the police found marijuana plants growing in the back yard, and that marijuana residue and paraphernalia was found in a dresser in the utility room used by the family. During the search, Appellant went into the utility room to recover some clothing for her children. Appellant admitted that she was aware that her husband smoked marijuana when they were first married, and that she was at least suspicious that he continued to smoke marijuana. There was also evidence that marijuana gives off a distinctive smell.

In Luke v. State, 178 Ga. App. 614, 344 S.E.2d 452 (1986), The appellant had been convicted of possessing marijuana after a search of the house where he and his wife lived revealed some marijuana in the master bedroom. The appellant's wife was an admitted user of drugs, and appellant maintained that the drugs were not his. The Court, however, reasoned that, from the evidence presented, a rational trier of fact could reasonably infer that appellant occupied the house with his wife, and this warranted the conclusion that appellant was in constructive possession, either by himself or jointly with his wife, of the marijuana.

There is a rule, known as the "equal access rule", that provides that if others have equal access or opportunity, then the mere discovery of contraband on the premises of an owner will not support the inference of constructive possession. See, Shreve v. The State, 172 Ga. App. 190, 322 S.E.2d 262 (1984). The "equal access rule", however, "is not properly applicable to the marijuana plants growing outside, which require a period of months to grow, mature, and be

harvested." Goode v. The State, 130 Ga. App. 791, 204 S.E.2d 526 (1974). The Goode court also pointed out that the trier of fact was justified in inferring possession by appellant because appellant acquiesced in the existence of the marijuana.

The Local Board, therefore, as the trier of fact, and based upon the evidence before it, could have determined that Appellant was in actual or constructive possession of marijuana. The Local Board's determination only required a preponderance of evidence, and not evidence beyond a reasonable doubt. Thus, the Local Board's decision was not dependent upon any finding of a criminal court, either before or after the hearing.

Appellant also argues that the Local Board was biased and that she was denied due process because of the bias. In support of her contention, she points out that one of the members of the Local Board made a statement that "the school system should not tolerate this behavior among its teachers" and that "they're grown people; they knew better." The Local Board member testified that he thought Appellant was innocent and that he had an open mind.

There was no showing that the particular Local Board member or any of the Local Board members were incapable of making a fair judgment in the case. A decisionmaker is not "disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances'". Hortonville Joint School District v. Hortonville Education Assn., 426 U.S. 482, 493 (1976).

The State Board of Education, therefore, concludes that the Local Board was not required to await the outcome of a criminal trial in order to conduct a hearing, and that there was evidence available from which the local board could conclude that Appellant was in possession of marijuana, from which it could infer immorality in the circumstances. The decision of the Local Board, therefore, is

SUSTAINED.

Mr. Sears and Ms. Baranco were not present. Mr. Lathem, Mr. Foster, Mr. Smith, Mr. Carrell voted to sustain the local board's decision.

This 9th day of November, 1989.

Mrs. Cantrell, Mr. Owens, and Mr. Abrams voted to reverse the loca board's decision.

John M. Taylor
Vice Chairman For Appeals