JOHN WATTS

v. Docket No. 93-33-211

McDOWELL COUNTY BOARD OF EDUCATION

DECISION

The grievant, John Watts, was employed by the McDowell County Board of Education (Board) as a custodian at Mount View High School (MVHS) until his dismissal for incompetency on June 7, 1993. He filed an appeal of that action directly to Level IV on June 11, 1993, and a hearing was held February 23, 1994. (See footnote 1) The parties submitted briefs by April 14, 1994.

At the time of his termination, the grievant had been employed by the Board as a custodian for approximately eight years, most of which were served at MVHS. During his first four years of employment, he received favorable evaluations and was not the subject of any disciplinary action. At the beginning of the 1989-90 school term, newly-appointed MVHS Principal Judith Kowalski began receiving complaints from teachers regarding the cleanlinessof the school. Indicative of the nature of the complaints was an August 31, 1989 memo to Ms. Kowalski from MVHS basketball coach Shaffron in which he reported a general lack of cleanliness in the gym-locker room area of the school. Mr. Shaffron noted that most of the area had not been cleaned and was cluttered with trash. The reports prompted Ms. Kowalski and MVHS Assistant Principal James Spence to make frequent inspections of the grievant's work area and bring to his attention any deficiencies discovered. A personal inspection of the gymnasium and adjacent locker and weight rooms on April 6, 1990, caused Ms. Kowalski to issue a strongly worded memo to the grievant over the condition of the area. Discussions with the grievant brought about moderate improvement in his performance.

In June 1990, Ms. Kowalski and Mr. Spence completed evaluations of the grievant's performance which overall rated him as "Meets Standards" but included comments to the effect that each had reservations about the ranking. Both noted that while they had seen improvement in the grievant's performance over the school year, deficiencies remained.

During the 1990-91 school term, Ms. Kowalski continued to receive complaints from teachers concerning the cleanliness of the school, particularly the bathrooms. The grievant's May 9, 1991

evaluation ranked him as not meeting standards in the areas of "Maintains Positive Work Habits" and "Performs Duties Efficiently and Productively." Ms. Kowalski's comments on the evaluation were generally directed to the grievant's lack of punctuality and his failure to properly clean his assigned areas. She also noted thatthe grievant did not stay on task and that he spent time making personal telephone calls and visiting with other employees. The grievant filed a written exception to the evaluation which contained responses to each of the areas of deficiency.

Pursuant to West Virginia Department of Education Policy 5300, the grievant was placed on a plan of improvement for the 1991-92 school year. The May 23, 1991 plan directed the grievant to be punctual in reporting to work; complete his assigned duties; organize his work time; log his phone calls; and notify staff when he would be unable to clean a particular area. By its terms, the plan was to be in effect during the entire 1991-92 school year. The grievant was provided a written schedule setting forth the approximate times he was to clean each of his assigned areas.

During school year 1991-92, the Board contracted with the Marriott Corporation to assess its custodial services at several schools including MVHS and to recommend changes aimed at streamlining those services. Marriott employees performed extensive observations of the work of MVHS custodians and conducted several training sessions at the school. Between March and June 1992, the Marriott officials sent numerous notes to the grievant and Ms. Kowalski concerning deficiencies in the grievant's work. At some point, the officials advised Ms. Kowalski that it did not appear that the grievant had a desire to improve.

At the end of the 1991-92 term, Ms. Kowalski determined that while the grievant had shown improvement in reporting to work as scheduled, he had not shown sufficient progress in other areas. His May 11, 1992 evaluation ranked him as not meeting standards in two of the three listed performance indicators. (See footnote 2) The grievant was placed on another improvement plan for the 1992-93 year which essentially contained the same goals as the 1991-92 plan.

By letter dated October 30, 1992, Ms. Kowalski advised the grievant that since the beginning of the term he had "demonstrated initiative in his cleaning schedule when needed and cleaning was more consistent." She also noted that he had "demonstrated punctuality thus far." Ms. Kowalski, however, cautioned the grievant that he had to meet all goals in the improvement plan and a failure to do so would result in a recommendation that his employment be terminated.

By February 1993, Ms. Kowalski had concluded that the grievant was not meeting the

improvement plan goals. In a February 19, 1993 evaluation she noted that the grievant exhibited a good attitude and a desire to improve but that he had otherwise not shown progress in the areas identified in the plan. Subsequently, she asked Alvin Belcher, the Board's Director of Maintenance, to appoint an improvement team to conduct an assessment of the grievant's work and make recommendations.

Mr. Belcher conducted a one hour inspection of the school on March 2, 1993 during the grievant's 3:00 p.m. to 11:00 p.m. shift. He included the following summary in his observation report,

> My observation began at 9:50 p.m., ended at 11:00 p.m. Complete "neglect" of most major areas was evident. he had been on the job site six (6) hours and fifty (50) minutes, cleaned one (1) small office and corridor. I found fifteen (15) soft drink cans, trash and textbooks in the gym bleachers where he said had just been cleaned. He said he knows how to do his job and I agree, however, it's not being done.
>
> A plan of improvement will be developed by Improvement Team in compliance with county policy immediately.

Mr. Belcher, Guidance and Testing Coordinator Bruce Childers, and Building Inspector Eddie Egleson comprised the improvement team. After inspecting the grievant's assigned work area, the group met with the grievant on March 10, 1993 and presented him with another improvement plan. The plan contained eight specific goals which the grievant was to achieve in thirty days or face termination. The team made at least six more inspections of the school during the improvement period and advised the grievant in detail of their findings. In a May 5, 1993 evaluation, the members concluded that the grievant possessed the knowledge and skills necessary to perform his job but for whatever reason, would not carry them out. They recommended to Ms. Kowalski that his employment be terminated. By letter dated May 17, 1993 Ms. Kowalski recommended to Superintendent of Schools J. Kenneth Roberts that the grievant be discharged. Mr. Roberts subsequently advised the grievant that he would make that recommendation to the Board.

The grievant was afforded a hearing before the Board on June 7, 1993. (See footnote 3) Following the presentation of evidence, the Board voted to terminate the grievant's employment. The grievant was notified of this action by letter dated June 8, 1993.

In a disciplinary action, the respondent board of education has the burden of proving its case by a

preponderance of the evidence. Camiolo v. McDowell County Bd. of Educ., Docket No. 92-33-245 (Jan. 26, 1993); Allen v. Monroe County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990). At Level IV, the Board presented the testimony of Mr. Belcher. (See footnote 4) The grievant presented his testimony and that of Coach Shaffron, MVHS Basketball Coach Mark Page, MVHS custodian Donald Riggs and Veteran's Administration counselor James Ruben. (See footnote 5)

The Board maintains that the evidence is sufficient to demonstrate incompetence on the grievant's part. The grievant essentially asserts that Ms. Kowalski assigned him duties whichcould not be completed during an eight hour shift and that any demonstrated deficiencies were the result of his neglecting one area in order to take care of another. (See footnote 6) For the reasons hereinafter discussed, the undersigned concludes that the Board must prevail.

It is not necessary to recount here the extensive testimony and documentation presented by the Board or to analyze its sufficiency in any detail. That evidence can readily be characterized as overwhelming. The grievant rebutted, at best, only minor and rather insignificant portions of the Board's case. The record as a whole supports, in clear and convincing fashion, that beginning at least as early as the fall of 1989, the grievant established a pattern of neglecting his duties and as of the time of his dismissal had shown only moderate, infrequent improvement. The record further establishes that the grievant was not simply overlooking minor details of his job but was instead so derelict in performing basic functions essential to the operation of the school that his neglect could be described as willful.

The evidence also supports that the grievant had ample time during his eight hour shift to complete the duties assigned him. The assertion that the deficiencies were the result of his havingto forego cleaning one area of the school in order to attend to another has little if any support in the record. Moreover, the improvement plans made allowances for any occasions on which a lack of time prevented the grievant from completing his duties by directing him to simply provide notification to the teachers or other employees whose work areas were to be affected. There is no evidence that the grievant availed himself of this provision. Simply stated, the Board's evidence clearly establishes that the grievant was incompetent despite that on occasion he may have been required to perform more tasks than his shift allowed.

County boards of education must comply with West Virginia Department of Education Policy 5300 before disciplining an employee for incompetence. Wilt v. Flanigan, 294 S.E.2d 155 (W.Va. 1982).

The grievant does not allege and the record does not support that the Board did not fully comply with this directive. Indeed, it appears that by placing the grievant on three improvement plans, the Board was overly cautious and exceeded the requirements of the policy. A county board of education is not required by the policy to provide an employee with unending opportunities for improvement. Putnam v. Braxton County Bd. of Educ., Docket No. 04-88-022-4 (May 13, 1988).

In addition to the foregoing, the following findings and conclusions are made.

FINDINGS OF FACT

1) The grievant was employed by the Board as a Custodian III assigned to Mount View High School (MVHS) for approximately seven years.

2) During school year 1989-90 newly-appointed MVHS Principal Judith Kowalski began receiving complaints from teachers regarding the cleanliness of their work areas. She and MVHS Assistant Principal made numerous inspections of the grievant's assigned areas. In June 1990, both rated the grievant as meeting expectations but noted that they did so with reservations.

3) The complaints continued in school year 1990-91 and the grievant was rated that year as not meeting standards. He was placed on an improvement plan for the 1991-92 school year which called for him to correct his deficiencies.

4) In May 1992 Ms. Kowalski again rated the grievant as having not met standards and placed him on another improvement plan for the 1992-93 school year.

5) By February 1993, Ms. Kowalski had determined that the grievant had shown minimal if any progress on the improvement plan and she asked Board Director of Maintenance Alvin Belcher to appoint an improvement team to conduct further assessments and assist the grievant.

6) In March 1993, Mr. Belcher and improvement team members Bruce Childers and Ed Egleson presented the grievant a third improvement plan which called for him to correct the deficiencies noted in thirty days or face termination. The team made numerous inspections of the grievant's work area over the next two monthsand held several conferences with the grievant during that time. 7) In a May 10, 1993 evaluation, the team members concluded that the grievant had failed to meet the expectations in the improvement plan and

recommended discharge.

8) After affording the grievant a hearing, the Board voted on June 7, 1993, to accept the recommendation of Superintendent of Schools J. Kenneth Roberts that the grievant's employment be terminated.

CONCLUSIONS OF LAW

1. Upon a school employee's appeal of a board of education's decision to dismiss pursuant to W.Va. Code §18A-2-8, the board must substantiate the charges against said employee by a preponderance of the evidence. Landy v. Raleigh County Board of Education, Docket No. 89-41-232 (December 14, 1989); Kirk v. Mingo County Board of Education, Docket No. 89-29-99 (September 12, 1989); Garcia v. Marshall County Board of Education, Docket No. 25-87-274-3 (December 29, 1987). The Board has met that burden in the present case.

2. When grounds for a school employee's dismissal include charges relating to incompetency or conduct which is deemed correctable, the Board must also establish that it complied with the provisions of West Virginia Board of Education Policy 5300 requiring it to inform said employee of his deficiencies and afford him a reasonable period of time to improve. Mason County Board of Education v. State Superintendent of Schools, 274 S.E.2d 435 (W.Va. 1987).

3. The Board has established by a preponderance of the evidence that grievant was fully apprised of his deficiencies and was given a reasonable period of time to improve yet failed to achieve the goals outlined in three improvement plans given him over the course of two years.

Accordingly, the grievance is DENIED.

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

_____

JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: July 29, 1994

Footnote: 1*Several scheduled hearings were continued for cause. The prolonged illness of one of the Board's key witnesses necessitated a delay of several months.*

Footnote: 2*Throughout the period in issue, the grievant was ranked as meeting standards in the area of "Productively Maintains and Upgrades Skills." Apparently, this ranking was merely a recognition that the grievant, as did other custodians, periodically received training in various janitorial tasks.*

Footnote: 3*The transcript of this proceeding and attached exhibits is part of the record herein.*

Footnote: 4*The Board presented the transcript of the Board hearing and attached exhibits as its case-in-chief. At that hearing, Ms.Kowalski, and Mr. Childers testified extensively.*

Footnote: 5*Mr. Ruben testified extensively about his treatment of the grievant for the past several years for psychological problems he was experiencing as a result of his service during the Vietnam War. Upon the undersigned's inquiry at the end of the hearing regarding the relevance of this evidence, grievant's counsel represented that he had mistakenly concluded during his earlier discussions with Mr. Ruben that the problems for which he had treated the grievant had caused or contributed to the problems for which he was discharged. He represented that Mr. Ruben's testimony did not establish that this was so and that the testimony was minimally relevant at best. Since the undersigned's review of the testimony confirmed counsel's assertions, it was deemed irrelevant to the inquiry.*

Footnote: 6*The grievant's Level IV filing contains allegations to the effect that the process by which he was terminated were flawed. His post-hearing brief makes no mention of any irregularities in the method by which his discharge was effected and any such arguments are considered abandoned. Nevertheless, the undersigned, after a careful review of the record, finds that the grievant was provided substantive and procedural due process. As hereinafter noted, it is also concluded that the Board complied fully with West Virginia Department of Education Policy 5300.*