RONNIE PERKINS

v. Docket No. 94-13-019

GREENBRIER COUNTY BOARD OF EDUCATION

DECISION

The grievant, Ronnie Perkins, was employed by the Greenbrier County Board of Education (Board) as a custodian at Crichton Junior High and Elementary School (CJHS) until his dismissal for incompetence on January 14, 1994. He filed an appeal of that action directly to Level IV on January 21, 1994, and a hearing was held February 25 and March 29, 1994. The parties declined to submit written legal argument. (See footnote 1)

At the time of his dismissal the grievant had worked as a custodian for the Board for approximately twenty years, most if not all of which was served at CJHS under Principal James Zopp. His evaluations from 1976 to 1984 generally reflect average to "effective and satisfactory" rankings. In 1985, Mr. Zopp began rating the grievant as unsatisfactory in several performance areas. In a November 25, 1991 evaluation, Mr. Zopp rated him as unsatisfactory in ten of nineteen categories. This evaluation listed numerous deficiencies ranging from a failure to clean designated areas to poor personal appearance. The grievant's September 1992 to December 1992 evaluation once again ranked him as "effective and satisfactory."

By early September 1993, after receiving numerous reports from teachers and other support staff about the lack of cleanliness in the grievant's assigned areas, Mr. Zopp determined that the grievant's performance was again declining. He so advised him in a September 17, 1993 memo. On September 29, 1993, the grievant did not report to work and did not call the school to explain his absence. On September 30 a relative called CJHS head custodian Novella Johnson to report that the grievant had been hospitalized that morning with pneumonia. The grievant returned to work October 18, 1993 and, in Mr. Zopp's absence, submitted a doctor's statement to CJHS secretary Jean Drennan.

On October 19, 1993, Mr. Zopp presented the grievant a written reprimand for his failure to report

for work or call in on September 29. Mr. Zopp also presented him a performance evaluation in which he was ranked as unsatisfactory in all categories except punctuality. Attached to the evaluation was a detailed improvement plan which called for the grievant to make significant improvements in his performance within thirty working days or face dismissal. The plan listed at least twenty routine tasks the grievant was to perform each day to Mr. Zopp's satisfaction. It also called forhim to report for work in clean clothes and refrain from spending excessive time in the school's furnace room. The grievant signed the plan acknowledging that he understood its contents but noted that he disagreed with Mr. Zopp's assessment of his performance.

Mr. Zopp enlisted Ms. Johnson, CJHS head cook Dreama Bragg, and teachers Elizabeth Hunter and Ann Fowler (See footnote 2) to assist him in conducting daily inspections of the grievant's assigned work areas. Between October 19, 1993 and November 29, 1993 the group completed numerous observations of the areas. Their written daily reports reflect that, while the grievant demonstrated occasional improvement, he was essentially performing at the same level as before.

During the improvement period, Mr. Zopp made numerous recordings of the grievant's assigned areas with the school's video camera. Principal Zopp did not advise the grievant as to the purpose of the recording but the grievant did observe him filming on several occasions.

Mr. Zopp completed a December 7, 1993 evaluation of the grievant which found him unsatisfactory in all areas except punctuality and "works well with school staff." In a December 7 letter to Superintendent of Schools Stephen Baldwin, Mr. Zopp recommended that the grievant's employment be terminated. By letter dated December 8, 1993, Mr. Baldwin advised the grievant that he was suspended without pay and that on December 22, 1993, hewould recommend to the Board that he be terminated. The grievant was advised of his right to be present at that meeting and submit evidence in his behalf.

The Board afforded the grievant a hearing on Mr. Baldwin's recommendation on December 22 and subsequently voted unanimously to discharge him. The grievant was advised of this action via a January 31, 1994 letter from Mr. Baldwin.

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 the Level IV hearing, the Board presented the testimony of Mr. Zopp, Ms. Fowler, and Ms. Bragg. (See

footnote 3) The Board also presented extensive documentation and the aforementioned videocassette made by Mr. Zopp. The grievant presented his testimony and that of former CJHS head cook Hazel Williams, his sister Rosetta Hizer, his brother-in-law George Hizer, former CJHS custodian Rodney Amick, CJHS teacher Nancy Osborne and Frank Osborne, the grievant's replacement at CJHS.

The grievant maintains that the improvement period was too short and he was thereby denied his right under West Virginia Board of Education Policy 5300 to a reasonable opportunity to improve. He also asserts that, notwithstanding the time established for the improvement period, it was arbitrary and capricious not to makesome allowance for his illness. Finally, the grievant asserts that it was burdensome if not impossible to complete the amount of work imposed upon him during an eight hour shift and that the deficiencies in his performance were directly attributable to that workload.

The Board asserts that the evidence presented is sufficient to show that the grievant was incompetent in the performance of his duties over an extended period of time and that those duties were not excessive. The Board also responds that, given the grievant's considerable experience accrued in his position, the improvement period afforded him ample time to achieve the goals outlined in the improvement plan. For the reasons hereinafter discussed, the undersigned concludes that the Board must prevail.

It is not necessary to recount here the considerable evidence presented or to analyze it in any detail. The grievant rebutted little if any of the Board's evidence. That evidence clearly and convincingly establishes that the grievant, beginning at the start of the 1993-94 school year, failed to carry out his assigned duties and continued to do so throughout most of the improvement period. The Board's proof further establishes that the grievant's deficiencies were not ones of omission or inattention to detail but were so substantial as to impair the operations of the school. Given the repeated warnings from Mr. Zopp and the explicit directions contained in the improvement plan, the grievant's conduct from October 18, 1993 until his dismissal could readily be characterized as willful neglect.

The record will not support that the grievant's deficiencies were the result of excessive work and insufficient time. Indeed, his replacement at CJHS Frank Osborne, a witness called by the grievant, testified quite credibly that there was ample time in an eight hour shift to complete the assigned duties. It is telling that the grievant testified that at no time prior to his dismissal did he ever complain to Mr. Zopp that time constraints were impeding his ability to perform his job. It is concluded that this

defense was contrived.

It is also concluded that the grievant's improvement period was sufficient time to correct his deficiencies. Policy 5300 does not specify the length of improvement periods but merely provides that the employee must be given a reasonable time to improve. See Wren v. McDowell County Bd. of Educ., 327 S.E.2d 464 (W.Va. 1985). Whether or not a given period is reasonable is dependent on a number of factors, including the complexity and breadth of the goals set forth in the improvement plan. Kelly v. Jackson County Bd. of Educ., Docket No. 18-87-179-3 (March 23, 1988). Here, the goals were neither extensive in their scope nor complicated in nature. The plan simply called for the grievant to carry out the duties which he had performed, usually successfully, for nearly twenty years. Thirty working days was ample time for him to demonstrate a willingness to work.

Finally, there is no evidence of record that the grievant was not physically able to complete his duties upon his return from sick leave except his testimony that he felt dizzy at times. Sincethe assertion that the grievant was impaired and, therefore, should have been afforded some accommodation arose only after the dismissal was effected, it is concluded that this defense was also contrived. Further, even if it were determined that the grievant was suffering from the after effects of his illness during the improvement period, such impairment would not be sufficient to excuse the almost total lack of attention to his duties during that period. Given that the grievant's doctor had released him to return to work with no restrictions and he made no complaints of ill-health to his superiors, it was entirely reasonable for the Board to assume that he was physically able to complete the goals of the improvement plan.

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 assigned to Crichton Junior High School (CJHS) for approximately twenty years. Prior to the 1993-94 school year, his performance was rated adequate or satisfactory.

2) Shortly after the beginning of the 1993-94 school year CJHS Principal James Zopp received complaints about the cleanliness of the grievant's work area and conducted inspections of that area. He determined that the grievant was not performing his duties and advised him that he must improve.

3) Mr. Zopp concluded in mid-October 1993 that the grievant was continuing to neglect his

duties and rated him on an evaluationas not meeting expectations. He also place the grievant on an improvement plan with a duration of thirty working days. The grievant was advised several times that a failure to meet the goals set forth in the plan could result in his dismissal.

4) On December 7, 1993, Mr. Zopp completed an evaluation of the grievant's performance during the improvement period which rated him as unsatisfactory in nearly all areas.

5) After affording the grievant a hearing, the Board voted unanimously to accept Superintendent of Schools Stephen Baldwin's recommendation that the grievant be discharged.

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 Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

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 Bd. of Educ. 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 the grievant was fully apprised of his deficienciesand was given a reasonable period of time to improve yet failed to achieve the goals outlined in his improvement plan. Thus, the Board has substantiated the charge of incompetence.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Greenbrier 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: August 12, 1994

Footnote: 1The parties' legal positions were made clear at the Level IV hearing in counsels' opening remarks.

Footnote: 2It appears that the grievant's assigned area included only two classrooms, those used by Ms. Hunter and Ms. Fowler.

Footnote: 3The Board presented the transcript of the December 22, 1993 pretermination hearing and attached exhibits as its case-in-chief.