CYNTHIA JACKSON,

Grievant,

v. **Docket No. 99-15-081**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Cynthia Jackson (Grievant) grieves the termination of her contract as a substitute teacher for the Hancock County Board of Education (HCBOE). The record does not reflect what proceedings occurred at level one. Grievant appealed to level two on January 28, 1999, and a level two hearing was held on February 2, 1999. A level two decision, denying the grievance, was issued on February 19, 1999. Grievant filed a default claim at level four on February 22, 1999. Following a hearing on the default matter, the undersigned found that a default had not occurred at level two. See Jackson v. Hancock Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). The parties agreed that this matter could proceed to a level four hearing on the merits, which was conducted in this Grievance Board's office in Wheeling, West Virginia, on May 28, 1999. Grievant appeared pro se, and Respondent was represented by counsel, William Fahey. This matter became mature for consideration on June 8, 1999, upon receipt of the parties' post-hearing submissions.

The following findings of fact are made from a preponderance of the credible testimonial and documentary evidence of record.

Findings of Fact

1. Grievant was employed under contract with HCBOE as a substituteclassroom teacher for the 1997-1998 and 1998-1999 school years.

2. At the end of the 1997-1998 school year, Grievant was placed on an improvement plan. Among the areas needing improvement were classroom climate, including discipline and

maintenance of order in the classroom, along with the use of instructional management systems and specific improvements in professional work habits. Grievant was given until October 9, 1998, to make the cited improvements.

3. In order to give Grievant sufficient opportunities to improve, Assistant Superintendent Mary Ann Bucci directed that Grievant be called frequently to substitute during the fall of the 1998-1999 school year.

4. Grievant was placed in a long-term substitute assignment at New Cumberland Elementary School in a first grade classroom on September 16, 1998.

5. Michael Swartzmiller, Principal of New Cumberland Elementary, observed Grievant's classroom during her assignment and became concerned about her lack of classroom control, the resulting chaotic conditions, and the potentially unsafe environment for the children.

6. Mr. Swartzmiller met with Grievant on three occasions during the first week of her assignment to discuss the problems in her classroom and to discuss methods to improve classroom control. Grievant refused to discuss her improvement plan with Mr. Swartzmiller.

7. When conditions in Grievant's classroom did not improve, Mr. Swartzmiller requested on September 25, 1998, that Grievant be removed from the long-term substitute assignment. This request was granted by Superintendent Charles Chandler. 8. Mr. Swartzmiller prepared an evaluation dated September 25, 1998, documenting numerous areas of Grievant's unsatisfactory performance, mostly in the areas of classroom management, classroom discipline and instructional skills.

9. Grievant received substitute teaching assignments at New Manchester Elementary School on four occasions during October and November of 1998.

10. David Stevens, Principal of New Manchester, observed Grievant's classroom during her substitute assignments there, and noted that students were not paying attention and that no discipline was being used by Grievant.

11. Mr. Stevens prepared an evaluation of Grievant's performance, noting deficiencies in classroom management and discipline. He met with her on October 22, 1998, to discuss the evaluation, the problematic conditions in her classroom, and her “detached” rapport with staff and students. Grievant was not cooperative during this meeting, and believed that the comment regarding her “detachment” was discriminatory. (See footnote 1)

12. On November 23, 1998, Dr. Chandler and Ms. Bucci met with Grievant to discuss the complaints about her performance, her lack of improvement pursuant to the written improvement plan, and to inform her that the termination of her contract would be recommended.

13. On December 12, 1998, Grievant received the following letter from Dr. Chandler dated December 10, 1998:

> The purpose of this letter is to inform you of the actions we will take as a result of our meeting on Monday, November 23, 1998. At that time, I explained my November 18, 1998, letter (See footnote 2) regarding your right to request a hearing with the Board of Education. To date, we have received no request. I am, therefore, making a recommendation to the Board that your name be removed from the substitute list at the Monday, December 14, 1998, meeting.

14. Grievant did not attend the December 14, 1998, board meeting.

15. On December 17, 1998, Grievant received the following letter from Dr. Chandler, dated December 15, 1998:

> Please be advised the Hancock County Board of Education, at its meeting on Monday, December 14, 1998, approved the administrative release of your name from the substitute teacher list, effective Tuesday, December 15, 1998.

16. Grievant initiated this grievance in writing on January 28, 1999.

17. There were 14 working days between December 17, 1998, and January 28, 1999.

Discussion

The instant case is somewhat difficult to analyze, due in part to HCBOE's stance that, because Grievant did not request or attend a hearing with the board regarding her termination, she was a former employee at the time of the filing of this claim and, therefore, without grievance rights. Respondent has asserted that this grievance is untimely, which must be addressed first.

The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v.Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). W. Va. Code § 18-29-4(a) provides, in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Furthermore, the statute provides that, within ten days of receipt of a response from the supervisor following the informal conference, a grievant may file a written grievance.

HCBOE contends that January 28, 1999, was well beyond the statutory requirement that a grievance be initiated within fifteen days of the board's action. However, W. Va. Code § 18-29-2(b) specifically states that only working days are counted in determining the timelines for filing a grievance, and holidays, weekends and school closings for weather- related conditions are not included. See W. Va. Code § 18A-5-2. Grievant has provided the following breakdown of actual working days between the date she was notified of the board's action and the filing of this grievance.

> December 17, 1998--Grievant received certified letter, notifying her of the board's action

> School was held on Friday, December 18; Monday, December 21; and Tuesday, December 22

School was closed for the holidays from December 23 through January 3

> Week of January 4 through January 8--only one day of school was held, due to snow days

> Week of January 11 through January 15--only two days of school were held, due to snow days

> School was held on January 19, 20, 21, 22, 25, 26, 27, and 28

Accordingly, when Grievant filed her grievance on January 28, 1999, she initiated it on the 14th working day after her receipt of notification of the board's decision. Respondent did not dispute

Grievant's representations regarding school closings during the relevant time period. Therefore, Grievant has complied with the provisions of W. Va. Code § 18-29-4, and this grievance was timely filed.

As noted above, Respondent's arguments in this grievance were somewhat limited. Although HCBOE contends that Grievant's contract was properly terminated for her failure to successfully comply with a written improvement plan, it has asserted no legal arguments in support of its decision. The provisions of W. Va. Code § 18A-2-12 address improvement plans for professional school employees, in pertinent part, as follows:

> Any professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If the evaluation shows that the professional is still not performing satisfactorily, the evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of section eight [§ 18A-2-8] of this article.

Although HCBOE has not addressed under what statutory provisions Grievant's contract was terminated, there appears to be no dispute that Grievant was dismissed forfailure to improve under the terms of her written improvement plan. Accordingly, as set forth in W. Va. Code § 18A-2-12, her dismissal would be governed by the provisions of W. Va. Code § 18A-2-8, which provides, in pertinent part:

> [A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. (See footnote 3)

In Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), the West Virginia Supreme Court of Appeals held that board of education employees with continuing contract status are entitled to due process protections when they are terminated and defined the extent of the due process to be afforded to such employees. However, Grievant was a non-tenured substitute teacher who did not have continuing contract status under W. Va. Code § 18A-2-2. (See footnote 4) Therefore, she had no

property interest in her employment, and, accordingly, no due process protections. See Scragg v. W. Va. Bd. of Directors, Docket No. 93-BOD-436 (Dec. 30, 1994).

Nevertheless, because Grievant was an employee whose contract was terminated prior to its expiration at the end of the school year, Respondent was obligated to follow theprovisions of W. Va. Code § 18A-2-8. Grievant contends that HCBOE failed in this regard, because she never received written notification of the reasons for her dismissal, which would appear to run afoul of the portion of the statute requiring that "the charges shall be stated in writing." However, the undersigned finds Grievant's testimony that she had no idea why Dr. Chandler recommended her dismissal to be incredible. After having been placed on an improvement plan, Grievant undisputedly received Principal Stevens' October 22, 1998, evaluation of her and met with him regarding the problems with her performance. Although it is not so clear whether or not Grievant received the prior evaluation from Principal Swartzmiller at New Cumberland Elementary, (See footnote 5) she did meet with Mr. Swartzmiller to discuss the problems with control in her classroom. After having been removed from New Manchester at Mr. Stevens' request, Grievant then attended a meeting with Superintendent Chandler and Assistant Superintendent Bucci, at which time the negative evaluations and complaints against Grievant were discussed with her. Therefore, it is simply not believable that Grievant did not know why Dr. Chandler was recommending her dismissal. Grievant received written notice of the problems with her performance through an improvement plan and written evaluations and was informed that her termination would be recommended due to her failure to improve in the problem areas. The undersigned finds that Respondent has substantially complied with the requirements of W. Va. Code § 18A-2-8. See Jones v. Preston County Bd. of Educ., Docket No. 99-39-017 (March 16, 1999). Moreover, Grievant undisputedly received notice of the Board hearing two days inadvance, and she has provided no explanation as to why she failed to appear and contest the charges against her.

Respondent has erroneously concluded that the burden of proof in this case was upon Grievant. The causes for dismissal stated in W. Va. Code § 18A-2-8 are disciplinary in nature, and the burden is upon the employer to establish the charges against the grievant by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); 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., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

A school employee's failure to improve her performance after having been placed on an improvement plan can form the basis for a charge of unsatisfactory performance, pursuant to W. Va. Code § 18A-2-8. “In terms of unsatisfactory performance, a county board of education is prohibited from 'discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable.' Syl. Pt. 3, Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979); See also Holland v. Bd. of Educ. of Raleigh County, 327 S.E.2d 155 (W. Va. 1985).” Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996). Further, as set forth above, W. Va. Code § 18A-2-12 states that, once having been placed on an improvement plan, if the employeeis still not performing satisfactorily by the next evaluation, dismissal can be recommended.

HCBOE has proven by a preponderance of the evidence that Grievant was appropriately dismissed for unsatisfactory performance. Grievant's problems with classroom control and discipline were brought to her attention through a written improvement plan, performance evaluations, and numerous conferences with principals and the administration. Grievant has introduced no evidence to contest these charges, only stating that she completed all her work assignments and teacher plans during her substitute assignments. However, she has not contested Respondent's claims that her classrooms were “chaotic,” that students were not paying attention, and that discipline was not used when necessary. Grievant was properly dismissed for unsatisfactory performance after her failure to improve the problem areas specified in her written improvement plan, pursuant to W. Va. Code §§ 18A-2-8 and 18A-2-12.

The following conclusions of law support the decision reached.

Conclusions of Law

1. A grievance must be filed within fifteen days of the occurrence of the event upon which it is based. W. Va. Code § 18-29-4(a)(1).

2. Holidays, weekends and school closings for weather-related conditions are not counted in determining the timelines for filing a grievance. W. Va. Code § 18-29-2(b).

3. Respondent failed to prove that this grievance was untimely filed.

4. In disciplinary cases, the burden is upon the employer to establish the charges against the grievant by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v.Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

5. When an employee subject to a written improvement plan fails to improve his or her performance, dismissal pursuant to the provisions of W. Va. Code § 18A-2-8 may be recommended. W. Va. Code § 18A-2-12.

6. Grievant was a non-tenured professional employee with no property interest in her employment, and, accordingly, no due process protections. See Scragg v. W. Va. Bd. of Directors, Docket No. 93-BOD-436 (Dec. 30, 1994).

7. "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board." W. Va. Code § 18A-2-8.

8. Grievant received notice of the charges forming the basis for her dismissal, as required by W. Va. Code § 18A-2-8, through a written improvement plan, performance evaluations, and conferences with her superiors.

9. Respondent proved by a preponderance of the evidence that Grievant''s dismissal for unsatisfactory performance was justified and complied with the provisions of W. Va. Code §§ 18A-2-8 and 18A-2-12.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal

petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 28, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant stated several times that she believed this comment was directed toward her marital status (she is divorced). However, she never explained why she held this belief.

Footnote: 2

The November 18, 1998, letter was not introduced into evidence, and its contents are unknown to the undersigned.

Footnote: 3

Failure to comply with a written improvement plan normally constitutes unsatisfactory performance.

Footnote: 4

Pursuant to W. Va. Code §18A-4-15, non-tenured substitute service personnel who have worked more than thirty days obtain continuing contract rights, along with due process protection. However, this does not apply to Grievant, a non-tenured professional employee.

Footnote: 5

The September 25, 1998, evaluation form was not signed by Grievant.