PATRICIA WINES,

Grievant,

v. **Docket No. 00-19-394**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Patricia Wines ("Grievant") filed this grievance directly at level four on December 14, 2000, challenging the termination of her employment as a substitute custodian by Respondent Jefferson County Board of Education ("JCBOE"). She seeks reinstatement, back pay and benefits, interest, and removal of all reference to the termination from her file. A level four hearing was held in the Grievance Board's office in Westover, West Virginia, on May 15, 2001. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Howard E. Seufer, Jr. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 26, 2001. (See footnote 1)

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

Findings of Fact

1. Grievant began employment with JCBOE as a substitute custodian on August 19, 1999.

2. Custodians, including Grievant, receive one day of training, during which themethods for cleaning various areas of school buildings are demonstrated.

3. Grievant was appointed to serve in a long-term substitute position at Jefferson High School ("JHS"), effective November 3, 1999.

4. Dr. Richard Keeler, Principal of JHS, prepared a daily schedule for Grievant, listing exactly which areas of the school she was to clean at particular times and the specific cleaning to be done in each area. This list was reviewed with Grievant and signed by her on December 8, 1999.

5. Dr. Keeler met with Grievant several times between December 8, 1999, and January 19, 2000, to discuss her work performance.

6. On January 19, 2000, Grievant was placed on an improvement plan by Dr. Keeler, due to her failure to complete her work assignments and for not following her assigned work schedule. The improvement plan was implemented pursuant to an evaluation dated January 21, 2000. Grievant had demonstrated a resistance to instructions from her supervisors, and she had neglected various cleaning duties assigned to her. Grievant's improvement period was to run through June 30, 2000. She refused to sign the improvement plan.

7. During a meeting to discuss her improvement plan on February 2, 2000, Grievant reacted negatively and told the principal “You're not worth my time.” Dr. Keeler recommended to the superintendent that Grievant be dismissed for this incident.

8. As a result of Grievant's conduct on February 2, the Board suspended her without pay for ten days, from April 13 through May 1, 2000, for insubordination. The Board rejected the superintendent's recommendation of dismissal. 9. Effective May 2, 2000, Grievant was placed in a long-term substitute position at Shepherdstown Elementary School (“SES”).

10. Grievant's improvement plan was still in effect when she was reassigned to SES, continuing through June 30, 2000. This was explained to Grievant by Principal Suzanne Offutt.

11. Ms. Offutt gave Grievant a written work schedule, listing which areas of the school were to be cleaned at particular times each day, along with instructions as to what cleaning was to be done in each area.

12. Between May 25, 2000, and July 5, 2000, three complaints were received from other employees about Grievant's performance. These included not cleaning a kindergarten student's refuse in a bathroom, classrooms which were not cleaned properly (and which Grievant refused to re-do, refusing the assistance of another custodian), and garbage which had not been emptied.

13. On May 30, 2000, Ms. Offutt met with Grievant to discuss several deficiencies she had personally observed, including a hallway that had not been cleaned, a classroom that had not been swept, an office which had not been cleaned for several days, Grievant's not cleaning the edges of any of the classrooms, a window left open, and air conditioning units left on.

14. In early June, 2000, Mr. Lemon, the regular custodian who had been assigned to the school for some time, gave Grievant detailed instructions for cleaning the classrooms during the

summer. These duties included moving most (moveable) furniture, then scrubbing and waxing all the floor areas. On the written instructions, Mr. Lemonhighlighted the following statements: “Move everything out of room. Move book shelves away from wall, scrub and rinse floor and clean wall and back of bookshelves. Move shelves back.” When Grievant cleaned the rooms, she cleaned and waxed around most of the furniture, and did not clean or wax the edges of most of the rooms. This was discussed with Grievant by Ms. Offutt, and Grievant responded that she had not understood the instructions, believing she was not to move certain furniture.

15. On June 21, 2000, Grievant left the school building unsecured. One teacher, who did not have a key or knowledge of the security codes, was still in the building when Grievant finished her shift, so Grievant left the building unlocked. This incident was discussed with Grievant by Ms. Offutt. The following day, Ms. Offutt pointed out to Grievant that she had left two large areas of cleanser on floors in the building, which Grievant said she had not noticed. Grievant also left the scrub buckets full of water with the mops in them overnight, which was pointed out to Grievant.

16. Grievant was injured while mowing grass at SES on July 3, and was off work on worker's compensation as of that date.

17. Ms. Offutt prepared a performance evaluation of Grievant, dated July 27, 2000, noting deficiencies in 11 out of 13 evaluation areas. She noted that Grievant had not met the requirements of her job, nor had she successfully completed her improvement plan. Ms. Offutt also prepared a letter to the superintendent, dated July 14, 2000, describing in detail the various deficiencies in Grievant's performance, and concluding that she did not believe Grievant would be able to succeed as an employee at SES. She provided a copy of this letter to Grievant, along with the evaluation. 18. In a letter to Grievant dated October 27, 2000, Gerry Sokol, Assistant Superintendent, advised Grievant that he would be recommending to the superintendent that her employment be terminated. He noted her numerous deficiencies throughout the year, along with her unfavorable evaluations. He did not advise Grievant of her right to a hearing before the Board.

19. At the Board's meeting on November 8, 2000, Grievant's name was removed from the substitute custodian list as part of the “consent agenda.” The consent agenda consists of personnel matters which do not need to be discussed, and they are voted upon as one item. At the time the Board voted on Grievant's termination, they did not know that she was being removed for disciplinary reasons, and there was no discussion of Grievant's situation at all.

20. After being informed that Grievant requested a hearing before the Board regarding her termination, Grievant was advised on November 28, 2000, that a hearing had been scheduled for December 7, 2000.

21. At the Board's hearing on December 7, 2000, Grievant was represented by counsel, witnesses were examined and cross examined, and Grievant was provided the opportunity to respond to all the allegations against her.

22. At the conclusion of the December 7 hearing, the Board voted to terminate Grievant's employment. Grievant was advised of this in a letter dated December 11, 2000.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges 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). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The authority of a county board of education to dismiss an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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). W. Va. Code § 18A-2-8 provides, in pertinent part:

> Notwithstanding any other provisions of law, 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 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.

Before addressing the merits of Grievant's dismissal, it is necessary to address Grievant's allegation that she was denied due process with regard to notice of her termination. W. Va. Code § 18A-2-8 provides, in part, that, when an employee is suspended or dismissed for the causes listed in the statute:

> The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request . . . a level four hearing [before the Grievance Board].

As noted by the West Virginia Supreme Court of Appeals in Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), the current statute is “silent as to whether an employee has a right to receive notice and have a hearing prior to dismissal.” 192 W. Va. 573. After finding that board of education employees with continuing contract status (See footnote 2) are entitled to due process protections when they are terminated, the Court defined the extent of the due process to be afforded to such employees:

> [W]e hold under W. Va. Code § 18A-2-8, due process requires a pre- termination hearing of a tenured employee . . . . . It is not necessary for a pre-termination hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to a written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to terminate the employee.

192 W. Va. at 575. Under this ruling and the provisions of W. Va. Code § 18A-2-8, Grievant was entitled to written notice of the charges, an explanation of the Board's evidence, and an opportunity to respond.

"However, an allegation that an employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of the evidence." Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999). In addition, a grievant must show the procedural error, more likely than not,influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be considered as "harmless error." Bradley, supra; Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999). In the instant case, it is obvious that, with regard to the Board's vote to terminate Grievant on November 8, 2000, she did not receive the notice and opportunity to respond to which she was

entitled. However, it is also quite obvious that, even if Grievant had been given proper notice and had appeared at the November meeting with her counsel, the same result would have been reached, which is exactly what occurred one month later.

Moreover, because Grievant did ultimately receive a full hearing before the Board, it would not be possible to grant her any appropriate relief as a result of the Board's error in terminating her on November 8. The administration and Principal Offutt had already agreed that Grievant should not be returned to her substitute position at SES, and it is clear that the Board would not have called her to substitute at any other schools during the intervening period between Board meetings, based upon her unsatisfactory evaluation and failure to satisfactorily complete her plan of improvement. In fact, as of the date of the November meeting, Grievant was still off work due to her injury, so she could not have possibly substituted during that time. In addition, there is no evidence that the Board had any knowledge of Grievant's situation when they voted at the November hearing, so, contrary to Grievant's allegations, she has not proven that the Board “prejudged” her case before hearing it in December. Accordingly, Grievant has failed to demonstrate that herrights have been prejudiced by the Board's premature vote at the November meeting. (See footnote 3)

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, W. Va. Code § 18A-2-12 states that, once having been placed on an improvement plan, if the employee is still not performing satisfactorily by the next evaluation, dismissal can be recommended.

Grievant has raised several defenses in her behalf. She contends that she had no idea that her performance was unsatisfactory, because Ms. Offutt constantly complimented her on how well she was doing. Indeed, Ms. Offutt admitted that she always attempted to give Grievant constructive criticism in a positive manner, but all the while pointing out to Grievant that her performance was deficient. Grievant also claims that Mr. Lemon gave her conflicting instructions, first telling her to

move furniture, then telling her not to do so. Mr. Lemon denied these allegations, stating that Grievant was uncooperative and resistantto his help. Grievant also testified that she received no training on how to wax floors, which should allegedly excuse her poor work.

Regardless of how positive Ms. Offutt's attitude toward Grievant was, it is simply not believable that Grievant thought she was performing her job well. Complaints were made about her work by other employees and Ms. Offutt, all of which were discussed with her. During these discussions, regardless of how positive the format, Grievant was obviously being told that her work was not conforming to requirements and that she must improve her performance. Moreover, Grievant knew she was still working under the terms of her improvement plan, yet still engaged in what was clearly sloppy work. Also, even if Mr. Lemon did give Grievant conflicting instructions, according to her own testimony, Mr. Lemon only stated that she should not move computers. This does not explain why Grievant did not move tables, cabinets and other furniture which clearly did not hold computers, along with failing to clean up spilled cleanser and other obvious “dirt,” and leaving windows open, air conditioners on, and doors unlocked.

Respondent has proven by a preponderance of the evidence that Grievant's performance was unsatisfactory, that she was given the opportunity to improve her performance after a proper evaluation was rendered, and that her dismissal comported with the requirements of W. Va. Code § 18A-4-8. Consistent with these findings, the following conclusions of law are appropriate.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. LewisCounty 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).

2. The authority of a county board of education to dismiss an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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).

3. A school employee who is dismissed pursuant to the provisions of W. Va. Code § 18A-2-8 is

entitled to written notice of the charges, an explanation of the Board's evidence, and an opportunity to respond. Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994).

4. “An allegation that an employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of the evidence." Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999). In addition, a grievant must show the procedural error, more likely than not, influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be considered as "harmless error." Bradley, supra; Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999).

5. Although Respondent failed to provide Grievant with proper notice andhearing prior to her termination on November 8, 2000, this has been proven to be harmless error, because Grievant received a full hearing and opportunity to respond to the charges against her on December 7, 2000.

6. “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).

7. Once having been placed on an improvement plan, if the employee is still not performing satisfactorily by the next evaluation, dismissal can be recommended. W. Va. Code § 18A-2-12.

8. Respondent has proven the charges by a preponderance of the evidence that Grievant's performance was unsatisfactory, that she was placed on a plan of improvement, and that her dismissal was accomplished pursuant to the requirements of W. Va. Code § 18A-2-8.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Jefferson 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: July 9, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Consistent with Grievance Board practice, this grievance challenging the termination of employment has been given expedited status.

Footnote: 2

Pursuant to the provisions of W. Va. Code § 18A-4-15, a substitute who has served in a leave of absence position for more than thirty days is given regular employee status.

Footnote: 3

The instant case is distinguishable from situations where an employee received no notice of the termination and never received a board hearing, which would entitle the employee to reinstatement. See Martin v. Grant County Bd. of Educ., Docket No. 99-12- 384 (Dec. 23, 1999); Pennington v. Mingo County Bd. of Educ., Docket No. 92-29-061 (June 16, 1992).