THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

STEVE STRICKLAND,

Grievant,

v.

Docket No.
07-20-378

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Steve Strickland, Grievant, is employed by the Kanawha County Board of Education ("KCBOE") as a Custodian III. He filed this grievance on May 22, 2007. His Statement of Grievance reads:

> Grievant is employed as a Custodian III. Grievant contends that is [sic] evaluation dated May 21, 2007 was inaccurate and unfair. (Among others [sic] things, Grievant was criticized for duties that were the responsibilities of another custodian at the school and for failure to maintain areas for which very little if anything was provided on his schedule.) Grievant asserts a violation of West Virginia Code § 18A-2-12a.
>
> Grievant seeks removal of the evaluation from his file and an examination for the custodial schedules at Clendenin Elementary School to address problems which were improperly determined to be the fault of Grievant.

This grievance was denied at level one and level two. Grievant chose to bypass level three. Grievant appealed to level four on August 7, 2007, and a level four hearing was held on February 4, 2008. Grievant appeared by John Everett Roush, Esq., WVSSPA. Respondent appeared by James W. Withrow, Esq. This grievance became mature for decision March 4, 2008, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed as a Custodian III at Clendenin Elementary School. This elementary school is rated as one of the county's dirtiest schools pursuant to a standardized rating scale. Grievant received his annual performance evaluation from his principal on May 21, 2007. The evaluation noted several areas that needed improvement, or Grievant would be placed on a plan of improvement. Grievant disagreed with these comments, and was particularly concerned about scheduling issues. Respondent established that there was sufficient time allocated in Grievant's schedule to permit him to fulfill his responsibilities. Grievant had been properly notified of the problem areas to address, and was given more then sufficient time to correct them. Grievant failed to meet his burden of proof that the evaluation was flawed, inaccurate or otherwise violated any statute, rule, regulation or policy or that it was arbitrary, capricious or an abuse of discretion.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a full day Custodian III at Clendenin Elementary School. He is one of two custodians assigned to the school. The other is a full day Custodian I.

2. Grievant received his annual performance evaluation from his principal, Karen Scherr, dated May 21, 2007. The evaluation ranked his performance as “satisfactory” overall, with three areas marked “commendable,” and eighteen marked “satisfactory.” This evaluation criticized Grievant for lack of planning and initiative; failure to keep areas of the school clean; failure to keep the outside of the building clean. Itshould be noted that this elementary school is consistently rated as one of the county's dirtiest schools pursuant to a standardized rating scale.

3. Several areas were noted by Mrs. Scherr as needing improvement by August 25, 2007, or Grievant would be placed on an improvement plan. The areas of deficiency included trash pickup outside the building, cleaning of stairwells, bathrooms, cafeterias, buffing services, and sanitizing bathrooms.

4. Grievant felt this evaluation was unfair because he did not have sufficient time to pick up trash outside the building. He also felt that the other custodian should be responsible for buffing the hallways.

5. The Custodial Supervisor rates each school on a scale of 1 to 5, with 1 being the cleanest,

and 5 being the dirtiest. A rating of 2.0 or better is considered an acceptable level of cleanliness for a school. Clendenin was rated as a 2.15 on January 25, 2007, by the Custodial Supervisor.

6. While this is a passing score, the Custodial Supervisor had several discussions with Grievant over areas that had not been cleaned for long periods of time. The Supervisor also received complaints from maintenance workers about Grievant taking time away from their duties. In addition, sufficient time was allocated in Grievant's schedule to permit him to fulfill his responsibilities.

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). *See W. Va. Code §* 18-29-6. (See footnote 1) "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden. *Id*.

"Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ*., Docket No. 94-10- 427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ*., Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682(1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

An evaluation is properly conducted if it is performed in an "open and honest" manner, and is fair, and professional. W. Va. Code § 18A-2-12. (See footnote 2) *See Brown*, *supra*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a Grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of

inappropriate motive or conduct on the part of the evaluator. *Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988). The immediate supervisor is responsible for the employee's evaluation, and he or she must share the evaluation with the employee. The employee has a right to attach a written addendum to the evaluation. *Jones v. Braxton County Bd. of Educ.*, Docket No. 97-04-311 (Apr. 28, 1998).

Grievant claims the evaluation he received on May 21, 2007, was unfair and illogical. Grievant asserts that a rigid schedule somehow renders individual planning useless, and strips an employee of initiative. Grievant also claims that criticism of him for areas assigned to other custodians is wrong. Finally, Grievant views it as unreasonable to criticize him for the appearance of the outside of the school building. Grievant argueshe has an inadequate amount of time to perform the duties and responsibilities he has for the school's grounds. None of these assertions demonstrate any factual or legal basis for the removal of the evaluation material from his personnel file. Grievant has not met his burden of proof in this grievance.

It is clear that Grievant is upset that he was placed on a rigid daily schedule for the 2006-2007 school year. (See footnote 3) Grievant's Exhibit One, Level Two. In fact, Grievant suggests in his proposals that he could better exercise initiative if his daily schedule were simplified or “loosened up a bit.” By proper planning and prioritization of assignments on a daily basis, Grievant argues he could do a better job of keeping his entire area in better shape. Grievant's position begs the question of how the evaluation was arbitrary, or was incorrect in attempting to serve as a basis for improvement of the performance of his assigned duties. The daily schedule was an attempt to put in place a mechanism to encourage initiative, and ensure proper planning and prioritization of assignments. Prior to the imposition of the schedule, the record reveals that daily work was not being accomplished by Grievant.

The evidence established that Clendenin Elementary School has been rated as one of the county's dirtiest schools. The Custodial Supervisor has had several discussions with Grievant about numerous areas that had not been cleaned for long periods of time. The Custodial Supervisor received complaints from maintenance workers that Grievant took time away from his responsibilities to converse with them, and observe their work. Theevidence established there was sufficient time allocated in Grievant's schedule to permit him to fulfill his responsibilities.

Grievant did not establish that his evaluation was incorrect or conducted in an arbitrary or unfair

manner. The comments made by his Supervisor, Mrs. Sherr, regarding Grievant's need to improve in certain areas were appropriate. As is required, Mrs. Sherr shared the evaluation with Grievant. The evaluation appropriately suggests an improvement in judgement concerning areas that need more attention, and planning ahead for all tasks to be completed.

The evidence demonstrated Grievant was minimally satisfactory in certain areas of his responsibilities. (See footnote 4) It is true that Grievant does not agree with Mrs. Sherr's assessment, however, the undersigned cannot intrude on the evaluation unless he proves the evaluation was "such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded." *Kinder*, *supra*. Such showing has not been made in this grievance. The undersigned is not in a position to factually determine the best cleaning assignment schedule at Clendenin Elementary School. This is an issue to be decided by the Custodial Supervisor, and Mrs. Scherr.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). *See W. Va. Code §* 18-29-6.

2. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a preponderance of the evidence." *Baker v. Fayette County Bd. of Educ*., Docket No. 94-10- 427 (Jan. 24, 1995).

3. "This Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ*., Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

4. Grievant has failed to demonstrate a factual or legal basis in support of his request that the evaluation materials in question be removed from his personnel file. The daily schedule was an attempt to put in place a mechanism to encourage initiative, and ensure proper planning and prioritization of assignments.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 1*, *supra*). Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: March 28, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

W. Va. Code § 18A-2-12(3) states that the purpose of an evaluation is to "serve as a basis for the improvement of the performance of the personnel in their assigned duties."

Footnote: 3

This schedule sets out specific assigned work duties in 10, 15, and 30 minute increments.

Footnote: 4

Grievant's overall evaluation score was satisfactory.