**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**MICHAEL DALTON,**
**Grievant,**

**v.** **Docket No. 2010-1607-MonED**

**MONONGALIA COUNTY BOARD OF EDUCATION,**
**Respondent.**

# DECISION

Michael Dalton, Grievant, filed this grievance directly to level three on June 18, 2010, following the termination of his employment with the Monongalia County Board of Education. A level three hearing was held before the undersigned Administrative Law Judge in Westover, West Virginia, on September 1, 2010. Grievant was represented by counsel, John Roush of the West Virginia School Service Personnel Association, and Respondent was represented by counsel, Jennifer S. Caradine. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 6, 2010.

## Synopsis

Beginning in 2006, Grievant was employed by Respondent as a regular employee and was subjected to numerous observations, evaluations, and meetings in an effort to improve his ability, and willingness, to clean his assigned school. Grievant was placed on an improvement plan at the end 2007-2008 school year after receiving an unsatisfactory evaluation. Upon the successful completion of this improvement plan Grievant demonstrated that his conduct was initially correctable. However, after being given more

than ample opportunity, Grievant did not display a willingness to perform his duties to an acceptable level. Respondent met its burden of proof in establishing a willful of neglect of duty on the part of Grievant. This grievance is denied.

The following findings of fact are made based upon a preponderance of the evidence of the record.

**Findings of Fact**

1. Grievant was hired by Respondent as a regular custodian during the 2006-2007 school year at University High School.

2. Grievant's evaluation for the conclusion of the 2007-2008 school year was performed by Assistant Principal Kim Greene on June 13, 2008. Grievant was given unsatisfactory ratings in several categories, including; observation of work hours, regular attendance, compliance with policies and procedures, accepts change, appearance of work area, quality of work, and ability to follow instructions correctly.

3. Grievant was placed on a plan of improvement contemporaneously with the evaluation.

4. Grievant was suspended on July 28, 2008, for three days for failure to utilize the proper procedure for calling off work.

5. Grievant successfully met the goals of his improvement plan and received a satisfactory evaluation from Ms. Greene for the 2008-2009 school year. She noted that Grievant's "job performance and attendance have really improved. His rooms look good. He has taken initiative and pride in his work. He is making sure floors are buffed and restrooms are clean."

6. In the 2009-2010 school year, Grievant received a memo in January 2010 concerning leaving work early. In addition, Grievant was counseled concerning keeping the mats for the wrestling team clean.

7. In April of 2010, Grievant received an unsatisfactory observation from the school administration. The observation indicated criticism of the cleanliness of his areas of responsibility. He was also advised that he had been observed on five dates during the month spending inordinate amounts of time in a classroom at the school rather than attending to his duties, that he had done his laundry at the school during his shift, and that he had left early on April 24, 2010.

8. Grievant indicated that he had brought a book to work to read during his lunch period and breaks, and that he had gotten engrossed in the book and that he had lost track of time.

9. Grievant acknowledged that, while he had washed his clothes at home, he actually only dried the clothes at the school. Grievant admitted to leaving work early, but indicated that he had circled the school in his car to make certain that the school was secure.

10. By letter dated April 28, 2010, Superintendent Frank Devono requested that Grievant meet with him to discuss potential disciplinary action. This meeting took place on May 6, 2010. At the conclusion of the meeting, Dr. Devono informed Grievant that he intended to recommend that Respondent terminate his employment.

11. Grievant requested a hearing before Respondent on the proposed recommendation that he be terminated. On June 1, 2010, Respondent conducted a

hearing on Grievant's proposed termination. Following the hearing, Respondent approved Dr. Devono's recommendation that Grievant be terminated.

**Discussion**

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Pursuant to West Virginia Code, school personnel may be suspended or dismissed 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 nolo contendere to a felony charge. W. VA. CODE § 18A-2-8; *Kanawha County Bd. of Educ. v. Sloan*, 219 W. Va. 213, 632 S.E.2d 899 (2006).

The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in W. VA. CODE § 18A-2-8 and must be

exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

Grievant makes two arguments. First, he contends termination for unsatisfactory performance may not occur unless the employee has received an evaluation on his performance and an opportunity to improve. The bad evaluation received by Grievant at the end of the 2007-2008 school year and the subsequent plan of improvement does not meet this requirement. Second, concerning leaving work early, doing his laundry on work time, and reading a book on work time, he believes Respondent failed to prove willful neglect of duty. Further, Grievant believes to find a willful neglect of duty relieves Respondent of the obligation of giving Grievant notice of his deficiencies and an opportunity to improve. Neither of Grievant's arguments are supported by the evidence.

Grievant aptly points out that it is not the label that is applied to conduct that determines whether evaluation and opportunity to improve prior to termination are required. The key question is whether or not Grievant's conduct is correctable. If it is correctable, then it matters not whether it is termed willful neglect of duty, unsatisfactory performance or any one of the other statutory grounds for termination. Prior to termination for correctable conduct an employee must be given notice of deficiencies through evaluation and opportunity to improve.[1] Respondent counters that to suggest that a board of education be required to place an employee, who has proven himself perfectly capable of

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[1]W. VA. CODE § 18A-2-12a(b)(6).

doing his work, on a plan of improvement that says, "do your work and don't waste time," is ridiculous.

Grievant goes on to argue that labeling his conduct as willful neglect of duty does not discharge Respondent from the requirement of providing Grievant with notice of deficiencies and opportunity to improve. Under the facts of this grievance, that is exactly what took place. Grievant was provided specific notice of his work deficiencies and an opportunity to improve. Grievant's conduct was initially correctable and, indeed, was corrected. Subsequently, after repeated attempts to provide Grievant with guidance and specific instructions, he continued to inadequately clean the school.

To adopt Grievant's reasoning in this case would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement. Respondent has done what was legally necessary in order to provide Grievant the assistance and tools he needed to accomplish his job. Nevertheless, Grievant's improvements in specific areas after completion of the improvement plan did not demonstrate a performance deficiency, but an intentional act on the part of Grievant to neglect his duties.

Grievant admittedly wasted substantial amounts of time for which he was paid by Respondent. The suggestion by Grievant that he should have been placed on another improvement plan rather than dismissed is not supported by the facts of this grievance. The termination of Grievant was not based upon unsatisfactory performance, but rather willful neglect of duty.[2] The undisputed facts of this case demonstrate that Grievant was

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[2]To prove a willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v.*

perfectly capable of doing his work and doing it very well. Grievant chose, though, to read a book or do his laundry instead of doing his work, and to rush through his duties or simply not do them at all. As to the "surprise, you're fired" scenario, this argument neglects to note that, while Grievant would improve regarding specific tasks which he was directed to do, he continually persisted in not cleaning well, and he worked well only with constant supervision.

In summary, Respondent proved by a preponderance of the evidence that Grievant had satisfactorily completed an improvement plan to address areas of deficiency in providing custodial services; Grievant knew how to clean his assigned areas; Grievant's failure to perform his duties resulted from a willful neglect of duty, not incompetency. The undersigned concludes that Respondent did not abuse its substantial discretion in disciplinary matters when it determined that Grievant's pattern of conduct outlined above warranted termination. The undersigned cannot find that Respondent's action was arbitrary and capricious.

The following conclusions of law support the decision reached.

**Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees

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*Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95029-151 (Aug. 24, 1995).

Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in W. VA. CODE § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

3. School personnel may be suspended or dismissed 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 nolo contendere to a felony charge. W. VA. CODE § 18A-2-8; *Kanawha County Bd. of Educ. v. Sloan*, 219 W. Va. 213, 632 S.E.2d 899 (2006).

4. Respondent has proven by a preponderance of the evidence that Grievant's conduct constituted a willful neglect of duty.

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. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**Date: November 23, 2010**

**Ronald L. Reece**
**Administrative Law Judge**