THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

WILLIAM LOTH,
Grievant ,

v. **DOCKET NO. 2009-1675-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, William Loth, on June 16, 2009, against his employer, the Hancock County Board of Education. The statement of grievance reads as follows:

> Grievant was evaluated as failing to meet expectations in several areas on his evaluation for the 2008-2009 school year. Grievant contends that his performance in these areas was acceptable and that the evaluator was unduly influenced by incidents in prior years. Grievant alleges a violation of W. Va. code 18A-2-12a.

As relief Grievant seeks, "removal of the June 5, 2009 evaluation from his file or in the alternative redaction of the evaluator's comments and the two check marks in the 'ineffective' column from the evaluation."

A hearing was held at level one on July 6, 2009, and the grievance was denied at that level on August 12, 2009. Grievant appealed to level two on August 25, 2009. A mediation session was held on December 16, 2009. Grievant appealed to level three on January 6, 2010, and a level three hearing was held before the undersigned Administrative Law Judge, in the Grievance Board's Westover office on July 7, 2010. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel

Association, and Respondent was represented by William T. Fahey, Esquire. This matter became mature for decision on August 13, 2010, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant received a rating of ineffective in two areas on his annual evaluation, relationships with other employees and with students. Grievant had a poor relationship with some teachers at the beginning of the school year, which led to a change in his work hours in order to try to limit his contact with these teachers. This alleviated the problem, but it was not inappropriate for this problem to be noted on the annual evaluation in order to make Grievant aware that he should work on this issue. The rating on relationships with students related to an incident that did not occur during the rating period, and it was unfair to consider this incident when it did not occur during the rating period.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Hancock County Board of Education ("HBOE") as a Custodian at Oak Glen Middle School for 14 years. His work hours are 5:00 p.m. to 1:00 a.m.

2. Grievant's supervisor is David Smith, Assistant Principal at Oak Glen Middle School. He has been Grievant's supervisor for three years, and he is responsible for evaluating Grievant's performance.

3. Grievant is assigned to clean the upper or second story level at Oak Glen Middle School, which consists of classrooms, bathrooms, and hallways.

4. Mr. Smith evaluated Grievant's work performance for the 2008-2009 school year, and met with Grievant on June 5, 2009, to discuss the evaluation. The evaluation form states the observation dates for the evaluation as "2008-2009."

5. The June evaluation rated Grievant as "ineffective" in the areas "employee relationships with co-workers," with a notation "teachers mostly," and "employee relationships with students," with a notation reading "not tolerating kids." Grievant received a rating of "effective" in all other areas in which his performance was rated. He did not receive a rating of "outstanding," the only other possible rating, in any area. Mr. Smith wrote under "evaluator's comments," "Mr. Loth has trouble working directly with a couple of teachers and does not want students in his area while cleaning. He does solid work but must work better with co-workers."

5. Mr. Smith's evaluation of Grievant's relationship with teachers was made based upon three incidents. First, at the beginning of the 2008-2009 school year, and in prior years, Grievant was involved in arguments with several teachers on the upper level at Oak Glen Middle School, and his relationship with these teachers was not good. Grievant's work hours were changed at the beginning of the school year from 4:00 p.m. to 12:00 p.m., to his current schedule in an effort to alleviate these problems. This change in work hours solved the problems for the most part, as Grievant's interaction with teachers was minimized; however, some teachers were still uneasy around Grievant. Then, near the end of the 2008-2009 school year, Mrs. Morris and Mrs. Cashdollar, teachers with rooms on the upper level at the school, brought two bags of garbage to Mr. Smith, and told

him the garbage bags had been left on their desks. Grievant was the only person in the area who could have placed the bags of garbage on the desks. Mr. Smith wrote a note asking Grievant why the garbage bags had been left on the teachers' desks in Grievant's assigned area, attached the note to the bags, and left the garbage bags in Grievant's custodial closet for him to dispose of properly. Grievant replied in a letter to Mr. Smith, telling him he had been in a hurry, and he could have accidentally left the garbage bags on the desks. Grievant had not previously had a problem with these two teachers.

6. Grievant had been off work for two days, and when he returned he was trying to get caught up on his work. Grievant did not believe it was likely he would have left garbage bags on a desk, but admitted it was possible. Grievant did not intentionally leave the garbage bags on the desk, and does not put garbage bags on the desks as part of his normal routine.

7. The third incident occurred after Mrs. Green, a teacher, asked that Grievant place more toilet paper in the upper level teachers' bathroom. After this request, 108 rolls of toilet paper appeared in the bathroom. Mr. Smith viewed this as an excessive response by Grievant to this request, as it was significantly more toilet paper than was needed, as evidenced by the fact that it was lined along the walls. However, Grievant's access to the toilet paper supply was limited to 13 rolls at a time, making it impossible for him to have been the culprit.

8. Grievant's rating of ineffective in relationships with students was based upon an incident which occurred during the 2007-2008 school year.

Discussion

"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).

Initially, Respondent argued that Grievant had not presented a grievable issue because Grievant's evaluation had not resulted in disciplinary action, nor had it been used against him in any way. Respondent's argument is without merit. Employee performance evaluations do just that; they evaluate whether the employee's performance is satisfactory. An employee whose work is not satisfactory, and whose work continues to be unsatisfactory, may be placed on an Improvement Plan, and if his performance does not improve, he may be dismissed for unsatisfactory performance. In fact, the evaluation form in this case specifically states that, "[t]he evaluation will become part of the employee's personal file and will be considered in cases on continued employment in the present position." The Grievance Board has allowed employees to grieve their evaluations for over 20 years, and the undersigned has heard nothing to convince her that this longstanding practice is incorrect.

"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.[1] *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).

Grievant argued his evaluation had to be based upon his performance during the 2008-2009 school year, and it was improper for Mr. Smith to consider incidents which occurred in previous years, which was the case with the rating in relationships with students. Mr. Smith explained that his rating of Grievant in this category was based upon Grievant's negative response to students returning to the upper level to retrieve their book bags after an after school dance. However, while Mr. Smith testified at level three that he thought this had occurred during the evaluation period, he testified at level one that he believed this had occurred during the previous school year. Clearly Mr. Smith had no idea when completing the evaluation when this incident occurred, and made no effort to assure

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[1]W. VA. CODE § 18A-2-12(3) states that one of the purposes of an evaluation is to "serve as a basis for the improvement of the performance of the personnel in their assigned duties."

that the evaluation was based upon observations during the rating period. While it seems reasonable for Mr. Smith to take into consideration Grievant's relationships over the years when evaluating instances which occurred during the year in question, it is unreasonable and unfair to rate Grievant in any area based solely upon incidents which occurred in a previous year, as is the case with the rating given Grievant in relationships with students. The evaluation clearly states that the observation dates are the "2008-2009" school year. Grievant demonstrated that he had limited contact with students during that school year, and that there was no basis for a negative rating in this area.[2]

Grievant did not demonstrate that the rating assigned for relationships with teachers was unreasonable or unfair. Grievant's relationship with teachers was so poor at the beginning of the school year that his work hours were adjusted to alleviate the problem, as Grievant apparently was either unwilling or unable to adjust his behavior in order to better get along with the teachers. It was not inappropriate for Mr. Smith to note this problem on Grievant's annual evaluation, so that Grievant was made aware that it was something he needed to work on.[3] However, the garbage bag incident clearly was not an intentional act on Grievant's part, and had nothing to do with Grievant's working relationships with teachers; rather, it reflected on his ability to focus on his job. Finally, Grievant was able to

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[2] Although Grievant speculated that the negative rating in this category could have been generated by his reporting that Mr. Smith's niece was wandering the hallways unsupervised after hours, Mr. Smith denied this.

[3] Grievant testified he received an evaluation in November or December of the 2008-2009 school year which did not note any deficiencies. While it is troubling that this problem with the teachers at the beginning of the year was not noted on the mid-year evaluation, that evaluation was not made a part of the record, and the parties did not explain the format of that evaluation. It is possible that this mid-year evaluation is not as detailed as the annual evaluation.

demonstrate that he was not responsible for leaving an excessive amount of toilet paper in the teachers' bathroom, and should not be faulted for this. Nonetheless, the undersigned cannot conclude that Grievant demonstrated his relationships with teachers were effective.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. "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).

2. "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).

3. 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 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).

4. Grievant demonstrated that his evaluation was not properly conducted inasmuch as it rated Grievant based upon an incident which did not occur during the rating period.

5. Grievant did not demonstrate that his relationships with teachers were effective, or that the rating of ineffective in this area was unreasonable or unfair.

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. Respondent is **ORDERED** to place into Grievant's personal file documentation that the rating in the area of relationships with students was improper and has been ordered changed to effective, and that his relationship with students will be considered by Respondent to have been effective for the evaluation period.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: January 7, 2011