THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

NORMAN HALL,
Grievant,

v. **Docket No. 2011-1341-GraED**

GRANT COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Norman Hall, filed this grievance directly to level three on March 24, 2011, alleging that "on or about March 3, 2011, Grievant, a school psychologist, was terminated from his employment. Grievant was not evaluated, nor offered any plan of improvement in accordance to the provisions in the state's own policy 5310. Grievant asserts that his termination is in violation of law, policies, and/or procedures, and is retaliatory, unjust, discriminatory, and/or arbitrary and capricious." Grievant seeks to be "reinstated into his position with applicable compensation retroactive to his termination date; to be made whole; and any other relief that the grievance examiner deems appropriate."

A level three hearing was conducted before the undersigned Administrative Law Judge on January 11, 2012, and May 4, 2012, at the Grievance Board's Elkins, West Virginia office location. Grievant appeared in person and by his counsel, Jeffrey G. Blaydes, Carbone & Blaydes, P.L.L.C. Respondent appeared by its counsel, Gregory W. Bailey, Bowles Rice McDavid Graff & Love, LLP. This matter became mature for

consideration upon the receipt of the last of the parties' proposed findings of fact and conclusions of law on June 11, 2012.

Synopsis

Respondent contends that Grievant was terminated from employment for willful neglect of duty and insubordination. In addition, Grievant's conduct was not correctable. Grievant asserts that the allegations supporting the termination more closely resemble a charge of unsatisfactory performance. Grievant argues that, based upon the rapid sequence of events leading to the termination of his employment, his dismissal was contrary to the provisions of W. VA. CODE § 18A-2-12 because he was not given an opportunity to improve his performance under an improvement plan.

Grievant was terminated for what amounted to a charge of unsatisfactory performance even though Respondent sought to characterize the charges as insubordination and willful neglect of duty. In addition, the record established that Grievant's conduct was correctable, and he was making efforts to improve his work performance. The record also established that Grievant was not provided an improvement plan which might have led to correcting his behavior. Based upon this sequence of events, Grievant's dismissal was contrary to the provisions of W. VA. CODE § 18A-2-12 because Grievant was not given a meaningful opportunity to improve his performance under an improvement plan. The Respondent exercised its authority to dismiss Grievant in an unreasonable fashion, and was arbitrary and capricious. This grievance is granted.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant was employed by Respondent as its school psychologist. Prior to the spring of 2010, Grievant was off work as a result of depression, attention deficit disorder, and anxiety.

2. In the spring of 2010, Grievant returned to work with the Respondent and was assigned the responsibility of preparing psycho- educational evaluation reports to determine whether students were eligible for services pursuant to the Individuals with Disabilities Education Act.[1]

3. At the beginning of the school year, Deborah Ann Mohr, Director of Student Services and Grievant's supervisor, prepared a list of evaluation reports that Grievant was expected to perform. The initial list contained 29 evaluation reports. Ms. Mohr met with Grievant on a weekly basis, and during the meetings they discussed his progress for completing these evaluations.

4. Ms. Mohr provided Grievant with a desk calendar to assist him in tracking the due dates for the evaluations he was assigned to perform.

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[1]Grievant was cleared to return to work by letter dated August 24, 2009, from Dr. Kevin T. Larkin. This letter noted that "Mr. Hall is perfectly capable of carrying out his job responsibilities as a school psychologist . . . [A]lthough Mr. Hall is currently asymptomatic regarding anxiety and depression, he continues to exhibit a long standing problem with ADD. Granted, it is currently well controlled, but it will need to be monitored regularly. Being aware of his condition, the Grant County Schools will need to work with Mr. Hall to assure a lengthy, productive relationship between school psychologist and school system. In this regard, it is recommended that Mr. Hall be granted the standard supports for maintaining his professional practice as a school psychologist, including . . . using a laptop computer as needed, having access to a functional dictation/transcription system for completing reports in a timely fashion, and being given some degree of flexibility in scheduling work activities to accommodate travel to and from various schools for conducting evaluations and participating in team meetings." Grievant's Exhibit No. 2, level three, day 2.

5. On April 30, 2010, Grievant was assigned his first evaluation to perform on a student at Maysville Elementary School. The eligibility committee meeting, at which the parents, teachers and others would be present to consider this report, was to be held on May 27, 2010.

6. On the morning of May 27, 2010, Ms. Mohr asked Grievant about the completion of the report. Grievant stated it was not ready, and that he was having difficulty printing it. Ms. Mohr instructed Grievant to put the document on a thumb drive and bring it to her office. Ms. Mohr completed the report, with Grievant dictating the unfinished portions of the evaluation.

7. In an e-mail communication to Grievant dated September 23, 2010, Ms. Mohr provided a written follow-up to a meeting she had held with Grievant concerning her expectations of him. Grievant was instructed to complete the psycho-educational reports and provide the original to her no less than five school days prior to the eligibility committee meeting. Grievant was to provide her with the original protocol booklets that were used to document and score the tests at the same time. Grievant and Ms. Mohr were also to continue the weekly progress meetings.

8. The evaluation reports were due five days in advance of meetings in order to make them available for review by meeting participants.

9. The next deadline Grievant was to meet occurred on the morning of October 5, 2010, concerning the completion of two written reports and the accompanying protocols. Grievant had had since August 2010 to complete the reports. Grievant turned in one report at 6:00 p.m. on October 6, 2010, and the second on October 8, 2010, at 5:30 p.m.

10. The report turned in on October 6, 2010, was of poor quality. The report referred to a child with communication disorders when the student had a previously identified learning disability. This error was corrected before it was finalized and presented in the meeting.

11. Grievant's next deadline to complete a report following this meeting was November 4, 2010. On November 4, 2010, Grievant indicated to Ms. Mohr that he would bring the report to her at lunchtime. He did not complete the report until a day after the due date. A second report, due on November 5, was not completed until a day later.

12. During the fall of the school year, Grievant was working with the Division of Rehabilitation Services ("DRS") in obtaining a laptop with a software transcription system. The software recommended for Grievant was Dragon Natural Speak. This software would allow Grievant to speak into a microphone and the software would transcribe his words. This is known as a learning software and there would be a period of time during which the software would become accustomed to the users voice and accent.

13. The final package from the Division of Rehabilitation Services arrived to Respondent on October 5, 2010, and was installed at that time. Grievant received a PDA, a screen magnifier to assist with his visual deficits, dictionary software, as well as the Dragon Natural Speak and laptop. Grievant also received a digital recorder for dictation that plugged into a printer also provided by DRS.

14. The first date upon which Grievant was actually able to work with the Dragon Natural Speak software was on October 5, 2010. Grievant received his first training on the software at that time. Once Grievant familiarized himself with the basic functions of the assistive technology, he was to contact DRS for more advanced training. The training that

Grievant would have received would have demonstrated shortcuts within the software that would have allowed him to more efficiently complete his work.

15. DRS indicated that the assistive technology would help Grievant meet deadlines; that conclusion was based upon both the input of Grievant and the assistive technology workers. DRS ultimately believed that the technology package would help Grievant do his job in a timely manner.

16. On October 18, 2010, Grievant received a letter memorializing a meeting he had with Superintendent Lundeen-Bolton and Ms. Mohr on October 15, 2010. She referred to the September 23, 2010, letter from Ms. Mohr and indicated that Grievant was to have the completed psychological evaluation and protocols to Ms. Mohr five days prior to a scheduled meeting date. She indicated that she refused to work with Grievant's labor organization with regard to work-related matters. She closed by indicating that Grievant must provide notice of reasons for any absences and stated:

> I assume the award of temporary custody of your children did not occur this morning. If you anticipated that child care responsibilities would require you to be absent today, you should have provided timely notice of your intention to take personal leave.
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> Administrative Exhibit No. 1, level one hearing.

17. On November 2 and 3, 2010, Ms. Mohr and Grievant exchanged e-mails, Ms. Mohr indicated that the two would be meeting on November 4, 2010. Grievant responded:

> I should have that report coming due for you tomorrow but at most may need an extension till Friday if I have your blessing. The reason is I want to double and triple check the scoring because it was the WIAT III (The new instrument) and I wanna make sure everything is done right. As I become more use to the instrument now that I have had some training this will be less of a factor on upcoming evals. It is a good instrument.

18. On November 4, 2010, Grievant and Ms. Mohr met and, thereafter, Grievant continued to ask for a one day extension to finish a report due on November 10, 2010. Grievant later informed Ms. Mohr that he would provide the report the following day and that it would still be approximately five calendar days before the scheduled meeting. Grievant further indicated that he believed that the one day extension was reasonable. Grievant included in his e-mail communication the following:

> Should this not be acceptable I will Notify the Office of Civil rights US Attorney and file a formal complaint. I will also pursue an internal Grievance with my AFT Representative John Estep who I copied on the email for which I would like to follow up with any how on that 4 page letter I received prior for it contains factually inaccurate information.
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> It is my belief that I am experiencing reprisal, being targeted for retaliation and possible harassment. I want it to stop.
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> Administration Exhibit No. 4, level one hearing.

19. Two days later Grievant's employment was terminated. By letter dated November 8, 2010, Superintendent Lundeen-Bolton informed Grievant of the following:

> I understand that you requested an extension of the deadline for the submission of the report in question on the day prior to the due date and that your request was refused. In an e-mail communication, dated November 4, 2010, you threatened to notify the Office of Civil Rights and to initiate a grievance should your request for an extension of the deadline be refused.
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> I have concluded that your failure to meet your job responsibilities and your attempt to intimidate your supervisor in order to obtain an extension of a psychological report due date, in the face of my recent warnings provided to you, compels a conclusion that you are not willing to comport your conduct to reasonable expectations that have been communicated to you.
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> Administration Exhibit No. 3, level one hearing.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *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).[2]

Respondent contends that Grievant's conduct amounted to willful neglect of duty and insubordination. In addition, Grievant's conduct was not the sort that is correctable.

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[2]Respondent has moved to dismiss the Grievant's claim asserting that the appeal of the decision to terminate Grievant's employment was untimely. Respondent contends that W. VA. CODE § 18A-2-8 provides a five day time frame to file a request for a level three hearing after receiving written notice of disciplinary action. In the instant case, the recommended decision provided that Grievant had 15 days to request a level three hearing. In any event, W. VA. CODE § 6C-2-4(a)(1) is controlling on the filing requirements in this grievance, which allows up to 15 working days for filing an appeal to level three. Nothing in the record establishes Respondent's contention that the appeal was untimely. Respondent's motion is denied.

Grievant asserts that the allegations supporting the termination more closely resemble a charge of unsatisfactory performance. Grievant argues that, based upon the rapid sequence of events leading to the termination of his employment, his dismissal was contrary to the provisions of W. VA. CODE § 18A-2-12 because he was not given an opportunity to improve his performance under an improvement plan.

W. VA. CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-8 goes on to state, in part, that:

> (a) 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 or a plea of nolo contendere to a felony charge.

Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, 675 S.E.2d 907 (2009).

The West Virginia Supreme Court of Appeals has found reversible error in the event an Administrative Law Judge does not assess whether Grievant's behavior was correctable pursuant to the State Board of Education Policy 5300.[3] *Maxey*, *supra*. In addition, "[f]ailure

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[3]That policy is now referred to as Policy 5310, 126 C.S.R. 142. It is worth noting that the legislature codified the specific improvement plan language from Policy 5300 in

by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5300 . . . prohibits such board 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." *Id.* "A board must follow the West Virginia Board of Education Policy 5300 . . . procedures if the circumstances forming the basis for suspension or discharge are correctable. The factor triggering the application of the evaluation procedure and correction period is correctable conduct. What is correctable conduct does not lend itself to an exact definition but must be understood to mean an offense or conduct which affects professional competency." *Id*. Policy 5300 "envisions that where a teacher exhibits problematic behavior, the improvement plan is the appropriate tool if the conduct can be corrected. Only when these legitimate efforts fail is termination justified." *Id*.

Respondent did not identify in the termination letter which of the statutory causes it believed applied to Grievant's behavior. "It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. VA. CODE § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999)." *Scott v. Wetzel County Bd. of Educ.*, Docket No. 06-52-289 (Jan. 3, 2007). However, the failure to do so results in speculation by the undersigned as to how to apply the law to this situation. The only statutory causes which seem remotely applicable are willful neglect of duty and unsatisfactory performance.

W. VA. CODE § 18A-2-12a(b)(6).

"Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994).

The undersigned agrees with the Grievant that the record supports a finding that the conduct for which he was disciplined was "unsatisfactory performance." There is no mention of either insubordination or willful neglect of duty in the termination letter. Further, there is no fact alleged in any communication to the Grievant that would constitute insubordination or willful neglect of duty. Moreover, the record is clear that Grievant was attempting to complete his assignments pursuant to the deadline directives of Respondent. By the same token, it can be said that Grievant's productivity was slow; however, Grievant contacted DRS to get technical support to allow him to accomplish his duties in light of his disability. Grievant had initiated training with DRS to fully utilize the technical assistance that had been provided to him.

Grievant had only recently obtained the computer and Dragon software to allow him to perform the essential functions of his job. The record established that there are technical difficulties and nuances that accompany the use of this software. Grievant only

had the software for a period of approximately three to four weeks before he was terminated. Grievant was not given sufficient time to work through the learning period and become, arguably, more productive. Grievant's behavior in the instant case is evidence of his effort to better do his job, not to be insubordinate or willfully neglect his duties.

Respondent has not demonstrated that Grievant's conduct was not and is not correctable. Accordingly, Grievant is entitled to an improvement plan. The procedures set forth in Policy 5310 must be followed in every dismissal pursuant to W. VA. CODE § 18A-2-8 on the grounds of unsatisfactory performance, which have been made known to the employee through evaluation and are correctable. The evidence in this case established that Respondent acted arbitrarily and capriciously in terminating Grievant's employment.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *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).

2. When grounds for a school employee's dismissal include charges relating to conduct which is deemed correctable, the county board must establish that it complied with provisions of West Virginia Department of Education Policy 5310 requiring it to inform the employee of his deficiencies and afford him a reasonable period to improve. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); *See also Maxey v. McDowell County Board of Education*, 575 S.E.2d 278, 2002 W.Va. LEXIS 226 (2002).

3. County boards of education have the burden of proof to show that conduct was not and is not correctable. *Maxey*, *supra*.

4. Respondent did not establish that Grievant's conduct was not and is not correctable.

5. Grievant's dismissal was not based upon an observation and evaluation of his performance, and he was not afforded an improvement period to correct any deficiencies in his performance.

Accordingly, this grievance is **GRANTED**, and Respondent is directed to reinstate Grievant to his position as school psychologist, with back pay, seniority, and benefits. Respondent is **ORDERED** to develop a feasible improvement plan consistent with this Decision.

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: September 19, 2012

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Ronald L. Reece
Administrative Law Judge