THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JILL BYERS,
Grievant,

v. **Docket No. 2013-2075-WooED**

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Jill Byers, was employed by Respondent, Wood County Board of Education. On June 10, 2013, Grievant filed this grievance against Respondent alleging she was terminated for correctable conduct, that the termination was not based upon her evaluations, and that she was not given an opportunity to improve prior to termination in violation of W. VA. CODE §§ 18A-2-8 and 18A-2-12(a). For relief, Grievant seeks reinstatement, back pay with interest, and restoration of all lost benefits.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on September 10, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John Everett Roush, West Virginia School Service Personel Association. Respondent was represented by counsel, Richard S. Boothby, Bowles Rice LLP. This matter became mature for decision on October 11, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a school service employee, was terminated for willful neglect of duty for failing to call off work properly. Grievant was previously placed on improvement plans and had been suspended for attendance issues, but had changed positions and had

good evaluations for several years. Grievant was entitled to evaluation and an opportunity to improve. Grievant's previous improvement plans and discipline were not sufficient notice and opportunity to improve as Grievant's position had changed, she had received two years of good evaluations, and the circumstances of her conduct were different. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Secretary III to Athletic Director Lori Lowers at Parkersburg High School. Grievant had been employed by Respondent since 1998, and had held two other secretarial positions prior to serving as the athletic director's secretary.

2. On October 7, 2003, Grievant received a written reprimand for calling off work late.

3. On March 24, 2004, Grievant received a performance evaluation rating her as does not meet performance standards due to her attendance, stating that she had missed all or part of thirty days and had been late to work ten times.

4. On the same date, Grievant was placed on an improvement plan for attendance.

5. On June 9, 2004, Grievant received a second performance evaluation rating her as meeting the performance standard. The evaluation notes that Grievant had improved greatly and met the requirements of the improvement plan.

6. On October 9, 2006, Grievant was placed on a second improvement plan for attendance, for three instances of reporting to work late.

7. On July 1, 2008, Grievant received a performance evaluation for the 2007-2008 school year rating her as not meeting the performance standards. Specifically, the evaluation stated that Grievant had failed to call or show up for work on seventeen occasions and was non-compliant in communicating with her supervisor about her absences.

8. On the same date, Grievant was placed on an improvement plan for attendance.

9. On June 24, 2009, Grievant received a performance evaluation for the 2007-2008 school year rating her as does not meet performance standards for attendance, other work habits, and performance. The evaluation notes that Grievant was "routinely" late to work and had failed to come to work or call off on one occasion.

10. On February 2, 2010, Grievant was suspended for three days for "failure to follow county procedures in calling off your absences" on five days. Grievant was absent without using the automated call off system or contacting her supervisor.

11. Grievant then called off forty-five minutes late, and Principal Board sought Grievant's termination from the superintendent in June 2010. Grievant was not terminated for reasons not appearing in the record.

12. Grievant moved into her current position as the secretary for the athletic director.

13. Principal Board left his position at the end of the 2010 - 2011 school year and was replaced by Principal Pamela Goots.

14. For the 2010 – 2011 school year, Grievant's attendance had improved, so Principal Board took no further action regarding Grievant's attendance during his last year.

15. On June 15, 2011, Grievant received a performance evaluation for the 2010-2011 school year rating her as meeting performance standards. Grievant was evaluated by her immediate supervisor, Athletic Director Lowers. Attendance was included in the "Work Habits" section of the evaluation, and Grievant was rated as meeting performance standards for that section. Of the other two sections, Grievant met performance standards for one section, and exceeded performance standards for the other section. The only comment on the evaluation is that Grievant has "adapted quickly" to her new position.

16. On June 11, 2012, Grievant received a performance evaluation for the 2011-2012 school year rating her as meeting performance standards. Grievant scored the same as the previous year for the three sections of the evaluation. The only comment on the evaluation is that Grievant "does an excellent job!"

17. On September 12, 2012, new principal, Pamela Goots, requested by letter to be allowed to place Grievant on progressive discipline for attendance. Grievant was not provided with a copy of the letter, and no progressive discipline process began. Principal Goots later stated that she actually considered Grievant's behavior a violation of the Code of Conduct[1], because it was a failure to follow policy, which she viewed to not be a performance issue.

[1] Neither the Code of Conduct, nor any policy, was entered into evidence.

18. Athletic Director Lowers allowed Grievant to report her absence by text message, but Grievant was still required to call in her absence to the automated system. However, because Athletic Director Lowers did not always want a substitute to be called if Grievant was going to be absent, Grievant would wait for Athletic Director Lowers to return her text message before calling into the automated system. The automated system requires the employee to select whether or not a substitute is needed.

19. From July 1, 2012 through April 2013, Grievant had thirty full-day absences and twenty-three partial day absences. Grievant had the leave time available to take off for all her absences.

20. Of those occurrences, on three days, Grievant was placed on unpaid leave because she failed to report to work or report her absence to either Athletic Director Lowers or to the automated system. The last of these occurrences was January 18, 2013.

21. On March 14, 2013, Grievant failed to report to work or respond to calls, and the school contacted the police. Grievant was ill, had broken her cell phone, and had no other way of reporting her absence. This was reported in the automated system by Respondent as “Illness” rather than as a leave of absence.

22. On fourteen occasions, the call to the automated system was after the start of Grievant’s shift. Three of the calls were so late so as not to be explained by a delay in Athletic Director Lowers’ response to Grievant’s text, but the others could be explained by texting delay.

23. Each time Grievant failed to call off properly for an absence, Principal Goots sent Grievant a memo.[2]

24. As the secretary to the athletic director, Grievant had significant contact with the public for the sale of tickets and other providing information. Principal Goots received numerous complaints from the public due to Grievant's failure to appear for work timely.

25. On May 6, 2013, Grievant was notified by letter of Respondent's intent to terminate her contract for willful neglect of duty. Grievant, by counsel, requested a hearing before the Board of Education. Grievant believed at that time that she was suspended and did not return to work.

26. On June 6, 2013, the Board of Education held a hearing on Grievant's recommended contract termination.

27. Although for the previous two years Grievant had been evaluated by her immediate supervisor, Athletic Director Lowers, on May 29, 2013, Principal Goots completed Grievant's 2012-2013 performance evaluation, rating her as not meeting performance standards. Ms. Goots did not meet with Grievant regarding the evaluation or provide her with a copy of the evaluation and Grievant did not sign the evaluation.

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. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally

[2] Principal Goots testified to this fact, which Grievant did not dispute the same, but none of the memos were introduced into evidence.

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 employer has not met its burden. *Id.*

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). The causes listed in W. VA. CODE § 18A-2-8 are as follows:

> (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.
>
> (b) 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. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

W. VA. CODE §18A-2-12a states in relevant part:

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel,

> other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion. . .

Grievant was terminated for willful neglect of duty. Grievant asserts that any issue Grievant may have had with attendance was related to performance, so she was entitled to evaluation and an opportunity to improve before termination. Respondent asserts that Grievant's failure to call off work properly was an issue of conduct and not performance, so she was, therefore, not entitled to evaluation and an opportunity to improve.

"[I]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." *Dalton v. Monongalia County Bd. of Educ*., Docket No. 2010-1607-MonED (Nov. 23, 2010). See Syl. pt. 4, *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 165 W. Va. 732, 274 S.E.2d 435 (1980), *Alderman v. Pocahontas County Bd. of Educ*., 223 W. Va. 431, 444 675 S.E.2d 907, 921 (2009). "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." *Mason* 165 W. Va. at 739, 274 S.E.2d at 439. This Board has specifically recognized that attendance is an issue for which an employee is entitled to evaluation and an opportunity to improve. *Carrell v.*

Kanawha County Bd. of Educ., Docket No. 20-87-073-1 (Jan. 30, 1987). However a review of past improvement plans and disciplinary action "can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable." *Bierer v. Jefferson County Bd. of Educ.,* Docket No. 01-19-595 (May 17, 2002).

To determine if Grievant's conduct in correctible, analysis must first turn to what conduct Respondent proved by a preponderance of the evidence. Respondent failed to prove that Grievant's attendance as a whole was a failure, even though Grievant had a large number of absences. Principal Goots testified that Grievant's actions violated policy and procedure, but no policy or procedure was entered into evidence. Without a specific policy, it cannot be said that Grievant's number of absences alone would constitute a disciplinable offence because she had the leave time available to take. Therefore, what is left to assess is Grievant's failure to call off work properly. Again, no policy or procedure was provided as to the specific requirements Principal Goots testified that the policy requires Grievant to call off prior to the start of her shift. However, Grievant had permission to text her supervisor to report her absence. That did not relieve Grievant of her responsibility to also call in to the automated system to report her absence, but the evidence shows that she was sometimes delayed in calling into the system because she was waiting for her supervisor to return her text about whether to request a substitute. Although Grievant was late calling into the system fourteen times, only three of those times were so late it was unlikely to be explained due to delay in her supervisor's response.

More troubling are the three times Grievant failed to call or show up at all, but, again, only very general testimony was offered on this issue. The automated system printout that was offered as evidence only shows when the absence was noted in the system by an administrator, and not actually how late Grievant was to call in. Respondent emphasized an incident on March 14, 2013, in which the police were called when Grievant failed to report to work or report her absence. Ultimately, however, this incident was recorded as an illness in the system rather than a leave of absence.[3] Recording the incident as an illness indicates that, at the time, the absence was excused. In addition, the last leave of absence day entered in the system was in January 2013, and Respondent did not seek termination until May.

Respondent cites *Dalton* as support that Grievant's infractions were not correctable conduct. However, *Dalton* is distinguishable from Grievant's case in several ways. Grievant's attendance issues, to the extent they were proven, are not completely the same as her attendance issues in the past. When Grievant was previously put on an improvement plan and disciplined, she was in another position with another supervisor. Sometime after Grievant's suspension, she moved to a new position with a new supervisor. Most importantly, the way she was allowed to communicate with her new supervisor regarding her absences was completely different. Dalton is also distinguishable in that Dalton "continually persisted" to fail to perform his job duties sufficiently. Grievant's evaluations were good, with her supervisor even stating that Grievant "does an excellent job!"

[3] Principal Goots testified that when Grievant failed to call in or show up to work, that would be recorded as an unpaid leave of absence.

This is not to say that Grievant's failures relating to her attendance are not serious. Grievant's attendance problems unquestionably had a detrimental effect on Parkersburg High School. Her instances of failing to report to work or call in are particularly disturbing. However, the question is whether Respondent erred in terminating her without affording her evaluation and an opportunity to improve. Grievant's conduct was the type that requires she be afforded evaluation and an opportunity to improve. Such conduct, if an employee is provided with notice and an opportunity to improve, can then be deemed uncorrectable if an employee fails to improve, or improves and then repeatedly lapses. Grievant's circumstances and behavior were different enough, coupled with two years of good evaluations, that she was entitled to an additional improvement period. Under the facts of this case, Grievant's attendance problems were correctable conduct, and therefore Respondent was not justified in terminating Grievant without providing her the opportunity to improve.

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. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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 employer has not met its burden. *Id.*

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. A board of education may terminate an employee for wilfull neglect of duty, but a charge of unsatisfactory performance cannot be made except as the result of an employee performance evaluation. W. VA. CODE § 18A-2-8.

4. School personnel are entitled to evaluation and an opportunity to improve prior to termination. W. VA. CODE §18A-2-12a.

5. "[I]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." *Dalton v. Monongalia County Bd. of Educ*., Docket No. 2010-1607-MonED (Nov. 23, 2010). See Syl. pt. 4, *Mason County Bd. of Educ*. *v. State Superintendent of Sch*., 165 W. Va. 732, 274 S.E.2d 435 (1980), *Alderman v. Pocahontas County Bd. of Educ*., 223 W. Va. 431, 444 675 S.E.2d 907, 921 (2009).

6. "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." *Mason* 165 W. Va. at 739, 274 S.E.2d at 439. This Board has specifically recognized that attendance is an issue for which an employee is entitled to evaluation and an opportunity to improve. *Carrell v. Kanawha County Bd. of Educ*., Docket No. 20-87-073-1 (Jan. 30, 1987).

7. A review of past improvement plans and disciplinary action "can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable." *Bierer v. Jefferson County Bd. of Educ.,* Docket No. 01-19-595 (May 17, 2002).

8. Grievant was entitled to evaluation and an opportunity to improve. Grievant's previous improvement plans and discipline were not sufficient as Grievant's position had changed, she had received two years of good evaluations, and the circumstances of her conduct were different.

Accordingly, the grievance is **GRANTED**. Respondent is ORDERED to immediately reinstate Grievant to her prior position with back pay, including statutory interest and benefits.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: October 31, 2013

_____

Billie Thacker Catlett
Administrative Law Judge