GENEVIEVE LEWIS,

Grievant,

v. DOCKET NO. 94-26-175

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Genevieve Lewis, a regularly-employed Custodian assigned to Respondent Mason County Board of Education's Central Elementary School, filed the following grievance at Level IV on May 5, 1994:

> Grievant, a regularly-employed custodian, was dismissed from her employment on the grounds of "unsatisfactory performance". Grievant alleges a violation of West Virginia Code §18A-2-8 and requests reinstatement, retroactive wages, benefits & seniority.

After several continuances, a hearing was held at Level IV on September 19, 1994, at which time the case became mature for decision.

Findings of Fact

1. Grievant was employed as a Custodian under a Continuing Contract with Respondent for approximately 18 years, and was assigned to Central Elementary School for the school years 1992-93 and 1993-94.

2. Grievant's duties included, among other things, opening the school, inspection of the premises, preparing the cafeteria for breakfast and lunch, general cleaning and, during the first year at Central Elementary, closing the school. R Ex. 13.

3. From July 1992 through January 1993, Koneda Devrick, Principal of Central Elementary School, found it necessary to write several reminders to Grievant about various aspects of her job duties and about the no-smoking policy in the school. (See footnote 1) These documents included

reminders about general cleaning, setting up and taking down tables in the gymnasium in a timely manner, locking doors both inside and outside the school building, and excessive absenteeism. R Ex. 14-17. Ms. Devrick warned Grievant that failure to correct the stated problems would result in her being placed on an improvement plan. R Ex. 16.

4. Grievant's performance did not improve and on March 5, 1993, Ms. Devrick wrote a letter to Grievant detailing duties which had been neglected, including locking the doors and cleaning the bathrooms. Ms. Devrick also noted her concerns about Grievant's poor attendance record, and informed her that she would be placed on an improvement plan. R Ex. 18.

5. Respondent, in compliance with W. Va. Code § 18A-2-12 and State Policy 5300, established Policy 810 for staff evaluations. Policy 810 established the process for evaluating performance of professional and service personnel. The Policy directs that each employee will be evaluated by her immediate supervisor based on a minimum of two observations. The employees will be provided copies of the written observation forms and plans of improvement will be developed for those areas which do not meet performance standards. R Ex. 2.

6. A Plan of Improvement was developed which was effective March 11 through April 7, 1993. The plan directed Grievant to lock doors inside and outside the building daily, cease smoking on school grounds, clean assigned restrooms daily, and improve her attendance. Grievant and Ms. Devrick signed the Plan of Improvement. R Ex. 19.

7. A Service Personnel Observation Report was filled out by Ms. Devrick for Grievant on April 1, 1993 which indicated that Grievant continued to fall below the "Meets Standards" level of performance in several areas, including attendance, tardiness, and her general cleaning duties. R Ex. 20.

8. On April 7, 1993, Ms. Devrick reported that Grievant had improved her performance on only two of the five items listed in the Plan: locking the doors inside and outside the building. Grievant's absences were excessive during the Plan period; in fact, she only worked 6-1/2 days during the entire Plan period. R Ex.21. Ms. Devrick recommended that another Plan of Improvement be developed for Grievant at the end of the formal observation period.

9. Grievant was observed again by Ms. Devrick on April 13, 1993, and again problems were noted with general cleaning duties and leaving doors unlocked. R Ex. 22.

10. Grievant received her Service Personnel Evaluation Report on April 28, 1993 and was

given a "Does Not Meet Performance Standards" overall rating by Ms. Devrick. The problems discussed above were noted on the evaluation and Grievant signed the evaluation. Grievant was put on a second Plan of Improvement from April 28 until May 12, 1993. R Ex. 3.

11. Ms. Devrick reported on Grievant's Plan on May 12, 1993 and found that Grievant had "made no effort to improve her work habits." Ms. Devrick noted that Grievant was only present 30% of the time during the Plan period, requiring substitutes to do her work 70% of the time. R Ex. 23. At the beginning of the 1992-1993 school year, Grievant had accumulated 79.25 days of personal leave. During that year she used 50.50 days of leave, resulting in a balance of 20.75 days of personal leave at the end of the 1992-1993 year. R Ex. 11.

12. Ms. Devrick forwarded the above information to Superintendent Michael Whalen on May 27, 1993, and recommended that Grievant's employment be terminated. No action was taken by the Superintendent at that time.

13. At the beginning of the 1993-94 school term, a schedule of duties was developed and agreed upon by Grievant and Ms. Devrick. R Ex. 25.

14. Ms. Devrick and Mr. Gary Mitchell, Maintenance Director of Mason County Schools, walked through Central Elementary on August 31, 1993 to observe the condition of the school in anticipation of the first day of school. The school was in unacceptable condition.

15. On September 1, 1993, Ms. Devrick wrote a letter to Grievant reprimanding her for failing to clean and prepare the school for the first day of classes. R Ex. 26.

16. Ms. Devrick and Mr. Mitchell met with Grievant to discuss the condition of the school and the problems they encountered on the walk through.

17. Ms. Devrick completed an observation report of Grievant on February 8, 1994, giving her an overall rating of "Does Not Meet Performance Standards". Ms. Devrick noted on the form that the last day Grievant had worked a full day was December 10, 1993. R Ex. 27.

18. Grievant was placed on a Plan of Improvement on February 16, 1994, in which she was directed to perform her assigned duties every day and to attend work all day every day. R Ex. 28.

19. Ms. Devrick gave Mr. Mitchell a copy of Grievant's latest observation report and Plan of Improvement on February 16, 1994. R Ex. 29.

20. On March 2, 1994, Ms. Devrick wrote to Grievant reviewing her progress under the Plan of Improvement. Ms. Devrick found Grievant deficient in many areas and extended her another week to

improve her performance. R Ex. 30.

21. Ms. Devrick wrote to Grievant on March 11, 1994 regarding her failure to improve under the Plan of Improvement and informed her that she was recommending her for termination. R Ex. 32. At that time, Grievant had used up all of her 20.75 accumulated personal leave days and had taken an additional 44.75 days off without pay. R Ex. 12. Several times Grievant did not call in sick until it was too late to secure a substitute custodian for work.

22. Ms. Devrick forwarded her report on Grievant's Plan of Improvement to Mr. Mitchell and recommended that Grievant be terminated from employment. R Ex. 31.

23. Mr. Mitchell, based on Ms. Devrick's report and his personal observations, subsequently recommended to Superintendent Whalen that Grievant be terminated. R Ex. 36.

24. Superintendent Whalen issued a formal notice to Grievant on March 18, 1994 that he would recommend her termination to the Board due to unsatisfactory performance and informing her of her right to request a hearing. R Ex. 5. The Board delayed taking action on the matter at Grievant's request until April 26, 1994. R Ex. 6.

25. Ms. Devrick continued to observe and make reports regarding Grievant's performance as she was still under the Plan of Improvement set up on March 2, 1994. R Ex. 33-35.

26. Grievant was given her formal evaluation on April 22, 1994 and received a "Does Not Meet Standards" rating. R Ex. 4.

27. Following a hearing wherein Grievant was represented, the Board of Education voted to terminate Grievant's employment upon recommendation by the Superintendent on April 26, 1994. R Ex. 7.

28. Superintendent Whalen informed Grievant of the Board's action by letter dated April 27, 1994. R Ex. 8.

Discussion

Respondent contends that Grievant had ample notice and opportunity to improve her performance and attendance deficiencies, and that over the course of two years Grievant consistently failed not only to improve her performance, but to satisfactorily perform even the most routine duties consistently. Ms. Devrick testified that, while Grievant's excessive absenteeism was a problem during her two years at Central Elementary, Grievant's performance even while present at work was so

unsatisfactory that she would have recommended her termination even if Grievant's attendance had been acceptable. Ms. Devrick was not aware of any serious health problems suffered by Grievant during this time period.

Grievant accepts no responsibility for the condition of the school and alleges that the problems with the school were the fault of others. Grievant alleges she has suffered from serious health problems for the past two years which caused her to miss excessivedays of work during the time period and consequently interfered with her ability to satisfactorily complete her work. Grievant testified that she is being treated by several different physicians; nevertheless, she did not tell Ms. Devrick of any of these health problems because she was embarrassed and she and Ms. Devrick were not on good terms and did not speak regularly.

West Virginia Code § 18A-2-8, governing the suspension and dismissal of school personnel, provides, in pertinent part, as follows:

> 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 contendre to a felony charge. 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 parties stipulate that there were no procedural irregularities involved in Grievant's termination. Thus, the issue is whether Respondent has proven, by a preponderance of the evidence, unsatisfactory performance by the Grievant. The undersigned finds, based upon the above background narration, that Respondent has met its burden. Grievant had been apprised of work deficiencies in writing on an ongoing basis since July 1992, received two evaluations indicating she did not meet work performance standards in April 1993 and April 1994, and failed to meet the requirements of three separate Plans of Improvement during that two-year time period.

Grievant admits that she did not inform Ms. Devrick that she had physical problems which made it difficult for her to perform her job responsibilities. She certainly should have disclosed this information if she expected latitude. See Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991). Furthermore, even assuming Grievant had advised of her physical problems, Respondent had no obligation to tolerate major problems with her performance ad infinitum. See Morrison v. W. Va. Dept. of Health, Docket No. 89-H-013 (Apr. 30, 1990); Duncan v. Lincoln Co. Bd. of Educ., Docket

No. 89-22-147 (May 1, 1989).

In addition to the findings of fact and conclusions of law in the foregoing narrative, the following conclusions are rendered.

Conclusions of Law

1. A board may suspend or dismiss any person in its employment at any time for unsatisfactory performance as a result of an employee performance evaluation and such charges must be proven by a preponderance of the evidence. W. Va. Code § 18A-2-8.

2. Pursuant to State Board Policy 5300 every school employee is entitled to be apprised of and given opportunity to correct performance deficiencies prior to dismissal from employment by a board of education.

3. Respondent adopted and applied the state board of education's system of evaluation through Policy 810, Staff Evaluation, and followed that system in Grievant's evaluations and subsequent Plans of Improvement.

4. Respondent has shown by a preponderance of the evidence that Grievant was subject to dismissal for unsatisfactory performance.

Accordingly, this grievance is **DENIED** and Respondent's termination of Grievant is affirmed.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 12, 1994

Footnote: 1 *Respondent presented evidence regarding the school's no-smoking policy and that Grievant had violated*

that policy more than once. However, Grievant's termination letter only cites "unsatisfactory performance" as the cause for termination. Violations of smoking policies are not usually reflective of an employee's performance. Therefore, only the evidence relating to Grievant's performance has been considered by the undersigned in reaching the decision in this matter.