LINDA EGGLESTON,

Grievant,

v. DOCKET NO. 94-13-395

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Linda Eggleston, filed the following grievance directly at Level IV pursuant to W. Va. Code § 18-29-1, et seq., the grievance statute for education and state employees, on August 10, 1994, protesting her dismissal by Respondent, Greenbrier County Board of Education:

> Grievant, a regularly-employed aide, has been dismissed from her employment on the grounds of cruelty and unsatisfactory performance. Grievant alleges a violation of West Virginia Code §18A-2-8 and requests reinstatement, back wages, benefits and seniority.

A hearing was held on October 4, 1994 and the parties filed post-hearing submissions on or about November 4, 1994, at which time this case became mature for decision.

Ms. Eggleston, an Aide assigned to Eastern Greenbrier Junior High School, was notified by Superintendent Stephen Baldwin on June 10, 1994 that he was recommending that her employment be terminated effective at the end of School Year 1993-94 due to unsatisfactoryperformance and cruelty pursuant to W. Va. Code § 18A-2-8, based upon the recommendation of G. A. McClung, Principal at Eastern Greenbrier Junior High. Grievant was advised that a hearing would be conducted upon the recommendation for termination on June 19, 1994. Joint Ex. 1. Grievant, by counsel, agreed to continuances to accommodate the parties and the matter was ultimately set for hearing before Respondent on August 4, 1994, where Grievant appeared in person and by counsel. At the conclusion of the hearing, Respondent voted unanimously to accept the recommendation of Superintendent Baldwin to terminate the employment of Grievant. R Ex. 21.

West Virginia Code § 18A-2-8 provides, in pertinent part:

> 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, ... 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. . . .

In disciplinary matters the board of education bears the burden of establishing the charges against an employee by a preponderance of the evidence. Lilly v. Fayette County Bd. of Educ., Docket No. 89-10-436 (Dec. 11, 1992). Thus, Respondent bears the burden of proving the charges against Grievant of cruelty and unsatisfactory performance. Based upon the testimony and evidence presented at the Level IV hearing, the undersigned finds that Respondent has met its burden.

Facts

There is no dispute over the facts in this matter; only a dispute as to the interpretation of those facts. Further, there is no claim that Respondent's actions in terminating Grievant were procedurally defective.

1. Grievant had been employed by Respondent as a Special Education Aide and was assigned to Eastern Greenbrier Junior High during the 1993-1994 school year. She previously was assigned to Greenbrier East High School as a special education aide.

2. Grievant served as an Aide to Special Education teacher Chris Sienkiewicz during the 1993-1994 school year, working with a population of three (3) moderately mentally-impaired students, two males and one female. Another Aide, Ramona Greene, was also assigned to Mr. Sienkiewicz' classroom.

3. Initially, Grievant was assigned one student, R.L. (See footnote 1), and Ms. Greene was assigned the other two students, B.D. and E.M. These students range in age from 11 to 14 and were smaller than Grievant. E.M., the female, is approximately 4'9" tall and weighs less than 100 pounds.

4. Elizabeth Johnson, a Special Education specialist assigned to consult with special education teachers throughout Greenbrier County, testified that on September 9, 1993, whileentering Mr. Sienkiewicz' classroom, she saw Grievant smack E.M. on the hand and yell "no." Ms. Johnson testified that the smack was accompanied by a loud sound, indicating that it was not just a "tap" on

the hand to get E.M.'s attention. Ms. Johnson reported the incident to Mr. Sienkiewicz and to her supervisor, Director of Special Education, Dr. Thomas Iles.

5. Ms. Johnson also testified that on June 3, 1994, while she was at Eastern Greenbrier Junior High, she observed Grievant pull E.M. off of the floor in front of the school office by jerking her up roughly and forcibly placing her in a chair. Ms. Johnson testified that Grievant then got in E.M.'s face, pointed her finger at her and yelled at her. Ms. Johnson characterized the treatment of E.M. by Grievant as "excessive and probably abusive".

6. Ms. Debbie Rutherford, Special Education Instructor for nine years and assigned to a classroom adjoining Mr. Sienkiewicz', testified that on October 7, 1993, as she was about to enter Mr. Sienkiewicz' classroom and looking through the glass pane in the door, she observed the Grievant slap student R.L., who was seated in a wheelchair, across the face. The witness testified that when she entered the room, R.L. was crying loudly and asking Grievant to leave him alone, but Grievant was forcing him to put his head up and do his work. Ms. Rutherford asked Grievant what was going on, and at that time noticed that Donna Simms, an employee of Open Door, which provides various services relating to the mentally impaired to Greenbrier County schools, was also in the room. Ms. Rutherford left the room to find Mr. Sienkiewicz. She met RamonaGreene, the other Aide, in the hall and instructed her to go into the room immediately while she reported the incident to Mr. Sienkiewicz. Ms. Rutherford testified that she did not know Grievant prior to this incident.

7. The October 7, 1993 slapping incident was also witnessed by Donna Simms, the Open Door employee. She testified that Grievant was working with the three students and that R.L. was seated in the middle of the group. The children were not being cooperative and Grievant smacked one of them on the hand with some cards. R.L. was acting up and Grievant was trying to push his head up and get him to work. Grievant slapped R.L. "across the face open-handed and shoved his head back". R.L. kept asking Grievant to leave him alone. Ms. Rutherford entered the room about that time and asked what was going on and left the room once she saw that Ms. Simms was there. Ms. Greene entered the room and removed R.L. from the group to calm him down. Ms. Simms filled out an incident report at Open Doors and reported the incident to Mr. Sienkiewicz. Ms. Simms testified that she did not know Grievant prior to this incident.

8. Concerning the October 7, 1993 incident, Ramona Greene testified that she entered the room after the slapping and did not actually witness the slap. However, R.L. was crying loudly and

appeared very upset and Grievant was still attempting to force his head up. Ms. Greene "took as much of that as she could" and told Grievant to remove him from the group in order to calm him down.

9. As a result of the October 7, 1993 slapping incident and investigation of the same, Grievant was suspended for five days without pay after being given an opportunity to contest the recommendation before the Greenbrier County Board of Education. Admin. Ex. 10. Grievant did not contest the suspension or file a grievance; however, she maintains that she did not slap R.L.

10. R.L.'s parents requested that Grievant never be allowed to work with R.L. again. She was assigned B.D., and R.L. was reassigned to Ramona Greene.

11. On November 17, 1993, Grievant was placed on an Improvement Plan as a result of the slapping incident. This plan was developed jointly by Principal G.A. McClung, Assistant Principal John Curry and Grievant. One element of this Improvement Plan was that Grievant was to avoid making any contact at all with R.L. Grievant was also to remain in the classroom at all times. Admin. Ex. 11.

12. As a result of this Improvement Plan and the change of assignment, Ramona Greene had to be advised concerning certain of the items in the Plan as they affected her. After being made aware of the information in the Improvement Plan, which was communicated to her by the Grievant, Ms. Greene testified that Grievant violated the terms of the Plan by attempting to make contact with R.L. and leaving the classroom for extended periods of time.

13. Ms. Greene testified that Grievant had a lot of problems when she took over the responsibility of B.D. B.D. was very aggressive and Grievant would instigate his aggression by talkingto him in a raised voice. Ms. Greene testified that there were fights almost daily between Grievant and B.D. until B.D.'s parents, noting that he was regressing, requested that Grievant not work with him anymore. Admin. Ex. 5.

14. Mr. Sienkiewicz confirmed that Grievant had to be assigned another student, E.M., in the Spring of 1994. Ms. Greene then assumed responsibility for both R.L. and B.D. Admin. Ex. 9.

15. Grievant's performance was evaluated on March 30, 1994 for the period September 1993-March 1994 by Assistant Principal John Curry. Admin. Ex. 13. The evaluation noted areas which needed improvement, including failure to avoid making contact with R.L., exercising poor judgment in dealing with the students which served to escalate situations, periodic absences from the classroom

when she was needed by the teacher, and failure to maintain confidentiality. Grievant agreed with the performance evaluation.

16. A second Plan of Improvement was developed for Grievant on March 30, 1994 by Grievant and Assistant Principal Curry. Admin. Ex. 14. The completion date for the Plan of Improvement was June 1994.

17. In the time between the implementation of the second Plan of Improvement (March 30, 1994) and June 1994, the date of its completion, Mr. Curry received three separate reports of incidents involving Grievant.

18. Donna Nickell, a special education teacher with approximately eight years experience at the junior high and high school levels, witnessed an incident in early May 1994 involvingGrievant and E.M. Ms. Nickell testified that Grievant and E.M. were at the water fountain when E.M. knocked a cup of water out of another teacher's hand. Ms. Nickell testified that Grievant yelled at E.M., "jerked" her into the girls' bathroom, got some paper towels, and then "forced" E.M. to get down on her knees to clean up the water. Ms. Nickell said she had never seen anyone jerk a student like that and characterized Grievant's treatment of E.M. as "abusive". Ms. Nickell did not know who Grievant was prior to this incident. Ms. Nickell reported the incident to Principal Curry and wrote a statement of what she observed. Admin. Ex. 2.

19. Mary Boone, a 5th grade teacher who was visiting Eastern Greenbrier Junior High on business, testified about an incident she observed on May 19, 1994, involving Grievant and E.M. Ms. Boone had been acquainted with E.M. through church since E.M. was three years old, but did not know Grievant prior to this incident. Again, Grievant and E.M. were at the water fountain, and this time E.M. spit water at Grievant. Ms. Boone testified that Grievant grabbed E.M. by her face and was "screaming at her" that she would never have anymore water as long as Grievant was there. Ms. Boone talked to a special education teacher at her school about the incident and was assured that this treatment was wrong and not part of some special new "tough love" program. Ms. Boone talked to Mr. Sienkiewicz and wrote a letter to Principal Curry about the incident. Admin. Ex. 3.

20. The third incident is the one referred to in Finding of Fact No. 5 reported by Elizabeth Johnson, the Special Education specialist.

21. The other special education aides at Eastern Greenbrier Junior High, Ramona Greene, Tamara Lucas, and Patty Rothe, also submitted written statements to Principal McClung and testified

regarding incidents where Grievant exercised poor judgment. Admin. Exs. 5, 6, and 7.

22. At the conclusion of the second Improvement Plan in June 1994, Principal McClung completed an evaluation of Grievant on June 9, 1994 which was reviewed and agreed to by the Grievant. This evaluation indicated that Grievant did not satisfactorily improve the areas of deficiency shown on the Plan of Improvement. Admin. Ex. 19.

23. Principal McClung recommended to Superintendent Baldwin that Grievant's employment be terminated. Admin. Ex. 20. Super-intendent Baldwin made the recommendation to the Board of Education, which, after a hearing on August 4, 1994, voted to terminate Grievant's employment. Joint Ex. 1; Admin. Ex. 21.

Discussion

Respondent offered the testimony of the other special education aides at Eastern Greenbrier High School, who all testified that they had offered suggestions to Grievant on how to improve her relationship with the children and that she did not respond positively to their suggestions. Mr. Sienkiewicz testified that he had offered suggestions to Grievant to help her be moreeffective with the moderately mentally-impaired population, but to no avail. He testified that her dealings with the students were too stern and uncompromising and that he felt certain that the parents of R.L. and B.D. would request that Grievant not be allowed to work with their children during the next school year. He also testified that the staff did not work well with Grievant due to the many controversies and that his other Aide, Ms. Greene, had to pick up the "load" because Grievant was not permitted to work with two of the three students. Admin. Ex. 9.

Grievant presented the testimony of several character witnesses, some of whom she had worked with before at Greenbrier East High School, as well as several letters of recommendation. G's Ex. 1. Virginia Slayton and Arlene Tharp, co-workers of Grievant's at Greenbrier East, testified that she never lost her temper or used excessive force in dealing with the students under her control despite considerable provocation. Grievant and Ms. Slayton explained that to someone who was unfamiliar with the mentally-impaired population, her dealings with her students could be interpreted as rough or abusive. Indeed, Grievant does not deny that any of the above-described incidents took place, but rather, that they were all misinterpreted by the witnesses.

Grievant's argument that someone who is unfamiliar with the methods developed to deal with

mentally-impaired students could have misinterpreted her actions has some merit. However, with the exception of Mary Boone, all of the witnesses were either teachers of the mentally-impaired or had extensive background and trainingin dealing with the mentally-impaired population. Additionally, the witnesses to the specific incidents described above all testified that they did not know Grievant or anything about her before witnessing the incidents. Therefore, the undersigned finds that not only did these witnesses have substantial knowledge and familiarity with the mentally-impaired population and the ability to correctly judge what they had seen, but that these witnesses also had no bias or motivation for reporting Grievant for these incidents.

Based upon the above discussion and findings of fact, it is appropriate to make the following additional finding of fact and conclusions of law.

Finding of Fact

The specific incidents reported occurred as they were described through the witnesses' testimony and written statements and were not "misinterpreted" by the witnesses.

Conclusions of Law

1. The Respondent has established by a preponderance of the evidence that Grievant's conduct as described above constituted cruelty within the meaning of W. Va. Code § 18A-2-8.

2. The Respondent has established by a preponderance of the evidence that Grievant had failed to satisfactorily correct the deficiencies set forth in the March 30, 1994 evaluation and which were the subject of the March 30, 1994 Improvement Plan.

3. The Respondent has established by a preponderance of the evidence that Grievant was afforded a reasonable period of time tocorrect the deficiencies noted in the evaluation, failed to remediate those deficiencies and failed to successfully complete the Improvement Plan.

4. The Respondent has established the grounds for termination by a preponderance of the evidence and the termination of Grievant's employment was not arbitrary or capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Greenbrier 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 29, 1994

Footnote: 1 The students will be identified by their initials, consistent with this Board's practice respecting the privacy of individuals under such circumstances. See, e.g., Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-118 (July 13, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).