

**JEROME KERN**

**v.**

**DOCKET NO. 95-50-260**

**WAYNE COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant Jerome Kern was employed by the Wayne County Board of Education ("WBOE") as a classroom teacher at Kenova Elementary School until his teaching contract was terminated for unsatisfactory performance by action of WBOE on July 10, 1995. Grievant appealed his termination directly to Level IV. [\(See footnote 1\)](#) He requested as relief that he be returned to his classroom teaching position, and be awarded backpay and attorney fees.

Grievant was placed on an Improvement Plan for the first semester of the 1994-95 school year by the Principal at Kenova Elementary School, Kenneth Cathell. Grievant's final evaluation in March of 1995, showed he had not improved in two of the four areas targeted in the Improvement Plan. Grievant received an unsatisfactory rating in four of the six areas of responsibility evaluated. WBOE Superintendent William Carmen notified Grievant by letter dated June 2, 1995, that he was recommending his dismissal to WBOE "based on unsatisfactory performance as outlined in WV [\[Code\]](#) §18A- 2-8." Superintendent Carmen referenced the following unsatisfactory ratings in Grievant's final evaluation as grounds for dismissal: Classroom Climate, Instructional Management System, Student Progress, and Professional Work Habits. Gr. Ex. 12. [\(See footnote 2\)](#) Grievant's termination letter simply stated that his teaching contract was being terminated effective immediately. Gr. Ex. 13.

Grievant made three arguments. Grievant argued he was not given notice that he could present witnesses at the WBOE meeting where it considered the recommendation that he be dismissed. Grievant further alleged defects in the implementation of the Improvement Plan which brought W. Va. Code § 18A-2-7 into play, and required WBOE to notify him by April 1, 1995, that the Superintendent was recommending his dismissal. Grievant concluded his contract could not be terminated, because he was not given notice of his termination by this date. Finally, it appears that Grievant is challenging the basis of the decision to terminate his employment. WBOE argued it terminated Grievant for

unsatisfactory job performance, after properly following the requirements of Policies 5300 and 5310. WBOE did not address the issue of whether Grievant should have been given notice he could call witnesses at the WBOE meeting.

The following Findings of Fact are necessary to the determination of the issues in this matter, and have been properly made from the Level IV record.

### **Findings of Fact**

1. Grievant had been employed as a classroom teacher by WBOE for 16 years prior to his termination. He is certified in Elementary Education 1-8, Social Studies 1-9, Special Education, Mentally Retarded 1-12, and Learning Disabilities 1-12. He had taught mildly mentally impaired and moderately mentally impaired students in a "Special Education" class at Kenova Elementary School under Principal Kenneth Cathell, for the four years preceding his termination.

2. Prior to the 1994-95 school year, Principal Cathell had talked to Grievant about his concerns with his performance, particularly discipline and working with students generally. They had discussed Grievant's techniques in working with students who are learning at different grade levels.

3. Grievant's evaluation for the 1993-1994 school year was prepared by Principal Cathell in April or May of 1994. Grievant and Principal Cathell signed the evaluation on June 8, 1994. That evaluation rated Grievant's performance as unsatisfactory in three of the six areas evaluated, those being Programs of Study, Classroom Climate, and Instructional Management System. Gr. Ex.

4. Near the end of the 1993-94 school year, Principal Cathell decided to place Grievant on an Improvement Plan for the following year. He developed the Improvement Plan based upon his observations over the year, and upon Grievant's teacher evaluation. Grievant was not invited to provide suggestions and ideas for incorporation into the Plan.

5. The Improvement Plan was submitted to Superintendent Carmen on June 6, 1994, and was approved by him.

6. Grievant received the Improvement Plan on June 8 or 10, 1994, and was advised by Principal Cathell of what he was expected to do to complete the Plan successfully. He was not advised that if he failed to complete the Plan successfully, Principal Cathell would recommend his dismissal to the Superintendent, but he was aware of this.

7. Prior to the 1994-1995 school year, Grievant had never been placed on an Improvement

Plan.

8. The Improvement Plan stated it was to be in effect for the first semester of the 1994-1995 school year, but Principal Cathell told Grievant when he gave him the Plan it would be for the entire 1994-1995 school year.

9. An Improvement Team was formed to monitor and assist Grievant with his Improvement Plan. Principal Cathell was a member of the Team, and he chose Eliza Adkins, Director of Special Education for Wayne County, as a member of the Team. The third member of the Team, Sharon Macri, a Special Education teacher at Buffalo Middle School, was selected by Grievant as the teacher representative. The Improvement Plan did not state that an Improvement Team would be formed, but Grievant was told when he received the Plan that he could choose a Team member.

10. The Improvement Plan identified Grievant's problem teaching areas as lesson plans, discipline, classroom appearance, and failure to provide a curricular challenge for the students. The Plan identified the specific actions which needed to be taken to improve in each targeted area. R. Ex. 1.

11. The Improvement Plan listed as resources and assistance available to Grievant to correct his problems in the targeted areas, the county policy on lesson plans, each student's Individual Education Plan ("IEP"), and attendance at a "classroom management training session to learn discipline techniques", if available. R. Ex. 1. Principal Cathell asked Grievant to work with lower grade teachers of his choosing to help with lesson plans and discipline.

12. The Improvement Team members were familiar with the areas of improvement listed in the Plan.

13. The Improvement Team jointly observed Grievant in his classroom on three occasions. Grievant was given advance notice of the dates. The Team first formally observed Grievant for about an hour on the morning of September 14, 1994. The second observation was for about one hour on the morning of September 20, 1994. The final observation was conducted for about one hour on the morning of March 6, 1995.

14. Grievant was aware that he was still on the Improvement Plan at the time of the third observation, and did not voice any objection to the Plan extending into a second semester.

15. Each of the Team members made notes about each observation. The observation notes pointed out problem areas in Grievant's instruction methods, and made suggestions for improvement

in instruction which would challenge the students. R. Exs. 2, and 3. Gr. Exs. 3, 4, 6, 7, 8, 9, 10, and 11. After each observation Principal Cathell placed these written comments in Grievant's school mail box.

16. Ms. Macri talked to Grievant at the first observation about how she prepared lesson plans, how she controlled and modified behavior, and how to provide instruction prior to an activity. Ms. Macri and her husband, also a teacher, met with Grievant after the first observation to help him with lesson plans.

17. Principal Cathell met with Grievant after each observation to go over his written suggestions.

18. During the 1994-95 school year, Ms. Adkins did not discuss with Grievant her observations or concerns about his performance. She did discuss with Principal Cathell her observations and concerns about Grievant's performance.

19. The third observation had been scheduled for February 14, 1995. This observation was not considered by WBOE in making its decision, because Principal Cathell was unable to attend. Ms. Adkins and Ms. Macri did observe Grievant's class for about one hour that morning. Grievant received a copy of the written observation notes of Ms. Adkins and Ms. Macri in his school mail box. Ms. Adkins noted concern that older children were still printing, no instruction was given by Grievant to one student, instruction was lacking overall, and the aide and grandparent were working too much with the lower functioning students.

20. Grievant improved in the first targeted area, lesson plans, and received a satisfactory rating in the related area on his 1995 evaluation, Programs of Study.

21. For the second area targeted in the Plan, Grievant was to "[d]evelop and maintain a discipline plan which supports an orderly environment, as well as, a good learning climate." Classroom rules and consequences were to be posted, clearly explained to students and enforced, and a detailed lesson plan on how to teach these procedures to the students was to be presented to "office" for approval. Grievant was also required to attend (if available) "classroom management training session to learn discipline techniques."

22. The Improvement Team members observed that Grievant posted classroom rules and consequences, clearly explained these to students, and enforced them. Grievant gave verbal praise and rewards. Grievant did not present to the office for approval a detailed lesson plan on how to

teach these procedures. No classroom management training sessions to learn discipline techniques were available to Grievant during the 1994-1995 school year. 23. For the third area targeted in the Plan, Grievant was to keep the classroom organized, clean, and brightly decorated, display student work in the classroom, and insist that students help him straighten the classroom to facilitate interest and learning.

24. The Improvement Team members observed that Grievant displayed student work in the classroom, and the classroom was brightly decorated, clean, and organized. Students did not help Grievant straighten the classroom. Grievant's bulletin boards and room appearance improved greatly.

25. The final area targeted in the Plan provided, "[g]rades (at least one per week in every subject) Lesson Plans, and the IEP will document a curricular challenge for each student who is the responsibility of Jerome Kern." The Plan noted the following specific actions which should be taken by Grievant:

A. Teacher should monitor achievement evaluation scores and assign different amounts of words in spelling, problems in math or questions in reading depending on child's ability. Teacher also should remediate with simpler work or enrichment work depending on student's ability.

B. After each lesson during a week, note whether the lesson seemed to focus on the right development level, below or above.

26. At the end of the improvement period, Grievant's grade book did not reflect student progress. Grievant was not observed giving instruction for lessons. Grievant did not work with some students during the observations. Only manuscript writing was being used by all students during the observations, even though there were three grade levels in the room which should have been doing cursive writing. Principal Cathell and Ms. Adkins agreed that Grievant's teaching had not improved. He was still not challenging the students, not using the IEP's to guide him in what each student should be doing, and not explaining to the students why they were doing the lesson.

27. Principal Cathell used the notes from the three observations to fill out Grievant's evaluation in March of 1995. Grievant received two satisfactory ratings and four unsatisfactory ratings in Classroom Climate, Instructional Management, Student Progress, and Professional Work Habits. He

recommended Grievant's dismissal to Superintendent Carmen.

28. Grievant was properly provided with written notice of the charges against him, an explanation of the evidence, and of the date of the WBOE meeting where his termination would be discussed. Grievant did not receive written notice that he would be given the opportunity to respond prior to WBOE's decision, but he was told this by Superintendent Carmen. Grievant was given the opportunity to speak to WBOE on two occasions, and did make a presentation to WBOE at its meeting, prior to the WBOE decision that Grievant's employment be terminated.

### **Discussion**

Grievant presented three arguments which are addressed in the following Sections.

**A. Opportunity For Hearing.** Grievant argued that WBOE could not terminate his employment because it did not notify him that he could call witnesses to testify at his pre-termination hearing before WBOE. It is clear that Grievant was given the opportunity to appear before WBOE and speak on his own behalf on two separate occasions prior to WBOE making its decision to terminate his employment. Grievant was represented by counsel on both occasions. At the first WBOE meeting, on June 13, 1995, WBOE tabled the decision after a discussion with Grievant's counsel, apparently to allow Grievant's counsel more time to prepare his presentation to WBOE. Gr. Ex. 14.

In Wirt v. Bd. of Educ. of County of Mercer, 192 W. Va. 568 (1994), the Supreme Court of Appeals of West Virginia held that a tenured public employee is entitled to a pre-termination hearing. The Court stated the hearing need not be:

a full adversarial evidentiary hearing; however, an employee is entitled to a written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to terminate the employee. Id. at 575.

In Wirt, the grievant was not notified of all the charges against him prior to his appearance at the Board of Education meeting where his employment was terminated, and his initial notification letter stated that the Board of Education would "not conduct a hearing concerning these charges prior to acting upon any recommendation . . . ", but that if the Board of Education agreed, the grievant could address the Board.

In this case, Grievant was notified in writing of the charges against him and the evidence against him, and was given additional time by WBOE to prepare to respond to the charges. Grievant was aware that he could make a presentation to WBOE, and his attorney did, in fact, do so. There is no

evidence that Grievant asked that he be allowed to present witnesses and that request was denied. Grievant was represented by counsel prior to his presentation to WBOE, and his counsel had spoken to WBOE at a meeting some time prior to making his presentation. It was up to Grievant's counsel to determine what the best response was.

Pre-termination hearings might go more smoothly if WBOE provided written notice of the procedures it would employ at such hearings, particularly with pro se grievants. However, WBOE complied with the notice and pre-termination hearing requirements of Wirt, and did not deny Grievant the opportunity for hearing.

**B. 18A-2-7 Notice.**

Grievant's argument that W. Va. Code § 18A-2-7 required that WBOE notify him by April 1, 1995, of the recommendation for dismissal is without merit. The only part of that lengthy Code Section which deals with dismissal of an employee is the first sentence, which provides:

The 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.

The provision of that Code Section referring to notice to the employee before the first Monday in April, is clearly applicable only to transfers, when it states:

However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred . . . (Emphasis added.)

It appears that it is W. Va. Code § 18A-2-2 which Grievant may have intended to cite as support for his argument. That Code Section provides:

The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher, unless and until terminated (1) by a majority vote of the full membership of the board before the first day of April of the then current year, after written notice, served upon the teacher, return receipt requested, stating cause or causes, and an opportunity to be heard at a meeting of the board prior to the board's action thereon, . . . (Emphasis added.)

That Code Section goes on to state, however, that its provisions "shall not affect the powers of the school board to suspend or dismiss a principal or teacher pursuant to section eight [§ 18a-2- 8] of this article". Code § 18A-2-8 provides:

[n]otwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: . . . unsatisfactory performance . . . as the result of an employee performance evaluation pursuant to section twelve of this article. (Emphasis added.)

Reading Code §§ 18A-2-2, 18A-2-12, and 18A-2-8 together, it becomes clear that a teacher who has failed to successfully complete an improvement plan may be dismissed "at any time" for unsatisfactory performance. As will be addressed below, if the board of education fails to comply with Policies 5300 and 5310, then it cannot dismiss an employee for unsatisfactory performance.

### **C. Implementation of the Improvement Plan.**

The burden of proof in this case is upon WBOE to prove by a preponderance of the evidence the charges of unsatisfactory performance, and that it complied with Policies 5300 and 5310 by informing the employee of his deficiencies and affording him a reasonable period of time to improve. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994).

"Code § 18A-2-8 requires that a termination based on 'unsatisfactory performance' be predicated upon an employer evaluation, pursuant to W. Va. Code § 18A-2-12 (1990). Code § 18A- 2-12(a) states in its entirety that:

[t]he state board of education shall adopt a written system for the evaluation of the employment performance of personnel, which system shall be applied uniformly by county boards of education in the evaluation of the employment performance of personnel employed by the board.

Code § 18A-2-12(b) goes on to more fully address the evaluation of professional personnel only, in the context of professional administrative or teaching performance." Wright v. Gilmer County Bd. of Educ., Docket No. 95-11-100/254 (Sept. 8, 1995). State Board of Education Policy No. 5300 provides that teacher evaluations are to be conducted on a regular basis, that evaluations be "open and honest", and that the teacher "be given an opportunity to improve deficient performance prior to any adverse personnel actions." Id. State Board of Education Policy 5310 requires that this opportunity to improve be formally provided in the form of an improvement plan which is "implemented in a manner consistent with the goal of raising the deficient performance to an acceptable level." Id.

"The aim of Policy 5300 and Policy 5310 is to provide a teacher with timely notice about the administration's views regarding his/her job performance as reflected by evaluations, observations, letters and conferences." Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995), citing Brown v. Wood County Bd. of Educ., 400 S.E.2d 213 (W. Va. 1990). "In determining whether Grievant's Plan of Improvement provided Grievant with a reasonable opportunity to improve, we must first examine what Grievant reasonably should have known about the administration's views regarding his job performance, as reflected by the evaluations, observations, letters and



conferences." Baker, citing Wilt v. Flanagan, 294 S.E.2d 189, 194 (W. Va. 1982).

Grievant argued there were two defects in the process which would prevent WBOE from discharging him. Grievant argued, first, that the improvement period was not set forth in the Improvement Plan. Grievant also argued that the Improvement Plan extended beyond one semester, contrary to Policy 5310, Section 11.2 ([See footnote 3](#)). Grievant was told by Principal Cathell in June of 1994, that the Improvement Plan would cover the school year 1994-95, and Grievant stated he was aware when the third observation was conducted in March 1995, that he was still on the Improvement Plan. Grievant did not voice objection to or grieve the length of the Improvement Plan when he became aware it would extend beyond one semester. These issues cannot now be addressed in this proceeding. This grievance is about Grievant's termination. Grievant cannot complain about the terms and conditions of the Plan itself in this grievance. Wright, *supra*. Further, Grievant does not allege he was harmed in any way by the duration of the Improvement Plan. Indeed, the additional time to improve may have worked to his benefit.

The second defect alleged by Grievant was that Principal Cathell failed to evaluate him at the close of the first semester. This argument has already been succinctly dismissed by this Grievance Board in an earlier case. "[T]he observations conducted and conferences held throughout the period of the improvement plan serve as evaluating tools for determining whether the employee has successfully completed the plan. . . . Thus, the language in Code § 18A-2-12 refers to the ongoing evaluative process inherent in the improvement plan, rather than a second 'formal' written evaluation as that term is used by Grievant in his argument." Baker, *supra*.

Grievant was not a novice, but was a teacher with over 15 years' experience. Principal Cathell had discussed his concerns with Grievant about his teaching methods prior to placing him on an Improvement Plan, and Grievant was given the Improvement Plan two and a half months before the beginning of the next school year. Principal Cathell talked to Grievant after each observation, and Ms. Macri talked to Grievant both during and after the first observation, and offered suggestions for improvement. Grievant was provided with the written observation notes of all three Team members, which continued to note deficiencies in his method of instruction. These notes also provided very specific direction for improvement.

All the witnesses agreed that it is very difficult to stay focused and to teach the children in Grievant's classroom. They are at different grade levels, and some have very short attention spans.

Grievant's class was disrupted throughout the day by these students leaving Grievant's classroom to receive some instruction in other classrooms, and then returning to his classroom. Despite the efforts of Grievant and the Team Members, however, Grievant was still not providing a curricular challenge to the students in his class at the end of the improvement period.

The following Conclusions of Law support the denial of this grievance.

### **Conclusions of Law**

1. The burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence when a school employee is dismissed pursuant to W. Va. Code § 18A- 2-8. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13- 019 (Aug. 12, 1994).

2. "When grounds for a school employee's dismissal include charges relating to incompetency or conduct which is deemed correctable, the Board must also establish that it complied with the provisions of West Virginia Board of Education Policy 5300 requiring it to inform [the] employee of his deficiencies and afford him a reasonable period of time to improve." Id. citing Mason County Bd. of Educ. v. State Supt. of Schools, 274 S.E.2d 435 (W. Va. 1987).

3. Respondent has established by a preponderance of the evidence that Grievant was fully apprised of his deficiencies and was given a reasonable period of time to improve, yet failed to achieve all the goals outlined in the Improvement Plan. Respondent has substantiated the charge of unsatisfactory performance.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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.

**BRENDA L. GOULD**

**Administrative Law Judge**

**Dated: March 27, 1996**

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[Footnote: 1](#)

*A Level IV hearing was conducted on September 5, 1995, and this case became mature for decision on October 24, 1995, with the receipt of the last of the parties' post-hearing submissions.*

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[Footnote: 2](#)

*Exhibits placed into evidence by Grievant at the Level IV hearing in this matter will be referred to as "Gr. Ex. ", with the Exhibit Number appearing in the blank. Those placed into evidence by Respondent will be referred to as "R. Ex. ", with the Exhibit Number appearing in the blank.*

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[Footnote: 3](#)

*Although Superintendent Carmen testified that an Improvement Plan could extend over the entire school year, Policy 5310 clearly states otherwise. Section 11.2 provides in pertinent part: "The improvement plan shall: . . . contain the time frame for monitoring and deadlines for satisfactory improvement, but in no case shall an improvement plan be for more than one semester in length . . .".*