DARRELL WARNER,

Grievant,

v. **DOCKET NO. 97-40-548**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Darrell Warner, filed the following grievance against his employer, the Putnam County Board of Education ("Board"), on or about August 11, 1997:

> Grievant is a former regularly employed probationary custodian. Grievant was released from his employment at the end of the 1996-97 school year. Grievant alleges a violation of West Virginia Code §18A-2-8a, §18-29-2(m), disparate treatment, violation of SBE Policy 5300, Respondent's policy on plans of improvement & evaluation, and also alleges that the Respondent did not comply with Grievant's plan of improvement. Grievant requests reinstatement as a regularly employed custodian, retroactive wages, benefits and regular employment seniority.

A level two hearing was held on October 22, 1997, and a decision denying the grievance was issued by Grievance Evaluator Harold Hatfield on December 11, 1997. Grievant appealed to level four on December 17, 1997, and a hearing was conducted on February 23, 1998, March 23, 1998 and April 2, 1998. This matter became mature for decision on May 4, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 1)

SUMMARY OF EVIDENCE

Level II Grievant's Exhibits

Ex. 1 -

Employee Evaluation Summary for Darrell Warner, dated April 30, 1997.

Ex. 2 -

May 9, 1997 letter from Sam P. Sentelle to Darrell Warner, Jr.

Ex. 3 -

May 14, 1997 letter from Darrell Warner to Dr. Sam P. Sentelle.

Level II Board Exhibits

Ex. 1 -

October 9, 1996 memorandum from Tom Tull to Darrell Warner.

Ex. 2 -

January 6, 1997 observation form for Darrell Warner from Tom Tull.

Ex. 3 -

Assistance Plan for Darrell Warner, dated February 17, 1997.

Ex. 4 -

Return Receipt form signed by Darrell Warner, dated May 10,1997.

Ex. 5 -

Service Personnel Evaluation Packet for Darrell Warner.

Level IV Grievant's Exhibit

Ex. 1 -

Service Personnel Evaluation Packet for Tim Cochran.

Testimony

Grievant testified in his own behalf and presented the testimony of Harold Hatfield, Jeff Hughes, Teddy Black, Bertha Jones, and Rebecca Ballard. The Board presented the testimony of Thomas R. Tull and Penny Fisher.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant was employed by the Board in a school service personnel position and was classified as a custodian.

2. Grievant worked as a substitute custodian for the Board for approximately two years at a number of different locations. His performance of substitute duties was satisfactory.

3. Grievant was employed as a one-half time regular custodian at Confidence Elementary on or about March 5, 1996. He continued in that position until September 1996 whenhe transferred to a regular full-time custodial position at Winfield High School. Grievant's performance at Confidence was satisfactory.

4. On or about May 9, 1997, Grievant was notified that his probationary contract would not be renewed.

5. Grievant requested and had a hearing before the Board on June 9, 1997, and the Board did not reverse its previous decision not to renew his contract.

6. Grievant worked the evening shift (3 p.m. to 11 p.m.) at Winfield High School, along with two other full-time custodians.

7. Grievant's job duties were to clean the upstairs of Winfield High School, including sweeping, spot mopping, emptying the trash from 14 classrooms, cleaning (disinfecting), mopping, emptying trash and restocking the boys' and girls' restrooms, sweeping and buffing the main hallway and two side hallways, and sweeping and mopping the five stairways.

8. Grievant also was responsible, along with the other two full-time custodians, for cleaning the Cultural Center, which took about one-half hour.

9. Beginning in December 1996, Grievant also was responsible, along with the other two full-time custodians, for cleaning the newly-constructed Athletic Building, which took about one hour.

10. Grievant did not have sufficient time on his shift to clean every area in his assignment on a daily basis. He was required to clean some areas on alternate days.

11. Steve Barnett was the custodian on the 3 p.m. to 11 p.m. shift responsible for the first floor of Winfield High School, as well as the Cultural Center and Athletic Building. 12. Jeff Hughes was the 3 p.m. to 11 p.m. custodian responsible for the commons area, the gymnasium, the locker rooms, and the Athletic Building.

13. Grievant's area was inspected by his supervisor, Assistant Principal Tom Tull, on October 7, 1996. Mr. Tull informed Grievant in writing that his work was not satisfactory, and provided specific examples of deficiencies found during the inspection. As a result, Mr. Tull assigned another custodian, Ted Black, to work with Grievant on how to more efficiently and effectively perform his job duties. LII Board Ex. 1.

14. During the 1995-96 school year, Ted Black held the custodial position at Winfield High School which Grievant was transferred into in September 1996. Mr. Black transferred to the day shift at Winfield High School in September 1996.

15. Mr. Black provided Grievant with four hours of training in October 1996, in accordance with Mr. Tull's directions.

16. Grievant was evaluated by Mr. Tull again in January 1997, and received an unsatisfactory rating. Grievant and Mr. Tull discussed the evaluation, and Mr. Tull offered Grievant any assistance he might need to improve his performance. LII Board Ex. 2.

17. Grievant was placed on an Improvement Plan on February 17, 1997. The plan specifically noted the deficiencies in Grievant's performance, offered the assistance of custodians Bill Stone and Ted Black, and provided a time line for improvement of May 1, 1997. LII Board Ex. 3.

18. Mr. Tull took Rebecca Ballard, an aide, formerly a custodian, around some of Grievant's work areas and she agreed Grievant's work was unsatisfactory. 19. Ms. Ballard offered to provide Grievant assistance with his work performance, but Grievant did not avail himself of her offer.

20. Mr. Tull evaluated Grievant again on April 29, 1997, and found his performance to be unsatisfactory, although noting he had made some progress. LII G. Ex. 1.

21. On May 9, 1997, Grievant was notified by Superintendent Sam P. Sentelle, that his probationary contract was not going to be renewed for the 1997-98 school year, due to unsatisfactory performance. LII G. Ex. 2.

22. Grievant requested a hearing before the Board, which was held on June 9, 1997. The Board indicated it would either confirm its original decision not to renew, reverse that decision, or take some other action. LII Tr., p. 7.

23. Following an inquiry on August 4, 1997, where he was advised by Assistant Superintendent Harold Hatfield that a decision had not yet been rendered by the Board, Grievant filed this grievance on August 11, 1997.

DISCUSSION

When a probationary employee's contract has not been renewed, it is the employee's burden to show by a preponderance of the evidence that his non-retention was improper. Valentine v. Wood County Bd. of Educ., Docket No. 92-54-310 (Oct. 26, 1993). When a probationary employee's contract is not renewed, a county board must meet the requirements of W. Va. Code § 18A-2-8a. Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991); see also Miller v. Boone County Bd. of Educ., 190 W. Va. 153, 437 S.E.2d 591 (1993). Grievant bears the burden of showing that he did not receive a full and complete hearing on the reasons for the non-renewal of his contract; that the evidence did not support the reasons; and/or he was denied his rights underState Board Policy 5300. Toler v. Wyoming County Bd. of Educ., Docket No. 94-55-306 (May 4, 1995).

W. Va. Code § 18A-2-8a, in pertinent part, states:

> The Superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with . . . § 18A-2-1 . . . of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five . . . of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such person's last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.
>
> Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for nonrehiring must be shown.

The import of this language and the rights in general of probationary employees who receive notice of termination were extensively discussed in Cordray, supra. Specifically, the case held that a county board of education may not refuse to rehire a probationary employee for “just any, or no, cause”, but that the board need not do more than afford the employee a “full and complete hearing which supports” that the reasons for the action are “substantive.” There is no “for cause” standard in

cases involving a board's decision to terminate a probationary employee's employment per Code § 18A-2-8a. Id.; Toler, supra. Cordray also recognized that per the holdings in Powell v. Brown, 238 S.E.2d 220 (W. Va. 1977), the following provisions of West Virginia Board of Education Policy 5300 (Policy 5300) are applicable to such cases:

> Every employee is entitled to know how well he is performing his job and should be offered the opportunity of open and honest evaluation of his performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his job performance, prior to the terminating or transferring of his services, and can only do so with assistance of regular evaluation.

> Every employee is entitled to “due process” in matters affecting his employment, transfer, demotion or promotion.

Thus, at Level IV, the employee bears the burden of showing that he did not receive a full and complete hearing on the reasons for the non-renewal of his contract; that the evidence did not support that the reasons were substantive; and/or that he was denied his rights under Policy 5300. Toler, supra.

Grievant concedes that the Board is not required to show cause for its decision and does not contend that the hearing held before the Board on June 9, 1997, was not “full and complete.” He asserts that the evidence presented at that hearing and the grievance hearings does not establish that the reasons for the action were substantive. Grievant also maintains the Board did not adhere to the provisions of Policy 5300.

The Board maintains that Policy 5300 was not breached, since the personnel action against Grievant was based upon documented “open and honest” communications with Grievant in which he was advised of his deficiencies, told how to correct them, and was warned of the consequences of not doing so. Valentine, supra. The primary question to be asked with regard to Policy 5300 is “what the [employee] reasonably should have known about the administration's views regarding hisjob performance, as reflected by evaluations, observations, letters and conferences.” Wirt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).

Mr. Tull testified to all the efforts he made to help Grievant perform his work satisfactorily. He placed him with Mr. Black for four days in order to learn the “tricks of the trade” and things Mr. Black

did to more efficiently perform the job. He counseled him about his deficiencies, noted those deficiencies in his observations and evaluations, and provided assistance through Rebecca Ballard, a former custodian. However, Grievant did not take Ms. Ballard up on her offer of assistance.

Grievant also alleges the Board failed to comply with the improvement plan because it did not offer him any assistance as set forth on the plan. Interestingly, Ms. Ballard testified that, when Mr. Tull took her around the school, and asked her to assist Grievant, she was not aware Grievant had been placed on an improvement plan. However, when she offered to help Grievant, he most certainly knew he was on an improvement plan which said he would be offered assistance, and yet he refused to let her help him. Thus, Grievant's argument that the Board did not follow the precise terms of the improvement plan because it did not offer him assistance is without merit. To argue that Ms. Ballard's offer of assistance did not “count” because she was unaware that Grievant was on an improvement plan puts form over substance. The undisputed fact is that she offered to assist Grievant in his job duties, he knew he was on an improvement plan, and yet he still refused her offer of assistance.

Grievant also argues “disparate treatment” because he alleges another custodian was given more opportunities to improve than he was before he was terminated. The other custodian, Timmy Cochran, was on various improvement plans over the course of his career with the Board. LIV G.Ex. 1. Mr. Cochran was a substitute custodian at Winfield High School in 1995 and received unsatisfactory evaluations. Mr. Tull requested he not be placed in a regular position at Winfield High School unless he was placed on an improvement plan and received additional training. LIV G. Ex. 1.

Thereafter, Mr. Cochran was hired as a half-time custodian at Hometown Elementary School in 1995, and transferred to Winfield Middle School in May 1996, as a full-time regular custodian. Mr. Cochran had been on an improvement plan at Hometown Elementary in February 1996, which he apparently complied with, because he was transferred to Winfield Middle School in May 1996. Principal Penny Fisher testified that Mr. Cochran never performed satisfactorily at Winfield Middle School, as evidenced by observation and evaluation forms completed by her on January 15, 1997, and February 26, 1997. She first placed him on a two-week improvement plan in January 1997, and he was given assistance. In February, when she observed him again, there were even more deficiencies in his work. He was then placed on a second improvement plan, for a one-month period. Mr. Cochran received his next evaluation on April 28, 1997, which again was unsatisfactory. Mr. Cochran did not avail himself of any assistance offered to him, and he was notified that his

probationary contract was not going to be renewed by letter dated May 9, 1997. LIV G. Ex. 1.

With regard to Grievant's argument that he was treated differently than Mr. Cochran with regard to the number of improvement plans given, it is not even certain that a probationary employee is entitled to be placed on any improvement plan before his contract is terminated because of performance. This Grievance Board has only recognized that such employees are entitled to the benefits of open and honest evaluation, and that any decisions concerning continued employment should be based only upon such evaluations, per Board of Education Policy 5300. Cordray, supra;Baker v. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998). It is questionable whether formal, written improvement plans are actually required for probationary employees. See Baker, supra. In any event, just because Principal Fisher placed Mr. Cochran on two improvement plans in one year at Winfield Middle School does not mean that Assistant Principal Tull had to place Grievant on two plans at Winfield High School. All that matters is that, having placed those employees on improvement plans, the terms of those plans were complied with by the Board.

No other custodian in Grievant's position ever complained that the job was too big for them, and they succeeded in performing the job in a satisfactory manner. Mr. Tull testified that Teddy Black, Don Rhodes, and Mary Chapman, the employees who performed Grievant's job both before and after Grievant, have successfully performed that job, and did not complain about the workload. Mr. Black testified that he had to “keep moving” to get the job done, but that he always did get it done.

Ms. Bertha Jones, a substitute custodian, who has substituted in Grievant's position, testified that it is a lot of work, and that she never finished completely. However, Ms. Jones has always received satisfactory evaluations, which would indicate a tolerance level on the Board's part in recognition of the difficulty of the job. It appears Grievant's performance fell below the “tolerance level.”

The fact that Grievant was given an entire year to improve his performance, both through letters, conferences, offers of assistance, and an improvement plan, was more than an adequate effort on the Board's part to treat Grievant fairly and give him the benefit of the doubt.

CONCLUSIONS OF LAW

1. When a probationary employee's contract has not been renewed, it is the employee's burden to show by a preponderance of the evidence that his non-retention was improper. Valentine v. Wood County Bd. of Educ., Docket No. 92-54-310 (Oct. 26, 1993).

2. When a probationary employee's contract is not renewed, a county board must meet the requirements of W. Va. Code § 18A-2-8a. Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991).

3. Probationary employees are entitled to the benefits of open and honest evaluation, and any decisions concerning continued employment should be based only upon such evaluations, per Board of Education Policy 5300. Cordray, supra; Baker v. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998).

4. Grievant bears the burden of showing that he did not receive a full and complete hearing on the reasons for the non-renewal of his contract; that the evidence did not support the reasons; and/or he was denied his rights under State Board Policy 5300. Toler v. Wyoming County Bd. of Educ., Docket No. 94-55-306 (May 4, 1995).

5. A county board of education may not refuse to rehire a probationary employee for “just any, or no, cause”, but the board need not do more than afford the employee a “full and complete hearing which supports” that the reasons for the action are “substantive.” There is no “for cause” standard in cases involving a board's decision to terminate a probationary employee's employment per Code § 18A-2-8a. Cordray, supra; Toler v. Wyoming County Bd. of Educ., Docket No. 94-55-306 (May 4, 1995). 6. The primary question to be asked with regard to Policy 5300 is “what the [employee] reasonably should have known about the administration's views regarding his job performance, as reflected by evaluations, observations, letters and conferences.” Wirt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).

7. Grievant failed to prove by a preponderance of the evidence that he was discriminated against or subjected to disparate treatment by the Board.

8. The Board complied with all applicable statutory and policy requirements when it did not renew Grievant's probationary contract at the end of the 1996-97 school year.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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: June 25, 1998

Footnote: 1

Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association. The Board was represented by James W. Withrow, Esq.