PATRICIA ZIMOWSKI,

Grievant,

v. **DOCKET NO. 98-28-050**

MINERAL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Patricia Zimowski, challenges her dismissal from employment by the Mineral County Board of Education ("MCBOE" or "Board"), based upon charges of incompetency, willful neglect of duty, and insubordination. Grievant was notified of her termination on January 30, 1998, and a hearing was held before the MCBOE on February 16, 1998, at which time the Board voted to accept Superintendent Charles Kalbaugh's recommendation for termination. In accordance with W. Va. Code § 18A-2-8, Grievant appealed directly to level four on February 20, 1998. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on May 8, 1998. Grievant has been represented throughout these proceedings by attorney Bradley Reed, and MCBOE was represented by attorney Elizabeth Harter. This matter became mature for consideration on June 22, 1998, upon receipt of the parties' written arguments.

The following findings of fact are made from a preponderance of the evidence of record, including all testimony presented before the MCBOE and at the level four hearing, along with all documentary evidence introduced at both hearings.

Findings of Fact

1. Since 1991, Grievant has been employed by MCBOE as a teacher and clinical instructor for nursing students at the Mineral County Vocational Technical Center.

2. Grievant's duties include providing classroom instruction and clinical supervision to students in the LPN nursing program, specializing in obstetrics. Grievant supervises these students on-site while they participate in clinical work at the Western Maryland Health System, which includes two hospitals, Sacred Heart Hospital and Cumberland Memorial Hospital.

3. On September 26, 1995, Sue Lindsay, Maternal Child Director for Sacred Heart Hospital, notified Grievant's supervisor, Terry Cannon,[1] that hospital staff had complained about Grievant's conduct. Hospital employees perceived that Grievant was spending an excessive amount of time in the labor and delivery lounge, engaged in activities such as sleeping, reading, grading papers, and socializing. Ms. Lindsay did not believe Grievant was providing quality supervision to her nursing students and expressed concern that patient care could be compromised as a result.

4. Rita Harber, departmental leader of the clinical nursing program for MCBOE, met with Grievant on October 5, 1995, to discuss the complaints about her work habits. Grievant was told that the duties of a clinical instructor include being on the floor working with the students directly and supervising them in hands-on procedures, along with making frequent rounds (every 45-60 minutes) to observe their activities.

5. In response to Ms. Lindsay's concerns, Mr. Cannon sent Grievant a memorandum dated October 5, 1995, setting forth a "Plan of action in regards to corrective professional work habits." The memorandum stated, in part, as follows:

[T]he following areas must be addressed in clinical supervision:

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[1]Mr. Cannon was Director of Mineral County Vocational Technical and Adult Education.

(1) Constant supervision of all LPN students must be evident and appropriate at all times.

(2) Clinical procedure opportunities which enhance the quality of LPN student experiences must be arranged whenever possible.

(3) Post conferences must be scheduled at the conclusion of each clinical day.

In order to monitor the plan of action concerns, I will institute the following observation/conference plan:

(1) Review weekly the status of clinical experience/supervision with data collection from clinical facility, LPN coordinator and Mrs. Zimowski.

(2) Conference with Mrs. Zimowski weekly.

(3) Observations monthly in regards to concerns raised or more frequently if needed.

6. Mr. Cannon did not engage in any of the monitoring activities referenced in the "plan of action." After the October 5 memo, these concerns were not discussed with Grievant again, and MCBOE officials received no further complaints about Grievant's performance at the hospitals for approximately two years.

7. On August 27, 1997, while Grievant was supervising students at Sacred Heart Hospital, one patient received several medications approximately two hours later than he should have. This error was committed by a student under Grievant's supervision. Grievant prepared an incident report, explaining to Mr. Cannon that the student's error caused one patient to receive four medications late. She also explained her intention to check each student's medications and treatments on a more frequent basis.

8. Also on August 27, 1997, Grievant was asked by a staff nurse if one of her

students could do a dressing[2] some time that day. When Grievant discovered later in the day that her students would not have time to do it, she informed the same nurse.

9. Sue Willison, Director of Nurses for Sacred Heart Hospital, wrote to Mr. Cannon on September 11, 1997, expressing concern regarding the events of August 27, 1997. She was concerned that "due to the number of discrepancies in medication administration that day, was Ms. Zimowski able to capably and safely supervise the students in patient care."

10. In or around September, 1997, a student under Grievant's supervision took a baby from the nursery and gave it to the wrong mother. When this occurred, Grievant was in the delivery room with another group of students where a patient was giving birth. It was the students' first day, and Grievant had instructed them not to remove any babies from the room. After the incident occurred, Grievant filed a report and recommended the student be dismissed from the program.

11. On two separate occasions in September and October of 1997, Ms. Lindsay complained to Mr. Cannon regarding Grievant's perceived excessive use of the lounge and reports that she was reading the newspaper, eating, and sleeping there. In correspondence dated October 9, 1997, Ms. Lindsay requested that Grievant no longer be assigned to clinical supervision.

12. Because Grievant did not have an office at either of the two hospitals, she was instructed by nursing supervisors to use the lounges for that purpose. Grievant used the lounge areas to meet with her students, grade papers, and as a place for students to

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[2]It is assumed from context that this involved medicating and bandaging some type of wound.

review their work.

13. On October 7, 1997, Mr. Cannon completed a “Teacher Observation/Data Collection” form regarding Grievant. The only comments made on the form were “Unsatisfactory supervision of students in the performance of administration of medicine and patient care.”

14. Also on October 7, 1997, Mr. Cannon completed a “Teacher Evaluation.” Although there were seven numbered areas for which the employee was to receive either a satisfactory or unsatisfactory rating, the only portion of the form completed was “Professional Work Habits,” where Mr. Cannon commented “Unsatisfactory supervision of students in the performance of the administration of medicine and patient care.” On the final page of the evaluation form, he stated that an improvement plan would be developed for Grievant by October 10, 1997.

15. Mr. Cannon did not actually observe Grievant performing her clinical supervisory duties in order to prepare the observation and evaluation forms of October 7, 1997. His comments were based solely upon the complaints of Ms. Lindsay and Ms. Willison.

16. After Grievant was evaluated in October of 1997, Superintendent Kalbaugh directed Mr. Cannon to investigate the complaints about Grievant.

17. Grievant was not placed on an improvement plan, and no improvement plan was ever prepared by MCBOE officials.

18. On January 30, 1998, after the conclusion of Mr. Cannon’s investigation, Mr. Kalbaugh recommended Grievant’s termination. She was placed on suspension without pay until the Board hearing on February 17, 1998.

19. Mr. Cannon became terminally ill in late 1997, and he passed away prior to the level four hearing in this case. He did not testify at the termination hearing.

Discussion

A board of education's authority to discipline employees must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). The statute provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person 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. 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 employer bears the burden of establishing the charges by a preponderance of the evidence. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). The charges against Grievant are insubordination, willful neglect of duty and incompetency, which will be addressed individually.

I. INSUBORDINATION

Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, Docket No. 93-BOD-309

(May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). "In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

Respondent has not specifically explained in this case what conduct on Grievant's part constituted insubordination. In order to prove such a charge, the burden is upon the board of education to specify what directive was issued to Grievant or what policy existed which she disobeyed. Even if the matters set forth in Mr. Cannon's 1995 "plan of action" are considered directives to be followed by Grievant, there was no specific evidence offered to prove that Grievant willfully disobeyed them. Although Mr. Cannon advised Grievant that "constant supervision" of her students "must be evident and appropriate at all times," the evidence does not prove that Grievant "intentionally" failed to comply.

The incidents in 1997 involving the baby taken to the wrong mother and the medication errors appear to have been handled appropriately by Grievant as clinical supervisor. These were mistakes made by students who disobeyed Grievant's directives, over which she could not be expected to have total control. As to Grievant's use of the lounge, no hospital employees disputed her explanation that the lounge was to be used by her as an office and meeting place. Also of particular import is the scant evidence regarding how and to what extent Grievant actually did or did not supervise her nursing students. No students under her supervision were called to testify, nor were any hospital employees who worked directly with Grievant or the students. Both Ms. Lindsay and Ms.

Willison testified that they did not personally observe Grievant engaging in the conduct which formed the basis of the complaints against her. Although called to testify at the Board hearing prior to Grievant's dismissal, Ms. Harber, director of the clinical program for MCBOE, only testified briefly about meeting with Grievant in 1995 to discuss expectations. Additionally, although statements were made by MCBOE witnesses to the effect that Mr Cannon conducted and concluded an investigation regarding the complaints against Grievant in late 1997, no evidence was introduced to establish the details or outcome of that investigation, aside from general findings that the allegations were true.

There is insufficient factual evidence in the record to establish that Grievant wilfully or intentionally defied authority. Consequently, the record in this case does not show evidence of conduct constituting "willful" or "intentional" refusal or failure to obey directives or policies. Accordingly, insubordination has not been proven.

II. WILLFUL NEGLECT OF DUTY

Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Therefore, to prove this charge, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra.

As with the insubordination charge, Respondent has failed to point to any specific set of facts which would sustain a charge of willful neglect of duty. Even "serious errors in judgment and failure to maintain a professional decorum" have not been found sufficient

to sustain this charge. See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 20, 1997). The evidence in this case does not establish knowing and intentional acts of misconduct on Grievant's part. As discussed above, although Grievant was told to actively supervise her students, none of the evidence presented to the undersigned proves that she knowingly and intentionally did otherwise. Indeed, there is little to no evidence at all regarding Grievant's actual supervision, its quality, or its frequency. The record contains only second-hand allegations. Therefore, this charge cannot be sustained.

III. INCOMPETENCE

The terms "incompetence" and "unsatisfactory performance" are frequently used interchangeably, as their definitions tend to overlap. "These terms apply to the individual's ability to perform all the expectations of a position, not just one." Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). "In terms of unsatisfactory performance, a county board of education is prohibited from 'discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable.' Syl. Pt. 3, Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979)." Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996). Code §18A-2-12 provides, in pertinent part, as follows:

> A professional whose performance is deemed to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.

Once the employee is given an opportunity to improve, if the next evaluation does not

reveal that the employee has corrected the deficiencies, dismissal may be recommended pursuant to Code §18A-2-8. Id. These same rights and procedures are addressed by West Virginia Board of Education Policies 5300 and 5310.

In the instant case, MCBOE contends that Grievant's conduct compromised the safety and welfare of hospital patients and was not "correctable" conduct. "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 County Bd. of Educ. v. State Superintendent, 165 W. Va. 732, 274 S.E.2d 435 (1980).

The undersigned finds that the conduct complained of in this case was, indeed, "correctable" and subject to an improvement period. The general allegations against Grievant indicate that, whatever her activities were while supervising at the hospitals, an impression of unprofessional behavior was created. This goes directly to the issue of Grievant's professional skills, which include maintaining an air of professionalism while performing her duties. Additionally, although there was little evidence regarding the issue, Grievant's alleged deficiencies in supervision of her students were undisputedly correctable. Grievant was entitled to the opportunity to improve her professional skills in these areas through evaluation and an improvement period.

Although mistakes were made by students on two occasions, there is no proof that any conduct on Grievant's part contributed to or caused these mistakes. Accordingly, Grievant has not personally engaged in willful conduct endangering patients, so she should have been afforded an improvement period. Policy 5300 may not be applicable in cases where an employee has committed a flagrant violation of a known policy, and has consequently caused potential harm to others. See Conner v. Barbour County Bd. of

Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997). Such was not the case here.

Respondent contends that Grievant was warned of the problems with her behavior in 1995 and given the opportunity to improve them, which she did not do. However, the events which occurred in 1995 are too far removed from the events of 1997 to be tied together for purposes of complying with the statutes and policies regarding improvement plans. Indeed, although a so-called "plan of action" was formulated in 1995 by Mr. Cannon, he did not follow through with the specified monitoring mechanisms. Moreover, the undersigned must conclude, from lack of evidence to the contrary, that Grievant's behavior and work was acceptable for a period of two years between 1995 and 1997. Accordingly, Mr. Cannon's 1995 plan of action is found not to meet the requirements of Code §18A-2-12 or Policy 5300, was not a valid improvement plan, and was not applicable to the problems which surfaced in late 1997.

Grievant contends that MCBOE failed to follow the procedure outlined in Mason, supra, regarding evaluations of employees. Although it is permissible for a board of education to dismiss an employee based upon a complaint by a citizen outside the school system, this does not excuse it from following the mandates regarding evaluation and improvement. Once such a complaint is received, an evaluation must be ordered, and an improvement plan implemented.[3] Grievant argues this procedure was not properly followed, and the undersigned agrees.

The record contains two observation forms which are pertinent to this issue. On October 7, 1997, Mr. Cannon only wrote on the form that Grievant's performance was

[3]Of course, this is only required if the behavior is "correctable" and may be improvable through such a plan.

unsatisfactory regarding supervision of students "in the performance of administration of medicine and patient care." This appears to merely mirror the information contained in Ms. Willison's letters of complaint, and does not indicate any particular observations or basis for these conclusions. Also of interest is a second observation form, completed on October 9, 1997. Unlike the form of October 7, this form indicates that the observation took place at "Memorial Hospital Labor & Delivery," and contains specific notations about what Grievant did and what took place that day. It contains no unfavorable comments.

Similarly, the formal teacher evaluation performed by Mr. Cannon on October 7, 1997, merely notes unsatisfactory performance as noted on the observation of the same date, with no further explanation of any basis for this conclusion. Since Mr. Cannon could not testify in this case, only implications can be drawn from this evidence. The superintendent testified that Mr. Cannon performed an investigation into the complaints against Grievant between October of 1997 and January of 1998, ultimately concluding that the allegations were substantiated. Accordingly, how is it possible that Mr. Cannon had sufficient independent information on October 7 to conclude that Grievant's performance was unsatisfactory in the particular areas cited?[4] This leads the undersigned to the conclusion that Mr. Cannon did not base the October 7 evaluation upon any actual observations of Grievant's performance, but only upon unsubstantiated complaints of third parties. This is prohibited by Policy 5300, because the termination of a school employee should be based upon a proper performance evaluation, and "not upon factors extraneous thereto." Mason, supra. Finally, Mr. Cannon's October 7 evaluation of Grievant stated that

[4]It is also interesting to note that, aside from the comment regarding unsatisfactory supervision, the rest of the evaluation form was left blank.

an improvement plan would be developed and implemented by October 10, 1997, which was clearly not done.

Grievant's discharge was not based upon a valid performance evaluation, and she was not given the benefits of a written improvement plan, to which she was entitled. The procedures set forth in Policy 5300 must be followed in every dismissal pursuant to Code §18A-2-8 on grounds of incompetency. Id. Accordingly, the undersigned finds that MCBOE's dismissal of Grievant was improper.

The following conclusions of law support the decision reached.

Conclusions of Law

1. A board of education's authority to discipline employees must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

2. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). "In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

3. Respondent did not prove that Grievant's conduct was insubordinate.

4. "Willful neglect of duty" encompasses something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Therefore, to prove this charge, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra.

5. Respondent did not establish that Grievant's conduct constituted willful neglect of duty.

6. "In terms of unsatisfactory performance, a county board of education is prohibited from 'discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable.' Syl. Pt. 3, Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979)." Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996).

7. A board of education may not dismiss an employee for incompetent, correctable conduct until it has conducted a professional performance evaluation of the employee and provided her with an improvement period to correct the deficiencies, as prescribed by West Virginia Board of Education Policies 5300 and 5310 and W. Va. Code §18A-2-12. See Mason County Bd. of Educ. v. State Superintendent, 165 W. Va. 732, 274 S.E.2d 435 (1980).

8. Grievant's dismissal was not based upon an independent observation and evaluation of her performance, and she was not afforded an improvement period to correct any deficiencies in her performance.

Accordingly, this grievance is **GRANTED**, and MCBOE is directed to reinstate Grievant, with back pay, seniority and benefits to January 30, 1998.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Mineral 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.

Date: July 20, 1998

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V. DENISE MANNING
Administrative Law Judge