BILL BOGGESS,

Grievant,

v.

DOCKET NO. 03-20-015

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Bill Boggess, filed this grievance against his employer, the Kanawha County Board of Education ("Board") on January 10, 2003:

> The Grievant, a former regularly employed school custodian, has been dismissed from his employment on the grounds of incompetency. The Grievant alleges a violation of West Virginia Code § 18A-2-7 and § 18A-2-6.
>
> Relief sought: The Grievant seeks reinstatement to employment, retroactive wages, benefits, and seniority, and removal of any reference to this dismissal from his employment records. The Grievant also requests an award of interest on all monetary sums.

This matter came on for hearing in the Grievance Board's Charleston, West Virginia, office on March 4 and April 3, 2003, and became mature for decision on July 11, 2003, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by James W. Withrow, Esq.

SUMMARY OF EVIDENCE

LIV Joint Exhibit 1 - September 30, 2002, Transcript of Disciplinary Hearing.

Board Exhibits

Ex. 1 -

August 12, 2002 letter from Ronald Duerring to Billy Boggess, with April 19 and June 7, 2002, evaluation forms.

Ex. 2 -

September 16, 2002 letter from William H. Courtney to Billy Boggess.

Ex. 3 -

Point Harmony Elementary School Half Day Custodian Schedule, Evening Shift.

Ex. 4 -

Point Harmony Elementary School 3 ½ Hour Custodial Schedule, Evening Shift.

Ex. 5 -

May 14, 1999 Evaluation Form.

Ex. 6 -

April 28, 2000 Evaluation Form.

Ex. 7 -

May 7, 2001 Evaluation Form.

Ex. 8 -

December 14, 2001 Evaluation Form.

Ex. 9 -

December 14, 2001 Plan of Improvement.

Ex. 10 -

January 8, 2002 memorandum from R. Messinger to Billy Boggess, with Cleaning Check-off sheets.

Ex. 11 -

January 18, 2002 memorandum from K. Godfrey to Billy Boggess, with January 18, 2002 evaluation form.

Ex. 12 -

January 25, 2002 evaluation form.

Ex. 13 -

February 1, 2002 evaluation form, with February 4, 2002 notes.

Ex. 14 -

February 8, 2002 memorandum from K. Godfrey to Billy Boggess, with February 8, 2002 evaluation form.

Ex. 15 -

February 21, 2002 evaluation form.

Ex. 16 -

March 1, 2002 evaluation form, with February 28, 2002 notes.

Ex. 17 -

March 8, 2002 evaluation form.

Ex. 18 -

March 15, 2002 memorandum from K. Godfrey to Billy Boggess.

Ex. 19 -

March 22, 2002 evaluation form.

Ex. 20 -

April 12, 2002 evaluation form.

Ex. 21 -

April 12, 2002 memorandum from K. Godfrey re: conference with Billy Boggess.

Ex. 22 -

April 5, 2002 evaluation form.

Ex. 23 -

April 19, 2002 evaluation form.

Ex. 24 -

May 3, 2001 evaluation form.

Ex. 25 -

September 7, 2001 memorandum from Karen Simon to Billy Boggess, with Grandview Elementary Custodian Schedule; Kanawha County Schools Job Description, Custodian I.

Ex. 26 -

April 29, 2002 evaluation form.

Ex. 27 -

April 30, 2002 Grandview Custodial Work Complaints Areas for Improvement.

Ex. 28 -

May 1, 2002 Plan of Improvement.

Ex. 29 -

May 10, 2002 memorandum from Karen Simon to Billy Boggess.

Ex. 30 -

May 23, 2002 memorandum from Karen Simon to Billy Boggess.

Ex. 31 -

June 3, 2002 memorandum from Karen Simon to Billy Boggess, with individual room reports.Ex. 32 -
June 7, 2002 evaluation form.

Grievant's Exhibits

Ex. 1 -

Cards and notes of appreciation.

Ex. 2 -

Grandview Evening Custodian Schedule.

Testimony (See footnote 1)

The Board presented the testimony of Richard Messinger, Kriss Godfrey, Darlene Reynolds, Karen Simon, Karen Williams, and Cecil Roberts. Grievant testified in his own behalf, and presented the testimony of Ronald Bess, Patricia Munday, Sandra Shaffer, Sue McCracken, and Bruce Stanley.

Based upon a review of the testimony and evidence in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Prior to his dismissal, Grievant had been employed by the Board for approximately four years as a custodian.

2. Grievant had two half-time or .5 FTE assignments at Point Harmony Elementary and Grandview Elementary, working 3-1/2 hours at each school.

3. During his first three years as half-day evening custodian at Point Harmony, Grievant received three evaluations rating him overall “satisfactory” by his principal, Richard Messinger. However, Mr. Messinger did note some unsatisfactory areas in the evaluations, including “appearance of work area,” “attitude,” “work judgments,” “quality of work,” “acceptance of responsibility,” “work coordination,” “attendance,” and “initiative.”

4. The May 7, 2001 evaluation by Mr. Messinger contained the following comments:

> PROGRESS ACHIEVED: Billy meets and discusses his work when requested. However, we continue to have the same concerns and complaints about his work.
>
> GOALS or IMPROVEMENT PROGRAMS: 1) Better attendance; 2) Increased compliments based on general cleanliness of his assigned areas; 3) Better time management; 4) More initiative.
>
> AREAS FOR IMPROVEMENT: Although overall performance is satisfactory, if the unsatisfactory areas do not improve the overall performance will not meet satisfactory expectations. Therefore, performance between now and the end of the year will determine if a plan of improvement is initiated for 01/02.

5. Mr. Messinger evaluated Grievant again on December 14, 2001, and rated him as "unsatisfactory" overall with the following areas being marked as "unsatisfactory": "observance of work hours," "attendance," "appearance of work area," "initiative," "work judgments," "quality of work," and "work coordination." The following comments were made:

> PROGRESS ACHIEVED: At this point progress is not being made. Complaints about quality continue from personnel in areas Billy cleans.
>
> GOALS or IMPROVEMENT PROGRAMS: Overall cleanliness must improve. Especially bathroom sanitation and cleaning.
>
> AREAS FOR IMPROVEMENT: 1) Attendance must improve and staying on task when here. 2) Assigned areas must be cleaned to the point complaints end. 3) Bathrooms must be stocked and sanitary.

6. The December 14, 2001 evaluation was undertaken after Mr. Messinger had continued to receive complaints about unsatisfactory cleaning from teachers and other staff members whose areas were assigned to Grievant. A plan of improvement was initiated to assist Grievant in improving his job performance to a satisfactory level. Specificdeficiencies were identified in the plan of improvement, including a lack of reliability in attendance, not working efficiently, not adequately cleaning rooms and bathrooms, and not budgeting time properly.

7. The plan of improvement established a program to be followed by Grievant. It directed that he improve his attendance; a check sheet and inspection program was initiated; all work areas were expected to be cleaned and bathrooms sanitized; Grievant's time was to be budgeted to ensure thorough cleaning, and complaints were expected to decrease as the quality of his work increased. An improvement team was selected, and weekly conferences were to be held prior to the next evaluation at the end of March, 2002. The time line for the evaluation was extended by agreement to April 19, 2002.

8. Mr. Messinger transferred to another principalship in January, 2002, and acting principal Kriss Godfrey monitored the plan of improvement until a new principal, Darlene Reynolds, was appointed in February 2002.

9. Conferences between Grievant and the principal or assistant principal began on January 8, 2002. Conferences were held on January 8, January 18, January 25, February 21, March 1, March 15, March 22, April 5, April 12, and April 19, 2002. Inspections, checklists, and other documentation of Grievant's work were reviewed, conference forms were completed and shared with Grievant, as well as any complaints or concerns from staff.

10. Some improvement was noted during the improvement plan period, particularly in dusting, mopping, emptying trash, and cleaning bathrooms. However, by the end of the improvement period, Ms. Reynolds determined that Grievant's performance had not improved to a satisfactory level overall. In an evaluation dated April 19, 2002, Ms.Reynolds rated Grievant as “unsatisfactory” overall and in the following areas: “compliance with rules,” “safety practices,” “meeting schedules, “ ”appearance of work area, “ ”initiative,” “work judgments,” “planning and organizing,” “quality of work,” “acceptance of responsibility,” “follows instructions,” “operation and care of equipment,” “work coordination,” and “knowledge of work.” Ms. Reynolds did not recommend that Grievant continue his employment.

11. The other school to which Grievant had been assigned was Grandview Elementary, where he worked the afternoon shift. Grievant was given a work schedule which included cleaning twelve classrooms, library, computer lab, and hallways.

12. Karen Simon, Grandview principal, completed an evaluation form dated April 30, 2001, in which she rated Grievant as “unsatisfactory” overall and in the following areas: “meeting schedules,” “initiative,” “attitude,” “work judgments,” “planning and organizing,” “quality of work,” “acceptance of responsibility,” “follows instructions,” “public relations,” “employee relationships,” and “work coordination.” Her comments included:

> GOALS or IMPROVEMENT PROGRAMS: Clean classrooms properly without being told. Do not blame dirt on teachers and the other custodian.
>
> AREAS FOR IMPROVEMENT: Classrooms remain dirty. Floors are not swept daily. Dirt is left behind trash cans and on floors. Diaper pails are not emptied in the dumpsters daily.

13. Ms. Simon provided Grievant with a very detailed list of duties to be performed during his afternoon shift, and inspected his work areas on a weekly basis during the 2001-2001 school year.

She found that his classrooms were not adequately cleaned, floors were dirty, trash cans were not emptied, and bathrooms and sinks were notcleaned. She discussed these concerns with Grievant informally as needed, or would leave notes for him in his mailbox.

14. On April 29, 2002, Ms. Simon again evaluated Grievant, and found his work "unsatisfactory" overall and in the following areas: "meeting schedules," "initiative," "work judgments," "planning and organizing," "quality of work," "acceptance of responsibility," and "work coordination." Her comments included:

> PROGRESS ACHIEVED: Mr. Boggess has tried to keep his classrooms clean. Attitude has improved.
>
> GOALS or IMPROVEMENT PROGRAMS: Rooms are still not clean regularly. Often classes are not swept and bathrooms are not cleaned. Paper products are not filled.
>
> AREAS FOR IMPROVEMENT: Accept responsibility for clean classrooms and get the job done. Do not blame others.

15. An improvement plan dated May 1, 2002, was implemented by Ms. Simon, and summarized the performance deficiencies. Deficiencies included poor judgment about work to be done, not utilizing materials and supplies properly, talking to staff instead of cleaning, unacceptable levels of cleanliness in classrooms and rest rooms, responding poorly to suggestions and instructions, blaming others for poor performance; failure to adequately sweep and dust, failure to refill supplies, irregular attendance, and calling absences in too late to get a substitute. An improvement team was named, and conferences were held by Ms. Simon with Grievant. Follow-up memoranda and documentation were provided to Grievant on May 10, May 23, June 3, and June 5, 2002. Written information from teachers as to work that needed to be done in their rooms was also shared with Grievant. 16. During the improvement period, Grievant did improve the cleanliness of the sinks by learning the proper way to mix cleaners.

17. His performance did not otherwise improve, and on June 7, 2002, Ms. Simon gave Grievant another "unsatisfactory" evaluation. Specific areas marked as "unsatisfactory" were: "meeting schedules," "appearance of work area," "initiative," "work judgments," "planning and

organizing," "quality of work," "acceptance of responsibility," "follows instructions," and "work coordination." Her comments were as follows:

> PROGRESS ACHIEVED: Cleanliness of classrooms overall has not improved. Quality of custodial work has not improved on plan of improvement.
>
> GOALS or IMPROVEMENT PROGRAMS: Quality of work is unsatisfactory. Classroom cleanliness.
>
> AREAS FOR IMPROVEMENT: Quality of work.

18. Ms. Simon did not recommend continued employment for Grievant.

19. When Grievant was not at work, the substitute custodian was able to perform the job duties in a satisfactory manner in the time allotted.

20. By letter dated August 12, 2002, Superintendent Ron Duerring notified Grievant that a predisciplinary hearing would be conducted on September 4, 2002.

21. On December 20, the hearing examiner recommended to Dr. Duerring that Grievant's employment be terminated.

22. Dr. Duerring recommended to the Board that Grievant's employment be terminated at the January 7, 2003, board meeting. The Board approved the recommendation. 23. Dr. Duerring notified Grievant by letter dated January 8, 2003, that the Board had voted to terminate his employment.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. W. Va. Code § 18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee 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 Education, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

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

> [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 plea of nolo contendre to a felony charge.

The issue is whether the Board has proven, by a preponderance of the evidence, unsatisfactory performance by Grievant. The evidence, as set forth in the Findings of Fact, clearly demonstrates Grievant had been apprised of work deficiencies verbally and inwriting on an ongoing basis since March 1999, received two evaluations indicating he did not meet work performance standards in December 2001 and April 2002, and failed to meet the requirements of two separate Plans of Improvement during this time frame. Four separate administrators determined Grievant's work performance was not satisfactory. It is clear from the evidence that Grievant's job performance was unsatisfactory, that the Board followed all applicable rules and procedures in assisting Grievant, and that Grievant still failed to perform in a satisfactory manner. Therefore, the Board has proved it had sufficient grounds to terminate Grievant's employment for unsatisfactory performance.

Grievant contends his assignments were too difficult to perform given the time allotted, and that he was further handicapped by the condition the schools were left in as a result of inadequate cleaning during the summer. Grievant also contends his principals had unreasonable expectations.

There is no doubt that a school custodian's job is difficult, and oftentimes, the time allotted is not always adequate for proper and thorough cleaning. However, the evidence established that other custodians brought into to assist Grievant were able to complete the tasks more often than not, and tried to give him helpful hints to make his job easier. Oftentimes, Grievant's performance did improve after receiving help from others, but overall, his performance remained unsatisfactory. Grievant has failed to produce sufficient evidence to demonstrate that he had successfully completed his Plans of Improvement, or that it was improper for the Board to terminate his employment.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. W. Va. Code § 18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

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3. The Board has proven, by a preponderance of the evidence, that Grievant's job performance was unsatisfactory, and that he failed to successfully complete two separate Plans of Improvement, thus giving the Board sufficient reason to terminate his employment.

4. Grievant has failed to prove his job was too difficult or impossible to perform satisfactorily, or that his principals' expectations were unreasonable.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any 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 norany of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

MARY JO SWARTZ

Administrative Law Judge

Dated: August 19, 2003

Footnote: 1

The testimony includes witnesses who testified at the Board's disciplinary hearing, the transcript and exhibits of which were admitted into evidence, and incorporated into the record at level four.