JENNIFER ABRAHAM,

Grievant,

v. **Docket No. 05-23-265**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jennifer Abraham, employed by the Logan County Board of Education ("LCBOE"), filed the following grievance on August 8, 2005:

> Grievant is a regularly employed custodian. She contends that Respondent has erred as a matter of law and fact in suspending her for two days without pay. Grievant alleges a violation of W. Va. Code §§ 18A-2-8, 18A-2-12a, and W.Va. Bd. of Ed. Policy No. 5300.
>
> Relief Sought: Grievants [sic] seek compensation for all lost wages and removal of references to her suspension without pay from her file.

As this was a disciplinary action, this grievance was filed directly to Level IV. A Level IV hearing was held on October 3, 2005, and this case became mature for decision on November 3, 2005, after receipt of Grievant's proposed findings of fact and conclusions of law. Respondent elected not to submit these proposals. (See footnote 1)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is a probationary employee working as a custodian at Mann Central K-8. 2. Grievant started the 2004 - 2005 school year at Mann Central, but only worked a couple of months before she was off on medical leave. She returned to work in mid to late January 2005. Her

work assignment was comparable to other custodians at Mann Central.

3. Principal Garland Elmore completed an observation of Grievant's work performance on February 7, 2005. Out of 25 areas, he rated Grievant as "Needs attention" in eight areas. Grievant did not use her work time wisely or establish a work schedule, did not perform assigned duties, needed close supervision, and did not demonstrate a willingness to work during emergency situations. This observation and Grievant's deficiencies were discussed with her on February 7, 2005.

4. On February 8, 2005, Principal Elmore gave Grievant a schedule for scrubbing and waxing her assigned areas.

5. After a conference about Grievant's work performance, Principal Elmore followed this discussion with a letter dated February 17, 2005. This document outlined his concerns and identified "the area[s] for improvement." Principal Elmore identified Grievant's problem areas, and noted another observation would be conducted to ensure these identified problem areas had been corrected. Principal Elmore then listed suggestions to assist Grievant in performing her duties. He noted the job required flexibility to complete additional, assigned duties from time to time. On February 25, 2005, Grievant signed this letter under a statement which said "I understand that a second observation will be conducted to document what further action is to be taken concerning my employment."

6. After this conference and letter, Grievant did not improve and numerous conferences, several counseling sessions, and two written reprimands followed. Thewritten reprimands were not grieved. At the time of the last written reprimand, Principal Elmore informed Grievant he would seek more severe disciplinary action if she did not improve her performance.

7. During the Spring of 2005, Mann Central received a negative report from the West Virginia School Building Authority. The areas cited as unclean were Grievant's.

8. Principal Elmore assigned other custodians to assist Grievant in learning how to do her job, such as how to clean a restroom.

9. Grievant's performance still did not improve.

10. On May 9, 2005, Principal Elmore informed Grievant he intended to ask Superintendent David Godby to suspend Grievant for two days, because of her failure to improve her performance.

11. On May 20, 2005, Principal Elmore conducted Grievant's second observation. Out of 25

areas, he rated Grievant as "Needs attention" in nine areas. Grievant still did not use her work time wisely, establish a work schedule, perform duties as assigned, and demonstrate a willingness to work during emergency situations. She still required close supervision. This observation was directly followed by her evaluation on the same date. Grievant's performance was unsatisfactory as she "Did not meet standards." Grievant did not comply with rules, accept responsibility, and use good work judgment.

12. On a date not specified in the record, Superintendent Godby met with Grievant to discuss the recommended suspension. After this discussion, Superintendent Godby decided to go forward with the suspension.

13. Grievant was suspended for two days and upon her return to work in August 2005, she was given an Improvement Plan. Although the original plan was for thesuspension to be served on May 20 & 23, 2005, it does not appear the suspension actually occurred on these days as the observation and evaluation were discussed with and signed by Grievant on May 20, 2005.

14. By letter dated July 27, 2005, LCBOE stated that after conducting a hearing on the suspension issue, it had decided to uphold the suspension.

15. Grievant reported that a former principal in a prior school year "gave her a hard time" and rated her performance as unsatisfactory, but Grievant believed this principal was wrong.

Issues and Arguments

Although Respondent did not submit proposals post-hearing, it asserted at hearing that Grievant's performance had been unsatisfactory for the entire year, and Grievant was well aware of her need for improvement through the observations, counseling sessions, written reprimands, and other letters.

Grievant advances several arguments. The first assertion is her performance was satisfactory for the 2004 - 2005 school year. The second argument is that it is a violation of W. Va. Code §§ 18A-2-8 & 18A-2-12a and Policy 5300 to suspend Grievant for unsatisfactory performance without first putting her on an Improvement Plan. (See footnote 2)

Respondent did not address the alleged Policy 5300 violation.

Discussion

___In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ.,

Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence 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 proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

The first issue to be addressed is whether Grievant's performance was satisfactory. It is clear from the documents presented and the testimony given that Grievant did not satisfactorily complete her custodial duties during the 2004 - 2005 school year.

The second issue to address is whether LCBOE violated W. Va. Code §§ 18A-2-8 & 18A-2-12a and/or Policy 5300 when it suspended Grievant for unsatisfactory performance without first placing her on a formal Improvement Plan. W. Va. Code § 18A-2-8 discusses the suspension and dismissal of school personnel and states 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, 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. . . .

(Emphasis added).

W. Va. Code § 18A-2-12a (b)(6) states:

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services.

> Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion. . . .

Policy 5300 at § 2.6:

> Every employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/her job performance, prior to the terminating or transferring of his/her services, and can only do so with the assistance of regular evaluation. (See footnote 3)
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> It is clear Grievant did not receive a formal Improvement Plan until after she returned from her two-day suspension. Accordingly, the question raised by this grievance is whether Grievant received an "open and honest evaluation of [her] performance on a regular basis" so that she was aware of "how well [she was] fulfilling [her] responsibilities," and whether she was given an "opportunities to improve [her] job performance, prior to the [suspension]." W. Va. Code § 18A-2-12a (b)(6). See Policy 5300 at § 2.6.

The undersigned Administrative Law Judge finds Grievant received "regular evaluation[s]" as required by W. Va. Code § 18A-2-12a (b)(6) and Policy 5300, and these evaluations put Grievant on notice that her job performance was not satisfactory. After the observation on February 7, 2005, Principal Elmore discussed the "Needs attention" areas with Grievant. He then followed this discussion with a letter dated February 17, 2005, explicitly identifying the areas needing improvement, which Grievant signed on February 25, 2005. Subsequently, Principal Elmore had additional discussions with Grievant, and assigned other custodians to demonstrate to her how to perform the duties of the position. When these actions did not result in change, Principal Elmore issued two written reprimands, again placing Grievant on notice that her performance was not acceptable. No change resulted from these written reprimands. The record reflects Grievant was told what she was to suppose to do, and was given an opportunity to improve. She did not, and because of this failure she was suspended for two days. While LCBOE could have placed Grievant on a formal Improvement Plan prior to her suspension, in this case it is not required.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ.,

Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence 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 proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

2. All board of education employees are entitled to know how well they are performing their jobs, and should receive open and honest evaluations on a regular basis. Additionally, employees should receive the opportunity to improve their job performance, prior to disciplinary action. W. Va. Code § 18A-2-12a (b)(6). See Policy 5300 at § 2.6. 3. The requirements of W. Va. Code § 18A-2-12a (b)(6) and Policy 5300 were met in this set of facts, as Grievant was given notice of her deficiencies and opportunities to improve prior to her suspension.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Logan 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 nor any 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: December 16, 2005

Footnote: 1

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and LCBOE was represented by Leslie Tyree, Esq.

Footnote: 2

Grievant also asserted Principal Elmore was required to make an hourly, daily schedule for Grievant because she had time management problems. As no source was cited for this requirement, it will not be addressed further.

Footnote: 3

The Grievance Board includes suspensions in this language.