THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ANN ROMANO,

Grievant,

v.

DOCKET NO. 2008-1504-MrnED

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant, Ann Romano, at level three of the grievance procedure, on April 29, 2008, contesting the termination of her employment by the Marion County Board of Education ("MBOE"). The statement of grievance reads:

> Ann Romano was employed as an LPN/Aide by Respondent. She was terminated at the BOE meeting on April 22, 2008. Grievant contends that Respondent erred in terminating her for the following reasons:
>
> a. Respondent violated Grievant's due process rights by:
>
> i. Failure to permit Grievant an opportunity

to respond to the charges against her;

ii. Failure to grant Grievant the opportunity for an open hearing; and;

iii. Failure to state the charges upon which Grievant was terminated with appropriate specificity.

b. Grievant was not guilty of any misconduct which would justify termination; [and]

c. Grievant alleges disparate treatment/discrimination and reprisal. (See footnote 1)

The relief sought by Grievant is:

a. reinstatement to her position

b. restoration of all benefits, pecuniary and nonpecuniary;

c. compensation for all lost wages;

d. compensation for all lost benefits; and;

e. removal of all references to her termination from her personnel file.

A level three hearing was held before the undersigned Administrative Law Judge on July 21, 2008, in the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Stephen R. Brooks, Esquire. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on August 4, 2008. (See footnote 2)

Synopsis

Grievant was terminated from her employment as a special education aide/LPN, when she was not able to successfully complete a Plan of Improvement. Grievant did not receive a formal evaluation prior to the recommendation to terminate her employment. W. Va. Code § 18A-2-8 requires county board of education personnel to complete a formal evaluation of the employee's performance prior to the recommendation to terminate her employment. Respondent was aware of this requirement. Despite Grievant's difficulties in learning her job responsibilities, Respondent simply did not do what

the statute requires, and consequently, the undersigned has no choice but to grant this grievance.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant was employed by the Marion County Board of Education ("MBOE") as a special education aide/LPN. She began her full-time employment with MBOE in 2006, and had not yet attained continuing contract status. She was a probationary employee.

2. At a meeting of MBOE held on November 7, 2007, Grievant's transfer from Barrackville School to East Fairmont High School was approved. Grievant began working at East Fairmont High School on December 10, 2007. She was assigned full-time to monitor the health situation of a diabetic, special education student, and care for his medical needs.

3. In order to properly care for the student to whom she was assigned, Grievant was required to understand and monitor the student's diabetic condition at all times, and understand how to properly respond to his health situation. She was required to learn how to use an insulin pump with the student.

4. When Grievant began working at East Fairmont High School, she did not understand the symptoms of hyperglycemia and the proper administration of glucagon. She had difficulty understanding carbohydrate calculations. It was essential to the proper care and monitoring of the student that Grievant understand all of this.

5. Dawn King, LPN, was temporarily assigned to train and assist Grievant in her new assignment at East Fairmont High School. Ms. King had been assigned to work with the same student before Grievant. Grievant was also assisted by Laura Bennett, a Certified School Nurse employed by MBOE.

6. Grievant was required to report to work by 8:30 a.m. It was especially important for her to report to work on time, because of the student's health condition. Hisblood sugar level had to be checked each morning between 8:30 a.m. and 9:00 a.m. Grievant reported to work late her first four days at East Fairmont High School, and continued after that time to report to work late on occasion.

7. Grievant used her cell phone in the classroom to which the student was assigned on more than one occasion, in non-emergency situations. Cell phones are not to be used in the classroom, and Grievant was aware of this.

8. After working with the student for several weeks, Grievant was not able to demonstrate a basic understanding of diabetic management, or that she had the skills necessary to properly care for the student to whom she was assigned.

9. On January 15, 2008, Grievant was placed on a Plan of Improvement, with all deficiencies to be corrected by February 15, 2008. The areas in which her performance was unsatisfactory were: “1. Ability to follow instructions. 2. Acceptance of responsibility. 3. Appropriate relationships with fellow employees. [and] 4. Observation of work hours.”

10. After working with Grievant for a short period of time, Ms. King was placed in another assignment. During the improvement period, Ms. King returned to East Fairmont High School to assist Grievant in learning to perform her duties, and to help her to successfully complete the Plan of Improvement.

11. Grievant was not able to correct the deficiencies noted in the Plan of Improvement by February 15, 2008. The Plan of Improvement was extended. Grievant was assigned to observe Ms. King during the educational phase of the Plan of Improvement, from February 13 through 29, 2008. Ms. Bennett was also to provide instruction as needed during this time. Grievant was to begin demonstrating her ability to make patient care decisions during the implementation phase, from March 1 through 14,2008, with Ms. Bennett monitoring Grievant. Grievant was not to take any action with regard to the student without supervision.

12. On March 12, 2008, Grievant, without supervision or approval, checked the student's finger stick reading, and directed the student to begin administering insulin from his pump. This was a violation of the Plan of Improvement. Grievant understood that she was not to work with the student without supervision.

13. At the conclusion of the improvement period, Ms. Bennett did not trust Grievant's judgement, and did not feel she could safely leave the student in Grievant's care. Grievant had not demonstrated to Ms. Bennett that she had the basic skills necessary to safely care for the student.

14. No formal evaluation of Grievant was completed either before the Plan of Improvement was implemented, or after the end of the improvement period.

15. Grievant was notified by James B. Phares, Superintendent of Schools, MBOE, by letter dated April 7, 2008, that he was suspending her without pay, effective April 7, 2008, pending a decision by MBOE on his recommendation that her employment with the board be terminated. The

stated reason was Grievant's failure to comply with the Plan of Improvement. This letter notified Grievant that the recommendation that Grievant be dismissed would be considered at a meeting of MBOE on April 22, 2008, and that Grievant had the right to present evidence and witnesses at the meeting.

16. The parties appeared before MBOE on April 22, 2008, prepared to go forward with a hearing on the Superintendent's recommendation. MBOE's counsel asked that the hearing be closed, because the name of a student attending Marion County Schools was included in the documents to be placed into evidence, and that student's name, as well asthe health conditions of students would be discussed in the presentation of the evidence against Grievant. Grievant had brought with her two acquaintances for moral support, and asked that they be allowed to attend the hearing. Board Member James Saunders was presiding, and stated that the hearing would be closed, and that no member of the public would be allowed to attend, which would include Grievant's two acquaintances. Grievant and her counsel then stated Grievant did not want a closed hearing, and the hearing was not held.

17. MBOE voted at the April 22, 2008 meeting to terminate Grievant's contract of employment, effective immediately. (See footnote 3)

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *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 West Virginia Code § 18A-2-8, 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). West Virginia Code § 18A-2-8 provides that “[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 contendre to a felony charge." In the instant case, Respondent dismissed Grievant for unsatisfactory performance.

The first issue which will be addressed is Grievant's contention that her due process rights were violated. Grievant argued she had a right to an open hearing before MBOE, and MBOE violated her due process rights when it denied her request that the hearing be open to the public. MBOE offered Grievant a closed hearing, but she specifically waived the right to a hearing that was closed to the public. In support of her position that her due process rights were violated, Grievant cited West Virginia Code § 18A-2-12a(b), which addresses when meetings of a county board of education may be closed to the public.

An individual's due process rights derive from the United States Constitution. West Virginia Code § 18A-2-12a(b) provides the statutory scheme for conducting meetings of a county board of education. It does not define, enlarge, or limit an individual's Constitutional rights. If the cited statute required the meeting of MBOE in this case to have been open, the fact that MBOE refused to allow the hearing to be open to the public wouldhave violated the statute, but the statutory violation does not create a due process violation.

"An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Supreme Court of Appeals of West Virginia, in *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment.

> It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. at Syl. Pt. 3.

Goldstein v. Dep't of Health and Human Res., Docket No. 2008-1061-DHHR (May 23, 2008). There is no constitutional right to a hearing that is open to the public, and certainly, Grievant could have

been advised of the evidence against her just as well in a closed proceeding as in one which was open to the public. Grievant was offered a hearing, which is all that is required. She waived her right to the hearing which was offered, and cannot now claim a due process violation.

Grievant argued she should have received an evaluation prior to her placement on an improvement plan, and again prior to the decision to terminate her employment. Respondent argued that, "[t]he Plan of Improvement, its Addendum, and the almost daily monitoring, training, and supervision of Ann Romano more than satisfies the need for an evaluation to have been conducted." Respondent's Post-Hearing Memorandum of Marion County Board of Education and Proposed Finding and Conclusions, at page 6. Respondent is incorrect in its analysis.

> "Failure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board 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. Board of Education of the County of Wayne*, 163 W. Va. 1, 254 S.E.2d 561 (1979).

Syl. pt. 2, *Hosaflook v. Nestor*, 176 W. Va. 648, 346 S.E.2d 798 (1986). Policy 5300 follows the requirement of West Virginia Code § 18A-2-8(b), which specifically states that "[a] charge of unsatisfactory performance *shall not* be made except as the result of an employee performance evaluation pursuant to section twelve [§ 18A-2-12] of this article." (Emphasis added.) The Grievance Board has specifically stated that in order to prove a charge of unsatisfactory performance, Respondent must demonstrate it has complied with West Virginia Code § 18A-2-8. *Potoczny v. Marion County Bd. of Educ.*, Docket No. 99- 24-344 (June 12, 2000). The Administrative Law Judge in the *Potoczny* decision made clear that one of the requirements of West Virginia Code § 18A-2-8 with which Respondent *must* comply is completion of an evaluation prior to the decision to dismiss the employee.

> Respondent has provided no evidence that any evaluations have been performed since [Grievant's last satisfactory evaluation], or at any time since July of 1999, when the specific incidents for which Grievant was ultimatelydismissed occurred. Accordingly, [Respondent] cannot sustain a charge of unsatisfactory performance.

Id. However, where Respondent has attempted to correct performance through the use of an improvement plan, and it later becomes apparent that the employee's deficiencies are not performance issues, but are "the result of a deliberate refusal to expend effort or comply with clear

and proper instructions from his supervisor," Respondent is "not required to conclude the improvement period with a formal evaluation." *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-141 (Aug. 24, 1995). In such instances, the charge upon which the dismissal is based is not unsatisfactory performance, but rather, insubordination and/or wilful neglect of duty. *Id.*

Grievant was terminated for unsatisfactory performance when she was unable to improve her performance after being placed on a Plan of Improvement. There is no question that Grievant did not receive a formal evaluation prior to the recommendation to terminate her employment. It is further clear that Respondent was required to complete a formal evaluation of Grievant's performance prior to the recommendation to terminate her employment, and that Respondent was aware of this requirement. It is obvious that an improvement plan itself is not an evaluation, and does not satisfy the need for an evaluation. *Potoczny, supra.* West Virginia Code § 18A-2-12 specifically defines the distinct purposes of the two. Daily monitoring, training, and supervision likewise are not the same as a formal evaluation of the employee's performance. School service personnel have many statutory rights, and it is imperative that a board of education be aware of and comply with the statutory requirements. Despite Grievant's difficulties in learning her jobresponsibilities, Respondent simply did not do what the statute requires, and consequently, the undersigned has no choice but to grant this grievance. (See footnote 4)

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in West Virginia Code § 18A-2-8, 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).

3. West Virginia Code § 18A-2-8 provides that "[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 contendre to a felony charge."

4. "A charge of unsatisfactory performance *shall not* be made except as the result of an employee performance evaluation pursuant to section twelve [§ 18A-2-12] of this article." W. Va. Code § 18A-2-8(b). (Emphasis added.)

5.

> "Failure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board 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. Board of Education of the County of Wayne*, 163 W. Va. 1, 254 S.E.2d 561 (1979).

Syl. pt. 2, *Hosaflook v. Nestor*, 176 W. Va. 648, 346 S.E.2d 798 (1986).

6. In order to prove a charge of unsatisfactory performance, a county board of education must demonstrate it has complied with West Virginia Code § 18A-2-8. *Potoczny v. Marion County Bd. of Educ.*, Docket No. 99-24-344 (June 12, 2000). Specifically, a county board of education *must* complete an evaluation of the employee prior to the decision to dismiss the employee in order to sustain a charge of unsatisfactory performance. *Id.*

7. Respondent did not comply with the requirements of West Virginia Code § 18A-2-8 when it failed to complete a formal evaluation of Grievant's performance.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to reinstate Grievant as a probationary employee, and to pay her all back pay and benefits to which she is entitled from the date her employment was terminated to the date her employment is reinstated.

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. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

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BRENDA L. GOULD

Administrative Law Judge

Date: December 16, 2008

Footnote: 1

Grievant did not present any evidence comparing herself to some other employee who had been treated differently than her; therefore, her claim of disparate treatment/discrimination is without merit. She likewise presented no evidence of a prior grievance filed by her to support her claim of reprisal.

Footnote: 2

As agreed to by the parties, after the hearing Respondent submitted the letter notifying Grievant of MBOE's decision to terminate her employment. That letter has been marked as Joint Exhibit A, and is ORDERED ADMITTED into the record.

Footnote: 3

Because Grievant's contract was terminated immediately, before her annual, probationary contract ended, which MBOE could have chosen not to renew, it is of no consequence to the analysis that Grievant was a probationary employee; and the parties did not argue that Grievant's probationary status was a factor to be considered by the undersigned.

Footnote: 4

It is not necessary to address Grievant's claim that the charges against her were not stated with sufficient specificity. However, the April 7, 2008 letter suspending Grievant and advising her of the Superintendent's intent to recommend her termination clearly stated the reason as the failure to comply with the Plan of Improvement.