THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN DANIEL BENNETT,
Grievant,

v. **DOCKET NO. 2013-1481-CONS**

TUCKER COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Two grievances were filed by Grievant, John Daniel Bennett, contesting his placement on an improvement plan and the subsequent termination of his employment by the Tucker County Board of Education. The grievance contesting the placement on an improvement plan was filed at level one of the grievance procedure on November 3, 2012. The statement of grievance reads:

> Grievant alleges harassment[1] (W. Va. Code 6C-2-2) and contends that he has been : (1) unfairly criticized about his job performance; (2) burdened by additional "out of schedule" duties; (3) unfairly compared with the previous custodian; (4) coerced to sign an improvement plan without sufficient time to study it; and [(5)] burdened with additional "on schedule" duties taken from the other custodian at the school and added to Grievant.

As relief Grievant sought: "to be assigned a reasonable work schedule, uninterrupted lunch time and breaks, the opportunity to bring a witness to any meetings concerning the performance of his duties, and reduction to writing of all orders to perform additional 'off schedule' assignments."

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[1] Grievant did not address the claim of harassment either at the level three hearing or in his post-hearing written argument. Accordingly, this specific allegation is deemed abandoned and will not be addressed.

A hearing was held at level one on this grievance on October 29, 2012, and a decision denying the grievance was issued on November 26, 2012. Grievant appealed to level two on December 4, 2012. Prior to the mediation session, Grievant's employment was terminated for unsatisfactory performance, and on February 1, 2013, he filed a second grievance at level three of the grievance procedure. The statement of grievance reads:

> Respondent terminated Grievant's employment on the basis of unsatisfactory performance. Grievant alleges that the duties of his position were too numerous and difficult to permit completion during a regular work day. Grievant contends that his performance was adequate with regard to both quantity and quality of work performed. Grievant alleges a violation of W. Va. Code 18A-2-8.

The relief sought by Grievant is, "reinstatement with compensation for all lost wagews [sic] and beenfits [sic] with interest. Grievant also seeks to have his record expunged of all references to his evaluation, plan of improvement, suspension without pay and termination."

By Order dated March 12, 2013, the two grievances were consolidated at level three, and a level three hearing was held before the undersigned Administrative Law Judge on May 24, 2013, in Elkins, West Virginia. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on June 26, 2013.

Synopsis

Grievant was terminated from his employment as a Custodian for unsatisfactory performance, after he did not successfully complete an improvement plan. Grievant

challenged the imposition of the improvement plan and his subsequent termination. Grievant did not demonstrate that his performance was such that he should not have been placed on an improvement plan. Respondent demonstrated that Grievant had failed to improve his performance at the conclusion of the improvement period, and that, in addition to the fact that he was unable to complete his assigned tasks, the quality of his work was not acceptable.

The following Findings of Fact are made based upon the record developed at levels one[2] and three.

Findings of Fact

1. Grievant was employed by the Tucker County Board of Education ("TBOE") as a Custodian. Grievant began working at Davis Thomas Elementary School at the beginning of the 2012-2013 school year, August 20, 2012, and his work hours were 6:00 a.m. to 2:00 p.m. This was his first time in a regular assignment. Prior to this he had been employed by TBOE as a substitute Custodian for four years.

2. Grievant was provided a schedule of his duties when he began working at Davis Thomas Elementary Middle School. There are approximately 200 students at the

[2] The transcript of the level one hearing did not include the exhibits noted as introduced at the hearing. The parties were notified of this and could not locate the exhibits. Exhibits 1 and 2 were also introduced at the hearing before the Board of Education, which was made part of the record at level three as Respondent's Exhibit Number 1. The parties did not recall marking any other exhibits at level one, although the transcriptionist made note of two other unidentified exhibits in the index. The parties noted that the transcript does not make mention of what Exhibits 3 and 4 were, although there is a reference that Principal Daryla Rapp's notes should be made part of the record. These notes were also made part of the record at the hearing before the Board of Education. The parties did not see a need to supplement the record with any additional Exhibits. The reference in the index to the transcript to Exhibits 3 and 4 at level one is determined by the undersigned to have been an error.

school in kindergarten through eighth grade. The 11 classrooms are located in 2 wings. Grievant's schedule of duties to be performed on a daily basis were cleaning all the desks in all classrooms, and the tables in some of those classrooms, while there were no students in the rooms; cleaning the 4 bathrooms; taking out all the trash throughout the day; setting up and taking down tables for breakfast and lunch and cleaning up the area where the students ate, including sweeping and mopping the floors; and turning on lights and unlocking and locking doors. In addition to his daily duties, Grievant had additional duties to be performed on occasion, and as the day shift Custodian, Grievant was on-call to clean up spills and accidents that occurred during the day, and miscellaneous duties such as locking and unlocking doors for staff when needed. It was Grievant's experience that these interruptions were an almost daily occurrence. In addition to the classrooms, there is a gymnasium/cafeteria, science lab, teachers' workroom, and computer lab.

3. When students arrive at the school on the earliest buses, they are served breakfast in the cafeteria. Grievant was responsible for cleaning up after this meal. Starting with the 2012-2013 school year, a second breakfast was added to the schedule around 9:00 a.m., which is served in the classrooms. Grievant was responsible for picking up the trash left out in the hallways from this second breakfast, and cleaning up any classroom spills. Because of this second breakfast, Grievant was only required to put out, clean, and put away three tables in the morning rather than the eight that the previous day shift Custodian had been putting out.

4. A second Custodian is employed by TBOE at Davis Thomas Elementary Middle School, who works the evening shift. This Custodian is not required to clean the bathrooms or take any trash to the dumpster. Grievant found an old schedule for the night

shift Custodian that had some duties marked out that had been assigned to the day Custodian. These duties had been switched from the night shift Custodian to the day shift Custodian many years before Grievant was placed in this position.

5. Grievant's supervisor was Daryla Rapp, Principal of Davis Thomas Elementary Middle School. At a staff meeting on September 20, 2012, many staff members complained to Principal Rapp that student desks were not being cleaned. Principal Rapp also either observed or was told by staff that bathrooms were not being cleaned, trash in the office areas was not being taken out daily, trash had piled up in the science lab, and mops and rags had been left in the washer. Principal Rapp observed that feces was stuck on the side of the teachers' workroom toilet for several days. Principal Rapp spoke with Grievant about these issues sometime prior to September 21, 2012, explaining to him that the desks were to be cleaned everyday. When Grievant responded that he did not have time to do so, and asked if some duties could be shifted to the night Custodian, Principal Rapp told him to go get a bucket of soapy water and start cleaning desks in the preschool room. Principal Rapp saw no evidence that Grievant had done as she requested. With regard to the mops and rags in the washer, these were left for Grievant by the night shift Custodian, and Grievant told Principal Rapp that the night shift Custodian should have taken care of these. Principal Rapp declined to change Grievant's duties, and told Grievant that the previous Custodian was able to get all the work done.

6. On September 28, 2012, the night shift Custodian reported to Principal Rapp that the trash inside the gymnasium door had not been emptied since September 25, 2012. Principal Rapp observed that the trash had not been emptied in the boys' or girls' main bathroom for three days. On that same day Grievant left a bucket of dirty water and rags

hanging on a hook in the custodial closet when he left, and trash had not been cleaned out from beneath the bleachers.

7. On October 1, 2012, Principal Rapp checked the primary rooms and found that desks had not been cleaned.

8. On October 5, 2012, Principal Rapp used Comet on the brown stain that had been in the sink in the teachers' workroom bathroom since the beginning of school, and most of the stain disappeared.

9. Principal Rapp observed that the trash bags had not been changed in the trash cans for several days in various places during the first part of October, and concluded from this that the trash had not been taken out by Grievant.

10. On October 9, 2012, Grievant met with Principal Rapp and Jonathan Hicks, TBOE's Director of Support Services, regarding his work performance, and he was placed on an improvement plan for the period October 9 through 30, 2012. The improvement plan identified performance deficiencies as:

> Daniel Bennett does not meet the Work Habits and Performance by not maintaining a high quality of work in his assigned building as a Custodian. Specifically he does not:
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> . Clean classrooms, hallways, restrooms, office, & etc. as assigned on his Custodial Responsibility sheet.
> . Trash is not removed from all assigned areas on a daily basis as it should be
> . Students desks in all classrooms are not being cleaned on a daily basis as assigned
> . Custodial closet and equipment are not being sufficiently cleaned

The improvement team members were identified as Principal Rapp and Mr. Hicks. The Corrective Action to be taken was as follows:

1. Daniel Bennett will submit a weekly check list of duties performed in accordance to the improvement plan timeline. A list of duties that must be completed daily will be given to the employee. Employee is to submit daily to the principal the check list of duties completed that day as well as a timeline of when duties were completed. I[f] duties aren't complete and explanation of "why" is to be submitted to the principal.
2. Improvement Team members will be doing spot checks during the time frame.
3. ***Previous custodian for this school** will work with Daniel Bennett for 1 day to assist him in planning his day to enable him to complete his duties. * Amended - Director of Support Services, Jonathan Hicks will...

11. Grievant did not sign the improvement plan because he did not agree that his performance was deficient. Grievant was allowed to take the improvement plan home overnight to review it. Although he was asked several times by Principal Rapp over a period of time to sign the improvement plan, Grievant never did sign it.

12. The list of duties to be completed everyday were as follows: open all classroom doors, computer lab and office doors; turn lights on in gymnasium; turn on pump; put down lunch tables for breakfast and unlock kitchen door, "get cart with pan and place in gym in line with the row of trash cans. Get the small white table and 2 chairs from behind cabinet and set up near the cook's window;" unlock outside door for trash removal; clean both shower room bathrooms and mop and check soap and towels; check soap and towels in main bathrooms; clean toilets, sinks, mirrors and floors in four bathrooms in k-4 wing; unlock main entrance at 6:50 a.m.; clean desks in classrooms until 8:00 a.m.; breakfast clean-up in gymnasium and empty trash as needed; clean tables and put them away, sweep and wet mop gymnasium floor and take trash to dumpster and reline cans by 8:05 a.m.; lock entrance doors at 8:05 a.m.; clean other desks before second period; pick up trash from second breakfast; clean out trash from under bleachers; clean trash

cans as needed, vacuum rugs, clean stainless steel splash guard in kitchen when dirty, and clean yellow mats near kitchen; “try to run scrubber or dust mop top half of gym at least once a week;” clean windows, change lights bulbs, and stock supplies from furnace room; at 10:55 a.m. put out tables for lunch and pick up trash in k-4 hall, girl’s restroom, all classrooms and teachers’ workroom; get food trays from students and stack in cook’s window; sweep under tables before second lunch, take bags to dumpster, and damp mop around trash cans; clean off tables in art room; pick up trash in 5-8 hall activities room, band room, office area and all other classrooms; and clean gymnasium after lunch, fold tables, mop, remove lunch trash, line cans and set them on bleachers.

13. On October 12, 2012, Principal Rapp observed that combs from picture day, which was October 3, 2012, were still in one of the trash cans. On many days from October 2012 through January 2013, Principal Rapp made notes that trash cans had not been emptied, but on some of these occasions the notes reflected that her check was made early in the day, and on many of these occasions her notes reflect that the basis for this conclusion is that the same bag was in the can as had been in it the previous day or days. Principal Rapp was able to determine if the bag had not been removed because she would mark the bags.

14. Grievant did not take the trash out of the cafeteria/gymnasium at the end of the day if he had done so in the morning. He also did not remove the trash from the teachers’ workroom after the teachers had lunch if he had taken the trash out in the morning. It was his practice, until Mr. Hicks observed his work in mid-October 2012, to remove and replace the trash bags in the cans when he emptied the trash. Mr. Hicks suggested to Grievant that if there was not much in the can he could just empty the bag

into another bag rather than replacing the bag every time, and Grievant did this for awhile. Later in the year, however, he went back to taking the bag out of every trash can and replacing it with a new bag when he emptied the trash.

15. Grievant asked Principal Rapp what he should use to clean the desks and she told him to use soapy water. Grievant testified at the hearing before the Board of Education, "[i]f you want me to take extra time to wipe [the desks] off, I would be glad to do it, but that takes extra time." Respondent's level three exhibit number 1, p. 108.

16. At the end of the first day of the improvement period, Grievant did not turn in to Principal Rapp a checklist of the duties he had completed that day, and Grievant left that day without removing the trash from the boys' bathroom and the entrance to the gymnasium. By letter dated October 16, 2012, Principal Rapp notified Grievant that he had violated corrective action item number one of the improvement plan by not turning in a copy of his checklist on October 9 or 15, 2012. During the improvement period, Grievant turned in a checklist of duties completed for the day at the end of only six work days.[3]

17. Mr. Hicks supervised Grievant's work one day during week number two. Grievant was unable to finish every task on his schedule that day, even though he had no unexpected interruptions. It was Mr. Hicks' conclusion that Grievant was unable to complete his work because he did not stay on task and did not work efficiently. Mr. Hicks'

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[3] Grievant testified, "I may not have turned in every single one, but that's because I didn't know what was going on. I didn't know - - I couldn't get any answers on what was going on. All they would tell me was, '[w]ell, you're on an improvement plan.' You know, '[y]ou're not doing what you're supposed to.' Well, I'm trying. You know, I don't have time to sit there and write on the - - I mean, if it don't get done during the day, there's a reason for it, because I've got a prior duty. And I don't know about - - there should've been more than six. I know that much. . . . After it got to her [Principal Rapp's] box, I don't know what happened to it." Respondent's level three exhibit number 1, p. 111.

recommendation to Grievant during the course of the day was to focus on getting the areas that had been identified by Principal Rapp as priorities cleaned. Mr. Hicks noticed that Grievant was not using his time efficiently, and he specifically recommended to Grievant that he take his cart with him as he cleaned the desks so that he could clean the bathroom in the wing after he cleaned the desks, instead of going back to the custodial closet and going back to that wing later. Grievant, however, chose not to incorporate this suggestion into his routine, because it did not seem right to him to be cleaning desks and bathrooms at the same time, and because he could not carry the water buckets at the same time as he pushed the cart. Mr. Hicks also observed that Grievant was not working at a reasonable pace. For example, when Grievant was cleaning the desks, the water in his bucket had to be changed frequently. Rather than use other sinks in the building to change the water, Grievant would walk back to the custodial closet each time. Mr. Hicks characterized Grievant's trips back and forth as, "he just walked slow." Respondent's level three exhibit number 1, p. 94. Mr. Hicks told Grievant that the goal was to get the duties completed, and in order to do so, he needed to pick up the pace. Grievant did not get all the bathrooms cleaned that day, nor did he get all the desks cleaned.

18. Mr. Hicks had no prior experience supervising custodial staff. Grievant did not believe that Mr. Hicks should have been giving him pointers on how to do a better job, because Grievant did not believe Mr. Hicks understood Grievant's job.

19. On October 23, 2013, Grievant met with Principal Rapp and Mr. Hicks to discuss the progress made on the improvement plan. Principal Rapp gave Grievant a letter at that time noting that on October 9, 2012, spot checks of the trash cans in the boys' bathroom and inside the gymnasium revealed that they had not been emptied daily as

directed; on October 11, 2012, a spot check revealed that the trash cans had not been emptied in the teachers' workroom, science lab, gymnasium, or the boys' and girls' bathroom; the teacher in room 22 had reported that her tables had not been cleaned; checklists had not been submitted on October 9 and 15; and the checklists submitted on October 9[4] and 11 were inaccurate because Grievant had marked that desks were cleaned.

20. On October 1, 2012, Grievant had asked Principal Rapp who to talk to about filing a grievance, and she did not know. Grievant told Principal Rapp he would go to the Board of Education Office to inquire about this. He then called for a substitute and went to the Board of Education office. Grievant did not inform Principal Rapp or any other personnel in her office that he was leaving the work site to go to the Board of Education office, and Principal Rapp did not understand Grievant to mean that he was leaving the building.

21. On October 16, 2012, Grievant reported to work, but called for a substitute at 6:40 a.m. and left work without notifying Principal Rapp or any other personnel in her office.

22. From the beginning of the 2012-2013 school year, through October 29, 2012, Grievant missed 18 days of work. From September 16 through October 29, 2012, he was absent from work on September 18, 24, and 25, October 2, 5, 8, 10, 17,18, 19, 22, and 29, 2012.

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[4] It is unclear what date is being referred to since the letter states that a checklist was not submitted for October 9, 2012.

23. On November 14, 2012, Principal Rapp extended the period of the improvement plan to December 3, 2012, due to Grievant's absences during the improvement period.

24. On November 7, 2012, Principal Rapp checked the Functional Emergency Lighting record, on which the day shift Custodian is to mark that he has checked all the emergency lighting each month to make sure all the lights are working, and discovered that it had not been completed for the month of October 2012 by Grievant. When Principal Rapp checked this record again on November 26, 2012, it had still not been completed by Grievant for October 2012, nor had November 2012 been completed.[5]

25. On November 27, 2012, Principal Rapp noted that there was trash under the bleachers, and on November 28, 2012, the trash was still under the bleachers. She also noted on November 28, 2012, that there was feces on the "K" toilet, and that the boys' shower room "reeks of stale urine and it is visible on the floor around the toilet." On November 29, 2012, Principal Rapp noted that the feces she had observed on the "K" toilet was still there, and that two staff members had reported that there was trash under the bleachers. Several times after this, Principal Rapp noted that there was trash under the bleachers.

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[5] Grievant testified that he had filled out these reports, although he did not clearly state that he had done so for October and November 2012, but that the "list" he had "hanging in my lock-up closet, where the custodian supplies are, . . . came up missing, along with certain other items." Respondent's level three exhibit number 1, pp. 119-120. Grievant also insinuated that Principal Rapp had taken keys to the snowblower so that he would have to shovel snow by hand. Id. at p. 121. Grievant testified that Principal Rapp "goes out of her way to make sure I fail." Id. Grievant stated that he believed Principal Rapp and Mr. Hicks were "taking it out on" him because he "questioned that things could be done better." Id. at p. 123.

26. Grievant found urine on the floor everyday in the gymnasium restroom when he cleaned it. If a student used the restroom after he cleaned it and left urine on the floor, Grievant would not clean it until the next day.

27. On December 3, 2012, a teacher reported to Principal Rapp that the desks in room 23 had not been cleaned since the previous week, and Principal Rapp observed that the trash can in room 20 had had trash in it since November 27, 2012. Teachers reported to Principal Rapp on many occasions that the desks in their rooms had not been cleaned.

28. On December 3, 2012, Grievant was asked by Steve Hull, who was the Acting Principal that day, to clean under the bleachers. Acting Principal Hull helped Grievant pull the bleachers out and observed him sweeping the area and mopping. The next morning Athletic Coordinator AJ Rapp complained to Principal Rapp about the area under the bleachers being dirty. Principal Rapp observed that there were "large balls of dust and black grime" on the floor. Principal Rapp brought this to Grievant's attention in person and by letter dated December 4, 2012.

29. On multiple occasions during the improvement period Grievant left doors unlocked, even after he was reminded that all doors were to be locked.

30. Grievant was evaluated by Principal Rapp at the conclusion of the improvement period. The evaluation rated Grievant as not meeting standards in the areas of maintaining regular attendance, following established rules, policies, and procedures, scheduling work to meet all requirements, maintaining a neat work area, demonstrating initiative, exercising good judgment, organization of cleaning tasks, maintaining buliding so that areas are clean, demonstrating a high level of responsibility, following instructions,

efficiency under stress, keeping equipment clean, and conducting periodic inspections and tests of electrical installations. The evaluation concluded by stating that Grievant's performance was below standards, and recommended that Grievant's employment be terminated.

31. Grievant's evaluation form states at the end "[t]his evaluation has been presented to me and I understand its contents." There is a place for the employee to sign and date the form below this statement. Grievant refused to sign the evaluation.

32. By letter dated January 3, 2013, TBOE Superintendent Eddie R. Campbell, Jr., informed Grievant that he was being suspended immediately, without pay, pending approval by TBOE of the termination of his employment for unsatisfactory performance, specifically failure to successfully complete the improvement plan and for poor attendance and failure to follow the proper call-off procedure.

33. At the conclusion of the January 30, 2013 hearing before TBOE, the Board members voted to terminate Grievant's employment.[6]

34. The current Custodian at Davis Thomas Elementary Middle School, Dian Pennington-Shiflett arrives at work 30 to 45 minutes before her shift is to begin everyday, and works as fast as she can, sometimes getting less than a 30 minute lunch break, in order to complete all her duties. She has found that it is difficult to get all the assigned tasks completed. At other schools where she has worked the night shift Custodian cleaned the bathrooms and took out the trash.

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[6] At the level three hearing, the parties reserved Joint Exhibit A for the termination letter, which was to be provided for the record after the hearing. Respondent's counsel advised the undersigned in July 2013 that a termination letter was not sent to Grievant, and Joint Exhibit A was withdrawn.

Discussion

The first issue to be decide is whether Grievant should have been placed on an improvement plan. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10-427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

An evaluation is properly conducted if it is performed in an "open and honest" manner, and is fair, and professional. W. Va. Code § 18A-2-12a.[7] *See Brown*, *supra*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a Grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed,

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[7] W. VA. CODE § 18A-2-12(e)(3)(A) states that the purpose of an evaluation is to "[s]erve as a basis for the improvement of the performance of the personnel in their assigned duties."

nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. *Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988). The immediate supervisor is responsible for the employee's evaluation, and he or she must share the evaluation with the employee. The employee has a right to attach a written addendum to the evaluation. *Jones v. Braxton County Bd. of Educ.*, Docket No. 97-04-311 (Apr. 28, 1998).

Grievant did not dispute that he could not complete all of his duties everyday, but argued that he had too much to do, and was held to an unreasonable standard. Grievant believed that some of his duties should have been shifted to the night shift Custodian. In support of his position both with regard to the placement on the improvement plan and his termination, Grievant called as a witness the current Custodian at Davis Thomas Elementary Middle School, Dian Pennington-Shiflett. Ms. Pennington-Shiflett testified that she arrives at work 30 to 45 minutes early everyday, and works as fast as she can, sometimes getting less than a 30 minute lunch break, in order to complete all her duties. She did not believe she could get all the work done if she did not come in early. Grievant also asserted that his predecessor in the position had come to work early in order to complete his duties, but produced no evidence to support this assertion. Principal Rapp disputed this assertion.

Grievant also specifically disputed the evidence that he did not take out the trash everyday, noting that he only emptied the trash once a day, so a trash can in an area could have filled up after he had emptied it. While this may have occurred, it was Principal Rapp's observation that Grievant simply was not emptying the trash everyday from every room. Further, it appears from the testimony presented that Principal Rapp expected

Grievant to have made sure that the trash was emptied at the end of the day, whether he emptied it earlier in the day or not, although she may not have made this clear to Grievant. However, it is common sense that in areas where food would be placed in the trash, such as the teachers' workroom, that the trash would be taken out at the end of Grievant's shift, whether he had taken it out in the morning or not.

There is no doubt that Grievant had a lot to do in a limited amount of time, and it is curious that the night shift Custodian would not be assigned to either clean the desks or the bathrooms to assure that these tasks were completed before the students arrived, since the day shift Custodian has a limited amount of time to complete these duties in the morning. However, the evidence is insufficient to support a finding by the undersigned that the burden on Grievant was unreasonable. Custodial work is by nature difficult, and just because Grievant would have to work quickly and hard all day long does not mean that his assignment was unreasonable. Further, the fact that Grievant had a lot to do does not excuse Grievant's apparent inability to get things clean when he cleaned them, nor does it excuse him from completing at least some of his duties. Respondent presented the testimony of Mr. Hicks who observed that Grievant made no effort to work quickly or efficiently to get his work done. Grievant has not demonstrated that he should not have been placed on an improvement plan.

As to Grievant's claim in the statement of grievance that he was "coerced to sign an improvement plan without sufficient time to study it," the evidence does not support such a conclusion. Grievant was allowed to take the improvement plan home, but continued to refuse to sign it, and in fact, he never signed it. The claim in the statement of grievance that Grievant was "burdened with additional 'on schedule' duties taken from the other

custodian at the school and added to Grievant," is without merit. While duties were moved from the night shift Custodian to the day shift Custodian, this occurred many years before Grievant was hired into this position.

The second issue is whether Grievant successfully completed the improvement plan, and consequently, whether his employment should have been terminated. 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 on 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 contendere to a felony charge." In the instant case, Respondent dismissed Grievant for unsatisfactory performance.

WEST VIRGINIA CODE section 18A-2-8(b) provides 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. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board."

Grievant admits that he was unable to complete all the tasks on his assignment list everyday, but argues this was because there were more duties than could be accomplished within his work hours, particularly with all the interruptions to clean up spills and other accidents. He again asserted that the expectations of the job were unreasonable. There is no doubt that the duties of Grievant's position were so numerous that he had to work hard and fast to accomplish the job requirements. However, it is clear that, rather than make every effort to do the very best he could do and work more quickly and efficiently in order to demonstrate that he had been assigned an impossible task, Grievant continued to work at the same pace, apparently made no effort to change the manner in which he approached his duties, did not make sure even the most basic tasks were completed daily, refused to take suggestions designed to improve efficiency, and did not bother to turn in the daily checklists as required by the improvement plan. Grievant likewise failed to improve the quality of his work. Had he simply made an effort to make sure that desks, bathrooms, and the area under the bleachers appeared clean when he finished his tasks, and that all the trash was taken out at the end of everyday, this would surely have resulted in a different outcome. However, Principal Rapp concluded that Grievant simply was not capable of performing the duties required of a Custodian in an acceptable manner, and the undersigned cannot disagree.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10-427 (Jan. 24, 1995)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

2. "[T]his Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Beckley, supra.*

3. Grievant did not demonstrate that it was improper to place him on an improvement plan.

4. 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).

5. 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).

6. 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 contendere to a felony charge."

7. "When grounds for a school employee's dismissal include charges relating to incompetency or conduct which is deemed correctable, the Board must also establish that it complied with the provisions of West Virginia Board of Education Policy 5300 requiring it to inform [the] employee of his deficiencies and afford him a reasonable period of time to improve." *Id*. citing *Mason County Bd. of Educ. v. State Supt. of Schools,* 274 S.E.2d 435 (W. Va. 1987).

8. Grievant was informed of the deficiencies in his performance, and afforded a reasonable period of time to improve. Respondent demonstrated that Grievant did not successfully complete the improvement plan, and his performance was unsatisfactory.

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. *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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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BRENDA L. GOULD
Administrative Law Judge

Date: August 5, 2013