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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
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THEODORA C. PLUMLEY

v.

DOCKET NO. DOE-88-164

WEST VIRGINIA DEPARTMENT OF EDUCATION

DECISION

Grievant Theodora C. Plumley, who was employed by Respondent West Virginia Department of Education as a teacher at the Colin Anderson Center until she was dismissed August 26, 1988, filed a grievance with the West Virginia Education and State Employees Grievance Board on that date. A hearing was held September 27 and 28 and October 4 and 11, 1988. Proposed findings of fact and conclusions of law were received on and before November 18, 1988.

State Superintendent of Schools Tom McNeel's August 22, 1988, letter of dismissal to Grievant stated that the grounds for dismissal were incompetence, insubordination and willful neglect of duty. The stated reasons underlying the charge of incompetence were as follows:

- A. Absenteeism and lack of punctuality.
- B. Failure to use accepted teaching practices with

- your students, and failure to keep your individualized educational programs in current condition.
- C. Inefficient use of class time and toleration of inappropriate student behavior during class time.
 - D. Failure to cooperate with superiors.
 - E. Lack of professional responsibility.
 - F. Failure to keep accurate records.
 - G. Failure to perform satisfactorily under your official improvement plan.

The stated reasons for both the remaining charges, insubordination and willful neglect of duty, were that on May 6, 1988, Grievant did not appear for work but instead attended a seminar in Morgantown, although permission to attend had been conditioned on her turning in to her supervisor data sheets and she had not fulfilled that condition.

Extensive evidence was presented during the four-day hearing on the state-level improvement plan that immediately preceded Grievant's dismissal, as well as three prior improvement plans implemented in the 1987-88 school year, and on Grievant's conduct. Nevertheless, the parties submitted limited proposals of findings of fact and conclusions of law, neither of which was longer than five pages.

Respondent contends that "the grounds alleged for dismissal of Mrs. Plumley were proven by a preponderance of the credible evidence, and the Department of Education sustained its burden that she should be dismissed for incompetence." Grievant's proposals do not discuss any of the reasons underlying the charge of incompetence except for the first. Grievant argues,

[T]he Grievant successfully performed in the areas of punctuality and absenteeism during the state-level improvement plan period yet "absenteeism and lack of punctuality" is listed as grounds for her dismissal.

As such the evaluation process conducted in this case is flawed. Otherwise any opportunity to improve job performance would be a meaningless exercise and the achieving of improvement to the point of satisfactory or outstanding performance would be of no purpose if the Grievant was to be dismissed despite the proof of correction of prior misconduct pursuant to an improvement plan.

Grievant's proposals also address the remaining charges, as follows:

Secondly, the dismissal of Grievant is based, in part, on insubordination and willful neglect of duty arising from one incident for which the Grievant had previously been punished (four-day suspension without pay). Again, the evaluation process has been flawed. "Due process" demands that grounds for dismissal be those for which a grievant has not already been disciplined.

Even if the evidence adduced at the hearing is deemed sufficient to prove the charges against the Grievant in some respects, the evaluation process and decision to dismiss Grievant in this case is based on conduct that either has been corrected or for which Grievant has been punished previously. Failure to follow proper procedures in the evaluation process which forms the basis for the decision to dismiss THEODORA C. PLUMLEY from her teaching duties at Colin Anderson is a fatal flaw (See Hosaflook v. Nestor, 346 S.E.2d 798 [W.Va. 1986]).

Respondent maintains there was no denial of due process.

Grievant's reliance on Hosaflook is misplaced. In Hosaflook the grievant was not given a proper evaluation finding his performance deficient with a subsequent opportunity to improve, as was provided Grievant in this case by an evaluation by her supervisor, Donald Rice, principal of the education unit at Colin Anderson, on June 6, 1988 (Res. Ex. 7), with an opportunity to improve under the state-level improvement plan implemented July 11 through August 12, 1988. Grievant is accordingly not complaining of an evaluation process like the one the Supreme Court of Appeals

found fatally flawed in Hosaflook but is rather complaining that some of the stated grounds for dismissal are not supportable.

Grievant's due process arguments may have merit, however. It was patently unfair for Respondent to base Grievant's dismissal, even in part, on action for which she had already been punished, and doubly unfair to base two charges on the same action.¹ Further, Grievant is correct that absenteeism and lack of punctuality could not properly be cited as supporting the charge of incompetence since, although Grievant's performance in all other areas that were the subject of the improvement period was found at the end of the improvement period to be unsatisfactory, her absenteeism and punctuality were found to have improved to a satisfactory level. Nevertheless, if the preponderance of the evidence establishes that Grievant would have been dismissed if only incompetence had been relied on and that, even with satisfactory performance in punctuality and absenteeism, Grievant's performance, after she was provided a reasonable opportunity to improve, was otherwise so incompetent as to justify dismissal, the dismissal must be upheld.

¹ Respondent did establish that Grievant did unreasonably ignore Mr. Rice's directive that she was not to attend the May 6th conference unless she turned in her data sheets. While Grievant may have not realized that she had failed to follow an order, her assumption that she could attend the conference was utterly unreasonable.

In addition to the foregoing narration, the following findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant Theodora C. Plumley was a teacher of the profoundly mentally impaired, individuals with intelligence quotients below 20, at the Colin Anderson Center since 1980.² Her pupils, ranging in number from three in the summer of 1988 to six during the 1987-88 school year, were multiply-handicapped, non-ambulatory, and non-verbal. The primary goal of instruction for such students is communication of their needs. All students have self-care objectives, and, if they are incapable of self-care, cooperation objectives, such as allowing teeth-brushing. Teaching leisure activities such as radio-listening are also stressed.

2. Individual education programs (IEPs), which state goals for teaching, are mandated by law for all special education students. At the beginning of each year the teachers at the Colin Anderson Center evaluate their students and write IEPs based on those evaluations. Once the

² In 1984 the Colin Anderson Center was transferred from the auspices of the Department of Health to the Department of Education.

IEPs are approved by an interdisciplinary team, the teachers must implement the IEPs and take data on whether the pupils are reaching the goals on their IEPs. Addenda must be filed in order to either add or subtract goals from IEPs, and addenda must be approved like IEPs. Teachers must file monthly reports correctly showing the status of IEPs.

3. Proper data collection requires that the teacher provide data that support the instruction provided. The data can be taken by simply marking a plus or a minus on the data sheet to designate whether the student fulfilled a goal. It is Mr. Rice's requirement that data be taken three times a week, but since data can be taken simultaneously with instruction, it can be taken daily.

4. In August 1987 Grievant was placed on an improvement plan for tardiness and absenteeism.

5. In November 1987 Grievant was placed on a second improvement plan with the stated goals to improve data collection,³ to use classroom time more effectively, and to remove "clutter" from her classroom. The plan provided, inter alia, that teachers Robert Hammel and Sue Maltby would assist Grievant in data collection and instructional scheduling, respectively.

³ Mr. Rice testified that Grievant's problems with accurate data collection was a resurfacing of the same problem she had had in 1986, when he discussed the problem with her.

6. Grievant was provided extensive assistance on setting up and maintaining a data system by Mr. Hammel, an expert on data systems. His job was to examine whether what was on Grievant's students' IEPs was what she was training and to develop an appropriate data system. Mr. Hammel spent the entire day of January 19, 1988, helping Grievant. He went through the entire process of checking IEPs, making any changes thereon by addenda, and checking and making appropriate changes on data sheets and monthly reports for two of Grievant's students.

7. Ms. Maltby provided assistance on classroom scheduling, i.e., how to plan a full day of activities for the students based on their IEP objectives. She described in detail a system for preparation of student schedules, lesson plans, and arrangement of data sheets for ready usage, on which she worked with Grievant. Ms. Maltby reviewed Grievant's schedules, made suggestions for changes, and invited inquiries. While Grievant seemed to understand, she later repeatedly brought her lesson plans to Ms. Maltby, on which Ms. Maltby's changes had not been incorporated, and Ms. Maltby repeated her suggestions several times. Grievant did not thereafter bring her schedules to Ms. Maltby, although Ms. Maltby was available.

8. On March 16, 1987, Mr. Rice notified Grievant that her success had been minimal under the second plan (Res. Ex. 5).

9. A third improvement plan was developed at the direction of Superintendent McNeel and implemented April 12, 1988. The goals of this plan were to improve Grievant's maintaining a data collection system and providing of instruction to students, and to remove clutter from her classroom.

10. On June 3, 1988, Mr. Rice evaluated whether Grievant had improved under the plans. He found Grievant's absenteeism and tardiness excessive (Res. Ex. 4). On the same date, in a detailed letter (Res. Ex. 6) he found Grievant had failed to meet the expectations of the third improvement plan in that her data collection, use of instructional time, and amount of "classroom clutter" were still unacceptable.

11. On June 6, 1988, Grievant's end-of-the-year formal evaluation found Grievant did not meet the standards in the following areas:

PERFORMANCE EXPECTATIONS	INDICATORS
A. PLANNING & ORGANIZATION	
1. Accepted Practices	Lack of data
...	
3. Lesson Plans	Often late - did not reflect IEP
4. Classroom Procedures	Disorganization - lack of schedule
5. Tasks Completed	Late - data not complete
6. Class Time Use	Lack of instructional opportunities
...	
B. INSTRUCTIONAL METHODS	
8. Challenging Methods	No expectations
...	
10. Students On-Task	Off task - not involved

11.	Individual Needs	IEP's not monitored non-functional
...		
13.	Student Participa- tion	Not always involved
...		
16.	Performance Evaluation	Data not utilized
...		
18.	Instructional Objectives	Not appropriate for for students
...		
21.	Physical Environment	Clutter ⁴ disorgan- ized
...		
PROFESSIONAL CHARACTERISTICS		
...		
2.	Punctuality	Excessive absences/ tardiness
3.	Cooperation	Failure to follow directions
4.	Responsibility	Failure to complete tasks
...		
9.	Accurate Records	Not maintained

12. On June 7, 1988, Mr. Rice recommended that Grievant not be reemployed for the new school year beginning July 1, 1988. In response to Mr. Rice's recommendation, Grievant requested additional observation and evaluation from an "unbiased" team. Grievant was allowed a fourth, state-wide improvement period.

13. The improvement plan's goals and evaluation were authored by Garnett Bowyer, supervisor of the Barboursville school for behavioral disorders; Mary Pat Farrell, who

⁴ Extensive testimony taken on Grievant's alleged failure to maintain a proper classroom environment is not discussed in this decision since any such failure was not a subject of Grievant's final improvement plan or a charge in the letter of dismissal.

develops programs for the mentally-impaired across West Virginia; and Lisa Caseman, a classroom teacher at the Colin Anderson Center who has a master's degree in severely and profoundly impaired and teaches at West Virginia University.

14. The improvement team members spent a day meeting with Grievant. They also met with those individuals who had worked with her in the past. After developing the plan, the team met with Grievant again to explain to her the plan and get any input from her she may have had. Grievant testified that she felt she had no choice of any input and that there was no use to object, but she provided no reason as to why she had felt that way. Grievant was provided adequate opportunity to submit input.

15. The improvement plan was designed to improve Grievant's deficiencies of excessive absenteeism and tardiness, "[i]nability to accurately complete and file lesson plans, data sheets, reports, forms, etc., at the specified time," "[f]ailure to compile and maintain accurate lesson plans, data sheets, IEP's, and class schedules," failure in "[u]tilization of accepted practices, e.g., data system," "[f]ailure to accept and implement, in a timely manner, directives issued by [her] superiors," and "[f]ailure to provide adequate instructional time to provide adequate trials on student IEP goals." The stated plan of assistance detailed the expectations in each area of deficiency and the assistance to be provided (Res. Ex. 9).

16. Grievant told the members of the improvement team that she had not received prior assistance. At the hearing Grievant agreed that she had received valuable assistance during the spring semester of 1988 and testified that she had meant to advise the team members that the prior assistance was inadequate, nevertheless. The team properly determined that her prior assistance had been "extensive" (Res. Ex. 1).

17. While the improvement plan stated that, in addition to the team members, Mr. Hammel and Ms. Maltby would review procedures and techniques they had worked with grievant on during the second improvement period and they did not actively assist Grievant, they were available or were willing to refer Grievant to other individuals who would assist. In any case, Grievant was provided adequate assistance to fulfill the goals of the plan, for the members of the team were available for assistance (see Finding of Fact 22).

18. The team members observed Grievant regularly. Although Grievant was not always aware that she was being observed since she could be observed from an observation room, the members always discussed their observations with her.

19. In order to cure Grievant's deficiencies in use of class time, Grievant was required to "provide more one-on-one and program instruction to students during the instructional activities" and to "[b]e able to show that 80%

of available class time is used for instruction" (Res. Ex. 9). Mr. Bowyer testified that, while there was some instruction, it was "sporadic in nature and was not consistent with program plans, lesson plans, and daily schedules. It didn't seem to have any real direction to it, and it was limited, at best, in my opinion." Tr. 225. He stated that Grievant spent time doing paperwork and the percentage of time Grievant spent in instruction was no more than fifty percent.

Ms. Farrell observed Grievant on July 20th, August 4th, and August 5th. On the 20th Ms. Farrell observed Grievant allowing inappropriate behavior of rocking and hitting that was not attended to by Grievant. She also observed that Grievant was not carrying out communication goals required by the speech pathologist, as required of teachers. On August 4th Grievant was working appropriately. On August 5th, she observed Grievant doing unauthorized paperwork during classtime and talking to a student, who was asleep, about her lesson plans. Grievant's behavior was utterly inappropriate. During Ms. Farrell's observation of Grievant, which lasted between forty-five minutes and one hour, nothing else went on. In that at the hearing Grievant had no explanation for her behavior except unsupported speculation that perhaps the other students were on a field trip and the remaining student was medicated, Ms. Farrell's conclusion that Grievant's behavior was inappropriate is accepted.

The evidence established that Grievant use of classroom was unsatisfactory.

20. The improvement plan required Grievant to perform in accordance with the directives of her superiors "in a professional and acceptable manner." On July 15 Grievant was requested to meet with Mr. Rice and Mr. Robert Sturey, Director of Institutional Educational Programs for the Department of Education, and she refused. Grievant testified that Mr. Sturey said, "'Could you stay for a meeting this evening?' and I just said no. I couldn't because I had a previous engagement." While Grievant's failure to follow a directive in this instance may have been unintentional, it also indicated an oblivious inattention and insensitiveness to the fact that she was required to follow any directive of a superior unless "unlawful, immoral, or unethical" (Res. Ex. 9).

On July 18th, Dianna Moore, head teacher, wrote a memo to Grievant directing her to find someone to transport a student on the next day from the living area, when Grievant was to be absent. Ms. Moore testified that all teachers are assigned certain students they must transport or see to their transportation in the teachers' absence. Grievant's testimony established only that she left a note for her aide to take care of the transporting of the student. Grievant also disregarded directives from Mr. Bowyer and Ms. Moore not to do paperwork during classtime.

The improvement team properly concluded that Grievant had difficulty working with her superiors.

21. The remaining areas in which Respondent required improvement by Grievant under the improvement plan were inter-related, for they involved the accurate compilation and maintenance of a data system and all reports and documents reliant on such a system and the timely filing of all required information and documents.

22. It is well-established that Grievant could not fulfill these requirements of the improvement plan⁵--that

⁵ There was also testimony on Grievant's long-standing history of poor job performance. The most extensive was that of Ms. Moore, who had supervised Grievant prior to 1984 and was knowledgeable of Grievant's performance throughout her tenure at the Colin Anderson Center. She testified that during the 1987-88 school year Grievant would change goals on an IEP without going through proper procedures and that Grievant's monthly reports would not correlate with the IEPs (Tr. 167-8). She stated that Grievant changed student schedules regularly and the class had little structure. Ms. Moore also complained that Grievant's verbal communications with her students were inappropriate, as were some of Grievant's instructional practices. She thought Grievant did little one-on-one instruction. Ms. Moore also testified that Grievant did not deal with inappropriate, socially offensive behavior of the students, such as self-stimulation or hand-biting, as she should. She stated that when a behavior specialist talked to Grievant about the problem, Grievant nevertheless failed to deal with the problem but let her aide do so. This intervention occurred in the spring or summer of 1988 (Tr. 182). On cross-examination Ms. Moore testified that the problems with Grievant she had testified to dated from the beginning of their association
(Footnote Continued)

Grievant continued to file inaccurate information and often in an untimely manner. For example, Respondent established that the team required submission of a proper monthly report by July 25, 1988, and that, while the report was submitted by that date, it required corrections, which were not returned, as required, within five working days. That incident was properly cited in the team's final report as support for its conclusion that Grievant failed to follow accepted practices (Res. Ex. 1). Respondent also established that during the six weeks of the plan, two of the weekly lesson plans were not submitted on time and only the plan for the fifth week was accurate. That failure was properly cited by the team as supporting Grievant's failure in "Responsibility (Task Completion)" (Res. Ex. 1).

Another incident, cited by the report in support of its conclusion that Grievant had failed to keep accurate reports was that the monthly report due during the plan was inaccurate, for some numbers necessary for proper reporting by the computer were wrong. Mr. Bowyer testified,

On August the 9th, Ms. Plumley indicated to Dianna Moore that someone had changed the numbers, and Ms. Plumley also requested the secretary to make corrections on the monthly report on August the 10th.

These same corrections were addressed on May the 17th in a memo from Mr. Rice to Ms. Plumley, requesting the same corrections to be made. Ms. Plumley was asked to

(Footnote Continued)
and continued throughout. She concluded that for all eight years Grievant had trouble with data collection and working on specific IEP objectives. Ms. Moore was a credible witness.

make these corrections back in May, and in August she was asking the secretary to make them.

(Tr. 228). Grievant did not deny that the incident occurred, but instead essentially only expressed surprise that something had been wrong and uncertainty as to her own actions.⁶

Lisa Caseman's testimony did establish that Grievant turned in her data sheets daily, as required by the plan. See also Res. Ex. 1. Otherwise, however, her testimony supported Respondent's position that Grievant continued to fail to perform competently. For example, she testified that she was given addenda that "were not correct. They were not in the format that addendums are supposed to be in. They were not clear and concise. There were notes all over them, and I'm not sure what all of the notes meant" (Tr. 237). After requiring further changes on them, she returned them to Grievant for proper filing but the next printout from the computer showed that the information was never properly filed or entered. She also testified that IEPs on three out of Grievant's four students were wrong; and that there were discrepancies between her data sheets and the IEPs. She concluded that, while the improvement plan stated

⁶ Grievant's testimony was rambling and unspecific and several cautions that her answers were unresponsive to the questions failed to modify her testimony so that it could readily be understood.

that Grievant would have corrected IEPs, "to the best of our knowledge we never found a corrected IEP" (Tr. 254).

Ms. Caseman also testified that, although she was in her room for consultation from 11:40 a.m. until 12 noon daily, when Grievant was also free, Grievant did not come to her more than once or twice for assistance. The other members of the team regularly observed Grievant and were available for consultation at least once a week, e.g., Mr. Bowyer testified that he was available about once a week. Grievant did not deny their availability.

23. Grievant testified that, due to the fact that she had five aides during the 1987-1988 extended school year, she was not able to fulfill the improvement plan goals. While the changes in aides during the school year may have had a negative effect, the record does not support that any change of aides affected her performance under the final improvement plan since she had only one aide during the time the plan was implemented and there was no evidence that the aide was unhelpful or incompetent in any way.

24. The improvement team concluded that Grievant satisfactorily fulfilled the expectations of the first area of performance, on punctuality and absenteeism, but in the other five areas, see Finding of Fact 15, Grievant's performance was not satisfactory (Res. Ex. 1).

25. Mr. Rice testified that, if Grievant had met the goals of the state-level improvement plan, he would not have recommended termination (Tr. 65). He concluded that, even

with the assistance provided, there was little change in Grievant's performance. Similarly, Assistant State Superintendent of Schools John Prisapia, who recommended Grievant's termination to Superintendent McNeel, stated that if Grievant had met the improvement plan, he would not have made that recommendation.

CONCLUSIONS OF LAW


1. Where an employee has been dismissed or otherwise disciplined, under the grievance procedures of W.Va. Code §§18-29-1 et seq., an employer must establish the charges by a preponderance of the evidence. Ramey v. West Virginia Department of Health, Docket No. H-88-005 (December 6, 1988).

2. Since the improvement plan found Grievant's performance unsatisfactory and therefore incompetent in all areas except for absenteeism and punctuality, and the evidence established that Grievant would not have been dismissed if she had met the goals of the improvement plan, Respondent established by a preponderance of the evidence that Grievant was properly dismissed for incompetency.

Accordingly, the grievance is **DENIED** and the decision of the West Virginia Department of Education to dismiss Grievant from her employment at the Colin Anderson Center is hereby affirmed.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Pleasants County and such appeal must be filed within thirty (30) days of receipt of this decision. See W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: December 22, 1988


SUNYA ANDERSON
HEARING EXAMINER