

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRENDA H. WELLS,

Grievant,

v.

DOCKET NO. 2010-0131-UpsED(R)

UPSHUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Brenda H. Wells, filed this grievance against Respondent, Upshur County Board of Education (“Board” or “Respondent”), on August 6, 2009, challenging her suspension and dismissal as Principal of Buckhannon-Upshur High School (“BUHS”) at the end of the 2008-2009 school year. Grievant seeks reinstatement, back pay and benefits with interest from the date of her termination.

PROCEDURAL HISTORY

On August 19, 2009, the parties waived timelines for the Level One conference. On August 26, 2009, the parties agreed to pursue private mediation. On March 11, 2010, an Order of Unsuccessful Mediation was entered.

On March 29, 2011, a Level Three hearing was held before Administrative Law Judge Ronald Reese. Grievant was represented by Andrew Katz, Esq., and Respondent was represented by Rebecca Tinder, Esq., Bowles Rice LLP. The day before the March 29, 2011, hearing, Grievant accepted a position as an administrator with the Braxton County Board of Education. At the hearing, Respondent inquired as to whether Grievant still sought reinstatement as Principal at BUHS or preferred to maintain employment with Braxton County. Counsel for Grievant advised that he was “not prepared to address

honestly right now.” ALJ Reese instructed Grievant and her counsel to supply Respondent and the Grievance Board a written statement of the relief that she was requesting within ten (10) working days. No response was received from Grievant or her counsel.

The parties had previously agreed on September 16, 2011, as the next day for the Level Three hearing. On September 6, 2011, Respondent filed a Motion to Dismiss because of the failure of Grievant to respond to its request to provide the specific relief sought. By that time, nearly six (6) months had passed since the expiration of the ten days ordered by ALJ Reese. On September 8, 2011, Grievant responded to the Motion, stating she wanted to be reinstated as Principal of BUHS. The September 16, 2011 hearing date was rescheduled, and on December 1, 2011, a Level III Hearing was held telephonically, wherein ALJ Reese addressed the Motion to Dismiss filed by Respondent.

On December 9, 2011, ALJ Reese issued a Dismissal Order, finding, *inter alia*, that Grievant sought a remedy that was wholly unavailable. ALJ Reese noted that Grievant had been employed as an Administrator with the Braxton County Board of Education during the course of the grievance proceedings. ALJ Reese concluded that the relief sought by Grievant, her reinstatement as Principal at BUHS, was “untenable,” based on the number of years that had passed since her dismissal; the harassment grievances filed against her by a majority of the faculty; and the acrimonious atmosphere that existed between Grievant, the faculty, and the administration.

On January 20, 2012, Grievant appealed the December 9, 2011 Dismissal Order to the Circuit Court of Kanawha County, West Virginia, asserting that the ALJ raised the issue of whether reinstatement was a possible remedy for the first time during the

teleconference, and did not provide her an opportunity to present evidence on the issue. Grievant claimed the ALJ's Dismissal Order erred as a matter of law and was an abuse of discretion.

On November 5, 2014, the Circuit Court of Kanawha County reversed ALJ Reese's decision and remanded for further proceedings.¹ The Circuit Court found that Grievant would be entitled to reinstatement and back pay if she prevailed on her grievance. The Circuit Court's Order provided no specific instructions as to the issues to be addressed on remand.

On February 1, 2, and 3, 2016, a Level III hearing was held before Administrative Law Judge Mary Jo Swartz in Buckhannon, West Virginia. Grievant appeared in person, and was represented by Patrick McFarland, Esq. The Board was represented by Aaron C. Boone, Esq., Bowles Rice LLP. Because the Circuit Court's Order did not provide any instructions on issues to be addressed on remand, no limitations were placed on the evidence provided at hearing. The parties were invited to submit proposed findings of fact and conclusions of law no later than March 31, 2016.

SYNOPSIS

Grievant was terminated from her employment as Principal of Buckhannon-Upshur High School for unsatisfactory performance after Respondent determined that she had not successfully completed a performance improvement plan. Respondent demonstrated by a preponderance of the evidence that Grievant failed to successfully complete the improvement plan within the time frame given.

¹See *Wells v. Upshur County Bd. of Educ.*, Cir. Ct. Kan. Cty., Civil Action No. 12-AA-10 (Nov. 5, 2014).

The following Findings of Fact are made based on the record developed at Level Three.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was employed by Respondent at Buckhannon-Upshur High School (BUHS).

2. From December 2006 through the end of the 2007 school year, Grievant served as Assistant Principal at BUHS.

3. At the end of the 2006-2007 school year, the Principal position at BUHS became available.

4. Grievant successfully applied for the Principal position, and served as BUHS' Principal during the 2007-2008 and 2008-2009 school years.

5. Doug Frashure had also applied for the Principal position. When Mr. Frashure returned to BUHS in the Fall of 2007, he found that his office had been relocated by Grievant without his knowledge, consultation, or notification. Mr. Frashure served as Assistant Principal under Grievant beginning in the 2007-2008 school year.

6. In January of 2008, Grievant wanted to purchase polo shirts for the faculty. She told Mary Hull, Finance Secretary, to use funds out of the parking account. Ms. Hull told Grievant that was a violation of policy. Grievant said she was going to do it anyway. Grievant got a purchase order and ordered the shirts. Ms. Hull refused to sign the check, and notified the auditor. R. Ex. 15.

7. The Faculty Senate gets the money from all vending machine sales. The State Code dictates how the money is spent. Grievant wanted all the money, and Ms.

Hull told her it was a violation of State policy. Grievant told Ms. Hull she was being insubordinate. R. Ex. 16.

8. In March of 2008, there was a Longaberger basket sale. Grievant told Ms. Hull she wanted the money received on the sale of the baskets before the baskets came in. Ms. Hull told her she had to wait until the baskets came in; it was a violation of policy to use the money before the baskets came in. R. Ex. 17.

9. On February 17, 2009, Claude Smith, Treasurer of the Upshur County Board of Education, notified Ms. Hull and Grievant that Grievant needed to get a purchase order before anything could be ordered. Grievant had ordered goods from Jostens without using a purchase order. Ms. Hull had explained the policy to Grievant many times before. R. Exs. 19, 20.

10. Grievant blatantly ignored or refused to abide by State Board Policies regarding the expenditure of school funds, despite being advised her actions were in violation of the Policies.

11. In March of 2008, Grievant circulated to all BUHS teachers a list of "Proposals" to be presented to the Board of Education; these "Proposals" included:

- Cameras will be installed in every classroom to monitor teachers.
- Professional and personal leave are revoked as of today.
- Sick days will be granted only with a doctor's slip, which must be notarized and approved by the BOE two weeks in advance.
- All personnel must be tested for AIDS; results to be published statewide.
- Female faculty members will work in the kitchen six months per school year.
- Male faculty members will report to Brent for daily work assignments.

See R. Ex. 10. Obviously, these were fake proposals, which Grievant meant as a joke, as the bold, underlined letters spell out “gotcha”. However, Jan Craig and Mary Hull testified that they, and many others, either did not realize it was a joke at first, and/or were disturbed by the content.

12. During the 2007-2008 school year, Charles L. Chandler served as Superintendent of Upshur County Schools.

13. In April 2008, Scott Lampinen learned that he would replace Dr. Chandler as Superintendent for the 2008-2009 school year.²

14. On April 2, 2008, the Office of Education Performance Audits (“OEPA”) conducted an audit of BUHS. See R. Ex. 6. In May 2008, OEPA released its report, noting major problems, including: “teachers not being involved in decision-making activities, not being involved in the strategic planning process, and deficiencies in classroom observations.” R. Ex. 6.

15. Superintendent Lampinen was aware of the OEPA report. He was also aware of concerns regarding collegiality among staff and administration under Grievant’s leadership.

16. In April 2008, Superintendent Chandler asked Mr. Lampinen to work with Grievant on coordinating a team-building retreat at West Virginia Wesleyan College. The Superintendent attended the retreat. Grievant failed to improve collegiality among staff and administration through this retreat.

² Mr. Lampinen is a 35-year educator, having served the Board as a classroom teacher, elementary school principal, middle school principal, high school principal, director of special education, and as Superintendent. Mr. Lampinen holds degrees in elementary education from West Virginia Wesleyan College, and a master’s degree in education and administrative from West Virginia University. He is employed part-time by RESA VII as a principal mentor.

17. Soon after stepping into the position of Superintendent, Mr. Lampinen received complaints from teachers regarding the conduct of Grievant. Mr. Lampinen learned that there was a top-down leadership style, in which teachers felt decisions were being forced upon them; that teachers' input in decision-making was not requested; and that, when teachers did give their input, Grievant did not seriously consider their input; teachers described the school environment as "toxic."

18. Superintendent Lampinen also received complaints from students regarding Grievant's conduct. Mr. Lampinen learned that the students felt oppressed; that rules seemed "heavy-handed"; and that discipline was inconsistently administered.

19. Superintendent Lampinen also heard from parents regarding Grievant's conduct. He learned that parents believed discipline was not administered consistently, that parents did not feel welcome, and that parents' ideas were not appreciated.

20. At the beginning of the 2008-2009 school year, Superintendent Lampinen met with Grievant to set Administrator Goals for the upcoming school year. See R. Ex. 44. Administrator Goals included, but were not limited to: (a) manage group behaviors to achieve consensus; (b) improve instructional strategies within the classrooms; and (c) achieve compliance with staff observations and evaluations. The Administrator Goals were approved by Grievant on or about September 29, 2008.

21. Throughout the 2008-2009 school year, Superintendent Lampinen met personally with Grievant to discuss concerns raised by teachers, students and parents. During these meetings, Mr. Lampinen and Grievant would discuss the various concerns, and develop ways to appropriately address them.

22. In December of 2008, John G. Haymond, Director of Curriculum, moderated several meetings involving teachers and Grievant. The purpose of these meetings was, in part, to ensure that the “climate” of the meetings permitted an “open exchange of ideas.” (Mar. 29, 2011 LIII Tr., p. 183). Mr. Haymond observed a management style whereby Grievant “wanted to . . . make improvements but, in making improvements, she didn’t always work directly with the people and get their ideas...”. (Mar. 29, 2011 LIII Tr., p. 183).

23. On Wednesday, January 14, 2009, Superintendent Lampinen conducted an open forum for teachers at BUHS, during 5th, 6th and 7th periods. During this forum, teachers explained, “we’re told exactly how things are to be, with no room for discussion for our input.” Teachers expressed fear of retaliation, specifically asking Mr. Lampinen *not* to mention their names when they expressed their concerns to him. Teachers expressed concern that students knew more about what was going on with scheduling than the teachers. The teachers felt “watched” and that there as a lack of trust within the school. Teachers reported, “I feel like every move I make is being watched.” R. Ex. 18.

24. On January 26, 2009, Superintendent Lampinen conducted a mid-year review with Grievant. R. Ex. 46. During this review, Mr. Lampinen noted several deficiencies with Grievant’s performance, including distrust among staff, inappropriate administration of student discipline, concerns with student achievement, administration and faculty relations. Mr. Lampinen said there existed an educational atmosphere of a disconnect within the desired direction of BUHS and the school’s leadership.

25. Grievant was not meeting the Administrator Goals which had been developed at the beginning of the 2008-2009 school year.

26. On January 6, 2009, and February 4, 2009, Chuck Heinlein, West Virginia Department of Education Office of School Improvement, conducted observations of BUHS. Thereafter, he prepared a report entitled, "High Yield Practice Inventory." In his report, Mr. Heinlein noted "a culture of mutual respect does not exist between administration and the faculty". "Students were not feeling as though they were getting an education that will enable them to achieve their goals". "Collaboration among administration and faculty is minimal." R. Ex. 5.

27. In February 2009, Lesa Hines with RESA VII met with teachers and administrators at BUHS, including Grievant. Following her meeting, Ms. Hines noted in a letter to Superintendent Lampinen:

I do, however, have reservations about the school administrators on the team. . . . The administrators frequently come 30-45 minutes late for the meeting and rarely have completed the assignments from the previous meeting. . . . I've seen very little administrative effort put into accomplishing the identified goals. . . . My concern now is the leadership issues at Buckhannon-Upshur High School are beyond the scope of what this team can accomplish.

R. Ex. 48.

28. Thereafter, Superintendent Lampinen decided to place Grievant on an Improvement Plan. Superintendent Lampinen tasked Assistant Superintendent Roy Pettit to develop the framework for the Improvement Plan.

29. Superintendent Lampinen conducted an initial meeting with Grievant to discuss her placement on an Improvement Plan. Grievant denied there were problems, and deflected issues back to her staff, saying the staff was unwilling to do anything. Grievant displayed little, if any, self-reflection during the meeting.

30. On April 8, 2009, the Improvement Team convened to discuss the Improvement Plan with Grievant. The Improvement Team consisted of Assistant Superintendent Petitt, Gabriel Devono, RESA VII Executive Director, and Patti McComas, an Administrative Representative selected by Grievant. The Improvement Team was tasked with developing "Corrective Actions," or steps and resources to support Grievant in implementing her improvement plan. In response to the corrective actions, Grievant was to create an "Action Plan." R. Ex. 4.

31. Grievant's Improvement Plan identified the following deficiencies:

- a. "Classroom Visitations are not regularly conducted", "Supervision of instruction and visibility in classrooms is minimal" (126-142-18.1.1);
- b. "Group behaviors have not been managed to achieve consensus" (126-142-18.1.4);
- c. "Effective communication has not been demonstrated";
- d. "Staff Members believe that they are told what to do rather than having a vested voice";
- e. "Communication structures are not effective by failing to encourage others to describe their perspectives" (126-142-18.1.4).

32. On April 9, 2009, Grievant signed the "Time Frame/Plan Completion" part of the Improvement Plan, confirming that the time frame for the plan would be from April 9, 2009 through June 15, 2009. R. Ex. 4.

33. That evening, at 10:21 p.m., Grievant sent an email to Allen Brock at the West Virginia State Department of Education; this email was ultimately forwarded to Steve Paine, State Superintendent. In her email, Grievant criticized Superintendent Lampinen personally, and criticized staff member Rick Craig. In describing her frustration, she writes "Can you tell I'm frustrated. This whole thing is ridiculous and evil ... It is "rape" of school children. Their futures are being raped from them by people playing these games!" R. Ex. 32.

34. That same evening of April 9, 2009, Grievant sent an email to Superintendent Lampinen and Roy Pettit, informing them that she would be out of town on April 21 and 22, and that OEPA was visiting on April 23. She advised them that she believed the timelines in the Improvement Plan were unreasonable, given the time she would be away.³

35. On April 10, 2009, Mr. Pettit responded to Grievant that the Improvement Plan would proceed as outlined, but did grant her additional time for submitting the second and third action plans. In addition, Mr. Pettit offered Grievant the option of working two extra days with pay during Spring break to prepare for the OEPA visit. Mr. Pettit informed Grievant the IP team would meet with her on April 20, 2009, and she could select any of the action plan assignments in her IP for discussion on that day.

36. Grievant did not accept the offer of working during Spring break.

37. The IP team met on April 20, 2009. Grievant submitted a Six-Point Action Plan on Shaping School Culture. R. Ex. 35. The Action Plan was discussed, recommendations were made for ways to improve, and Grievant had input into the discussion. R. Ex. 34.

38. Over Spring break, between April 20 and 29, 2009, Grievant created three additional "Action Plans." R. Exs. 36, 37, and 38.

³ Grievant filed a grievance in April 2009 over her placement on the Improvement Plan. The grievance was unsuccessfully mediated, and filed at Level Three on March 19, 2010. Thereafter, the grievance was placed in abeyance, pending the outcome of the grievance challenging her termination. As previously noted, the termination grievance was dismissed by ALJ Reese on December 9, 2010. He subsequently dismissed the grievance over the improvement plan as moot. See *Wells v. Upshur County Bd. of Educ.*, Docket No. 2009-1490-UpsED (Jan. 24, 2012).

39. On April 27, 2009, Grievant submitted a document entitled Six-Point Action Plan on Shaping School Culture Improvement Plan 2 with Modifications. This Action Plan includes recommendations made in the April 20, 2009, meeting, and is even more detailed than the first Action Plan. R. Ex. 36.

40. On April 27, 2009, Grievant submitted a second document entitled Frameworks for High Performing Schools and Classrooms Improvement Action Plan 3w/modifications. Again, this document contains many detailed, specific plans in addition to those included in the first two Action Plans. R. Ex. 37.

41. On April 29, 2009, Grievant submitted a third document entitled High Yield Practices Inventory Review Improvement Action Plan 4. This document was created in response to the High Yield Practices Inventory Review written by the members of the Office of Leadership Development team following their visit to BUHS. R. Ex. 38.

42. Grievant was aware the period of her Improvement Plan was from April 9, 2009 through June 15, 2009. She even told Superintendent Lampinen and Mr. Pettit that she needed more time the day she was put on the Improvement Plan, because she was going to be out of town. Nevertheless, Grievant did nothing to effectuate the Improvement Plan from April 9, 2009 to April 29, 2009, approximately three weeks.

43. In April 2009, Grievant accused David Chipps, head football coach of the BUHS football team, of holding back mail concerning her son's applications and interest in colleges. Her son was the quarterback of the BUHS football team.

44. On April 27, 2009, Grievant informed her staff that all mail had to be brought to the office for sending out, and it had to be left open. Grievant would look at all the mail, and opened other people's mail. R. Ex. 23, LIII Test., Hull.

45. Superintendent Lampinen put a stop to this change in the mail process.

46. At the beginning of the 2008-2009 school year, Grievant told Mr. Chipps that he was holding her son back with his method of coaching, that she had been an Athletic Director before, and she could tell him how to coach. Grievant's son was the starting quarterback for BUHS.

47. The Athletic Director had instructed coaches that any weight-lifting being done in the weight room had to be done using an SSAC-approved method of lifting. Grievant's husband was an Assistant Coach under Mr. Chipps. Several boys told Mr. Chipps they were not going to use the SSAC method of lifting. One boy got belligerent with Mr. Chipps when he told him he had to use that method. The boys left with Grievant's husband to go to another facility where they could lift the way they wanted to. Mr. Chipps submitted a disciplinary referral on the boy who was belligerent to Grievant for action. Two days later the boy was back in the weight room, and told Mr. Chipps that the Athletic Director agreed that he did not have to use the SSAC-approved method of lifting.

48. Grievant assigned Mr. Chipps to stand outside a bathroom in the school during his duty period. She then told him he needed to stand inside the bathroom. He refused to do this, based on privacy and safety concerns. Grievant told the other teachers they were not to talk to Mr. Chipps while he was on bathroom monitor duty.

49. In April of 2009, David Chipps attended a Board meeting, and spoke with the Board in Executive Session. Mr. Chipps expressed concerns regarding his treatment by Grievant, and explained that they had had several confrontations over the course of the 2008-2009 school year regarding his coaching in general, and her son, the BUHS

quarterback, specifically. He also told the Board he felt Grievant had retaliated against him.

50. On or about April 29, 2009, teacher Edwina Howard-Jack, told Jan Craig, Rick Craig, Jane Brady, Maureen Rhodes, and David Chipps that Grievant had identified them by name, to her, as being individuals who were “lowering morale” and “harassing the administration and bullying students as well as doing wrong things in the classroom.” Mar. 29, 2011, LIII Hrg., Rhodes Test., p. 34.

51. Grievant told Maureen Rhodes that she had not meant to identify her as one of the problem teachers, that she had actually meant Angie Westfall. Mar. 29, 2011 LIII Hrg., Rhodes Test., p. 63.

52. On or about May 4, 2009, during a school Culture and Climate Committee meeting attended by teachers, Grievant stated there were “negative people” at the school, and then identified these people as Jan Craig, Rick Craig, Jane Brady, David Chipps, and Angie Westfall.

53. After learning they had been publicly identified as being “negative people”, and/or people who were “bullying students” and “doing wrong things in the classroom,” the named individuals filed harassment complaints against Grievant.

54. John Haymond, Director of Curriculum, investigated the allegations of harassment and intimidation that allegedly occurred on April 29, 2009 and May 4, 2009. These allegations were substantiated by Mr. Haymond. Mar. 29, 2009 LIII Hrg., Haymond Test., p. 180.

55. On May 19, 2009, Grievant unilaterally decided to give the senior class two periods, back-to-back, for lunch. Grievant did not discuss this change in the schedule

with any administrator or teacher. During this lunch time, a food fight broke out. Grievant was summoned by walkie-talkie to come to the cafeteria. When she arrived, she encountered a large group of students standing around a smaller group of male students, who had piled themselves on top of one another, in close proximity to a glass trophy case. Video evidence, captured by a student using a private cell phone, shows Grievant walking up to the pile of male students, jumping on top of the pile, placing her entire weight onto the students, and then rebounding back onto her feet. The video shows the crowd of students laughing, while the smaller group of students stood up and dispersed. Thereafter, misbehavior continued in the lunch room area: (a) one male student jumped off a table into the arms of other students (i.e. crowd surfing); (b) other students threw rolled-up, heavy, welding gloves at one another; and (c) other students refused to go into the auditorium for a concert by the show choir.

56. On May 20, 2009, Superintendent Lampinen interviewed Grievant about the incident in the lunch room. He asked Grievant generally if anything unusual had occurred yesterday, and she answered “no”. Eventually, Grievant conceded that she had been involved in the “dog pile” of male students; however, she said she only “leaned” on the group of male students. She saw no fault with her actions. R. Ex. 39.

57. On May 20, 2009, Superintendent Lampinen directed Rick Malcolm, Facilities and Maintenance Director, to acquire the school security footage of the “dog pile”. However, Mr. Malcolm discovered the school video had been erased. R. Ex. 39.

58. On May 21, 2009, Superintendent Lampinen directed MicroLogic, the third party vendor that maintained technology for Upshur County Schools, to investigate the missing video. MicroLogic concluded the video was, most likely, purposefully erased,

remotely, via an offsite location. R. Ex. 39. Grievant's husband, who is the Director of Information Systems, had the ability to delete the video.

59. On May 21, 2009, Superintendent Lampinen suspended Grievant, with pay, for the dog pile incident pending further investigation. R. Ex. 49. Mr. Lampinen concluded his investigation into the dog pile incident, and suspended Grievant, without pay, for five (5) days, June 8-12, 2009.⁴

60. On or about June 15, 2009, Grievant provided Superintendent Lampinen with a printout showing student disciplinary referrals and consequences covering a period of April 27 through June 3 2009, compiled as part of her Action Plan. R. Ex. 40.

61. Superintendent Lampinen noted numerous referrals were not addressed or no action had been taken. He did not see any improvement in Grievant's handling of student referrals and record keeping.

62. On or about June 15, 2009, Grievant provided Superintendent Lampinen with sign-up sheets for six "Professional Learning Community" opportunities which she developed as part of her Action Plan. Only one teacher signed up for two of the seminars; no teachers signed up for the remaining three. R. Ex. 41.

63. Superintendent Lampinen concluded Grievant did not successfully meet that portion of her Action Plan goals.

64. As part of the Improvement Plan, Grievant was to complete walkthroughs of the faculty classrooms. Grievant provided documentation to Superintendent Lampinen showing the number of walkthroughs completed for the weeks of 4/27, 5/5, and 5/11.

⁴Grievant filed a grievance over the five-day suspension. The Level Three ALJ affirmed the suspension, but reduced the penalty to one day. *Wells v. Upshur County Bd. of Educ.*, Docket No. 2009-1714-UpsED (May 6, 2010), *rev'd in part*, Cir. Ct. of Kan. Cty., CA No. 11-AA-77 (Jan. 11, 2012)(reinstated the five-day suspension), *aff'd* W. Va. S.Ct. App., No. 12-0209 (Feb. 11, 2013).

Grievant's notations indicate she did not do any walkthroughs the weeks of 5/18, 5/25, and 6/1, because she was on suspension. R. Ex. 42.

65. Also included in R. Ex. 42 is a printout of classroom observations completed by Grievant from February 2, 2009 through May 21, 2009. This printout is created using a palm-pilot application which allows the observer to record their observations in real time.

66. The recommended classroom observation time is three to five minutes. The intent of an observation is to provide feedback to the teachers. R. Ex. 42 shows that Grievant's time spent observing was inadequate, from one to two minutes. Moreover, a random survey asking teachers whether they were provided with feedback following Grievant's observations indicates they did not receive feedback on all walkthroughs, often when they did receive feedback, it was not timely, and all teachers surveyed believed there were inaccuracies in the feedback. R. Ex. 42.

67. Grievant failed to complete performance evaluations for a majority of her staff for the 2008-2009 school year.

68. On June 24, 2009, the Improvement Team authored a letter summarizing its recommendations. R. Ex. 31. The Improvement Team identified several deficiencies, including the following:

- a. "classroom and teacher observations were not completed";
- b. "no service personnel evaluations performed by Grievant during the entire 2008-2009 school year";
- c. "the Walkthrough Observation Report . . . demonstrated that [Grievant] and her administrative staff failed to perform the classroom walkthrough observations for all teachers as directed";
- d. "time spent in many classrooms concluded within one or two minutes";
- e. "random survey of teachers shows significant percentage of teachers who reported that walkthrough feedback was not received in a timely fashion and did not receive feedback on all observations and most had inaccuracies on the feedback received";

- f. “instructional leadership has also failed to enhance its effectiveness by improving instruction as evidenced in having only one teacher sign up for six offerings in Professional Learning Community opportunities”;
- g. “there continues to be a culture of distrust and fear among staff members”; staff members were chastened for attending board of education meetings, which resulted in a harassment complaint, charging [Grievant] with intimidation, retribution and harassment”; and
- h. “As per the discipline logs . . . there exists many disparate occurrences which failed to be addressed in a timely fashion.”

R. Ex. 31.

69. On July 6, 2009, Superintendent Lampinen sent a letter to Grievant confirming that she did not successfully complete the Improvement Period; that she would be suspended immediately, without pay; and that Mr. Lampinen would recommend termination of her contract with the Board at a meeting on July 21, 2009.

70. On July 9, 2009, fifty-two (52) teachers and staff filed a grievance with the Board, requesting that Grievant’s contract be terminated due to a “hostile work environment where harassment and retaliation are common-place”. R. Ex. 9.

71. On July 21, 2009, the Board ratified Superintendent Lampinen’s decision to suspend Grievant, without pay, from employment from July 6, 2009 through July 21, 2009, and further approved Mr. Lampinen’s recommendation to terminate Grievant’s administrative contract effective July 21, 2009. R. Ex. 54.

72. Following Grievant’s termination, the signatories to the 52-person grievance withdrew their grievance.⁵

DISCUSSION

⁵There is no evidence to suggest the 52 grievants were aware that Superintendent Lampinen intended to recommend Grievant’s termination to the Board when they filed their grievance.

As this is a disciplinary action, the Board has the burden of proving Grievant's unsatisfactory performance by a preponderance of the evidence. W. Va. Code §18-29-6. "Superintendents, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to the provisions in this chapter." W. Va. Code § 18A-2-7. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20005 (Apr. 16, 1991). See *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

W. Va. Code § 18A-2-8 provides, 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 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.

In terms of unsatisfactory performance, a county board of education is prohibited 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. Bd. of Educ.*, 163 W. Va. 1, 254 S.E.2d 561 (1979); See also *Holland v. Bd. of Educ. of Raleigh County*, 174 W. Va. 393, 327 S.E.2d 155 (1985).

Grievant was terminated for unsatisfactory performance following the unsuccessful completion of an Improvement Plan. Grievant alleges her performance was not

unsatisfactory, the Improvement Plan did not follow the requirements of the law, and alternatively, that she was not given enough time to complete the Improvement Plan.

The requirements of *W. Va. Code* of State Rules, 126-142-16, Performance Evaluation of School Personnel (Policy 5310), include the following:

§ 126-142-16. Improvement Plan for Administrators.

16.1 An improvement plan shall be developed by the supervisor and administrator when an administrator's performance is unsatisfactory in any area of responsibility as contained in § 126-142-18.

16.2 The improvement plan shall designate how the administrator shall meet the performance characteristics. The improvement plan shall:

16.2.1. identify the deficiency(ies),

16.2.2. specify the corrective action to remediate the deficiency(ies),

16.2.3. contain the time frame for monitoring and deadlines for meeting the performance characteristics, and in no case shall an improvement plan be for more than (1) semester in length, and

16.2.4. describe the resources and assistance available to assist in correcting the deficiency(ies).

W. Va. Code State Rules § 126-142-16.

As it relates to 16.1, the Improvement Plan appropriately satisfies the provision because (a) Grievant's supervisor, Superintendent Lampinen, developed the Improvement Plan in conjunction with Grievant, and because (b) Grievant had, for some time, demonstrated unsatisfactory performance in multiple areas of responsibility enumerated under § 126-142-18, including:

Classroom Visitations are not regularly conducted, in contravention of 126-142-18.1.1;

Supervision of instruction and visibility in classrooms is minimal, in contravention of 126-142-18.1.1;

Group behaviors have not been managed to achieve consensus, in contravention of 126-142-18.1.4;

Effective communication has not been demonstrated, in contravention of 126-142-18.1.4.

Staff Members believe that they are told what to do rather than having a vested voice, (126-142-18.1.4).

Communication structures are not effective by failing to encourage others to describe their perspectives, in contravention of 126-142-18.1.4.

See R. Exs. 4, 44.

As it relates to 16.2, the Improvement Plan properly explained how Grievant could meet the desired performance characteristics because the Plan (a) identified the deficiencies; (b) specified the corrective action, including creation of a Culture Climate Committee, conducting observations and walkthroughs, facilitating follow through on discipline reports; (c) contained a specific time frame within which to complete the improvement period, namely April 9, 2009, through June 16, 2009; and (d) listed numerous written resources available, as well as any personal assistance she might desire.

Grievant did not satisfactorily improve her performance during the Improvement Period. Grievant failed to appropriately conduct walkthroughs and observations; Grievant failed to consistently administer discipline to students; and Grievant failed to turn in minutes from the Culture Climate Committee meetings. Further, Grievant failed to improve the overall culture and climate of the school; this failure is demonstrated by the filing (and substantiation) of two harassment complaints by teachers; by the suspension of Grievant for placing students in danger during the “dog pile” incident; and by the continued complaints of teachers, as noted by the filing of the 52-person grievance,

seeking termination of Grievant's contract. Given the above, the Board's decision to terminate Grievant's contract cannot be viewed as "arbitrary or capricious."

Grievant claims she had insufficient time to successfully complete the Improvement Period. Grievant had from April 9, 2009, through June 16, 2009, or 68 calendar days, to complete the Improvement Plan. Grievant's reduction in number of "working days" to participate in the Improvement Period was due to Grievant's own, inappropriate behavior; namely, participating in the "dog pile" incident which led to a suspension, as well as the two harassment complaints.

Grievant had already had 43 calendar days to perform walkthroughs, observations, and attend to discipline referrals, which she had not successfully completed. It is speculative to presume that, if afforded additional days, she would have satisfactorily performed these tasks.

Finally, Grievant simply failed to improve the culture and climate of BUHS, as evidenced by her interactions with Ms. Hull over spending policies, her interaction with Mr. Chipps, the football coach, the two harassment complaints, and the 52-person grievance, which were caused by conduct of Grievant after the implementation of the Improvement Plan. Grievant had ample resources available to her to aid in her improvement. She did not take advantage of these resources. Her own selected committee representative, Patti McComas, testified that Grievant never contacted her at any time during the Improvement Period. There is no evidence to suggest that Grievant was motivated to, or would have succeeded, in changing the environment at BUHS.

Vice-Principal Doug Frashure described Grievant's leadership style as authoritative and inflexible. He testified that the atmosphere at Curriculum Team meetings was tense and difficult when Grievant was present.

Jan Craig served as the Secondary Coordinator of Special Education Services. During the 2007-2008 school year, Jan Craig noted a significant change in the school culture and climate.⁶ Ms. Craig testified that you felt like you were in trouble all the time, did not know what would happen next, and you always felt on edge.

Mary Hull, BUHS Finance Secretary, experienced numerous episodes of aggressive, unprofessional behavior by Grievant. For example, during the 2007-2008 school year, while Ms. Hull was seated at her desk, Grievant yelled at her, then swiped her arm across Ms. Hull's desk, breaking a figurine sitting on Ms. Hull's desk.

Angie Westfall testified that under Grievant's leadership, the culture and climate of BUHS was poor. Grievant did not like to be told "no." Ms. Westfall explained that, if you did not do what Grievant asked, then there would be repercussions. Ms. Westfall testified that she, and others, felt as though she was being spied on by Grievant.

Ms. Westfall testified that, on one occasion when students were not in school, Grievant had scheduled a meeting for teachers, but did not clearly communicate the time for this meeting. Ms. Westfall had arranged for some students to come into her class for extra tutoring that day. Upon discovering this, Grievant instructed Ms. Westfall to send her students home, and report to the meeting. Ms. Westfall felt this was unfair to her students who had, on their own volition, come to her for tutoring on their day off school.

⁶ During all pertinent times, Jan Craig served as West Virginia Education Associate representative. Ms. Craig's role as WVEA representative afforded her a unique perspective in that many teachers and/or staff members communicated concerns directly to her.

On or about February 27, 2009, Superintendent Lampinen met with Cheryl Reger and Neal Reger, who are national board-certified teachers and chairs of the Math Department. They explained to Mr. Lampinen: “Everything involving scheduling is kept secret until it’s too late to do anything about it ... [c]ourse prerequisites have been eliminated without our knowledge and consent.” R. Ex. 45.

Maureen Rhodes, a BUHS teacher, testified that Grievant conducted walkthroughs in her classroom; however, no feedback was ever provided to Ms. Rhodes. Mar. 29, 2011 LIII Tr., p. 32. Ms. Rhodes also testified that Grievant’s “work paranoia” steadily got worse, and relationships between Grievant and teachers became strained. Mar. 29, 2011 LIII Tr., p. 50.

Mr. Pettitt was aware of concerns with Grievant’s leadership skills, and knew that teachers felt as though they were not welcome to the process of goal-setting and building upon the culture of the school.

Grievant was aware that her leadership style was deemed to be harsh and divisive, and she was to communicate to her staff ways in which she was going to try to improve the culture and climate of the school. Instead, after receiving her Improvement Plan, Grievant on two occasion singled out members of her faculty as troublemakers in front of other faculty members, indicating that her job would be easier if she could get rid of them.

The undersigned agrees with Grievant that approximately two months was not enough time to improve the culture and climate of the school. However, this is solely due to Grievant’s leadership style, which she did not show any inclination to change. The damage was already done. The faculty was not likely to be receptive to any overtures on Grievant’s part to effectuate change. This was not a surprise to Grievant. Superintendent

Lampinen had been informally counseling her throughout the school year on her leadership style, and met with her to discuss complaints he received from faculty, students, and parents. Superintendent Lampinen did not observe any change in Grievant's demeanor, or any improvement in her leadership style.

The final straw clearly was the "dog pile" incident. Standing alone, this incident may not have been met with the reaction by the administration that it received. But this incident occurred while Grievant was on an Improvement Plan during which her interactions with faculty, students, and parents were being scrutinized. It showed extremely poor judgment on Grievant's part, at a time when she should have been on her very best behavior. Compounding the incident was suspicious erasure of the incident from the school's video recording of the cafeteria. There was no direct evidence implicating Grievant in the video erasure, but her initial denial that anything had occurred in the cafeteria, until she was presented with the video from a student's phone, justifiably created suspicion on Superintendent Lampinen's part.

The Board has presented more than enough evidence to demonstrate that Grievant did not successfully complete her Improvement Plan. Grievant's own evidence which she submitted to Superintendent Lampinen at the end of the Improvement Plan demonstrates she failed to meet the quantifiable goals set forth in the Plan. Grievant's conduct and behavior in her interactions with her staff and faculty showed no improvement, despite many consultation sessions with Superintendent Lampinen, as well as input from county and state administrators. The Board has met its burden of proof.

CONCLUSIONS OF LAW

1. As this is a disciplinary action, the Board has the burden of proving Grievant's unsatisfactory performance by a preponderance of the evidence. W. Va. Code §18-29-6. "Superintendents, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to the provisions in this chapter." W. Va. Code § 18A-2-7. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20005 (Apr. 16, 1991). See *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

2. W. Va. Code § 18A-2-8 provides, 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 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.

3. In terms of unsatisfactory performance, a county board of education is prohibited 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. Bd. of Educ.*, 163 W. Va. 1, 254 S.E.2d 561 (1979); See also *Holland v. Bd. of Educ. of Raleigh County*, 174 W. Va. 393, 327 S.E.2d 155 (1985).

4. W. Va. Code § 18A-2-12 clarifies and codifies this statement and requires that an unsatisfactory professional must be given notice and an opportunity to improve.

If the individual is still not performing satisfactorily by the next performance evaluation, their supervisor may place them on another improvement plan or recommend them for dismissal. It is not necessary for a professional to be on an improvement plan to be dismissed. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996).

5. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Conrad v. Nicholas County Bd. of Educ.*, Docket No. 97-34-388 (Jan. 12, 1998); *Mullins v. Logan County Bd. of Educ.*, Docket No. 94-23-283 (Sept. 25, 1995); *Dodson v. McDowell County Bd. of Educ.*, Docket No. 93-33-243 (Feb. 15, 1994).

6. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16., 1996).

7. While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

8. The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision

is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dept. of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

9. The Board has met its burden of proof and proved its charge of unsatisfactory performance against Grievant. Given that the Board proved these charges by a preponderance of the evidence, its termination of Grievant's administrative contract was not arbitrary and capricious.

10. The Board violated no statutes, rules, regulations, policies, or written agreements when it terminated Grievant's contract of employment.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also *W. Va. St. R.* § 156-1-6.20 (2008).

DATED: May 24, 2016.

Mary Jo Swartz
Administrative Law Judge