JANE BECKLEY,

Grievant,

v v.

Docket No. 99-22-168

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jane Beckley, employed by the Lincoln County Board of Education, filed the following grievance on or about February 23, 1999:

> Violation of WV State BOE Evaluation Policy 5310. Grievant's supervisor for evaluation purposes is Mr. Baisden. Mr. Smith issued an Improvement Plan based on no classroom observation. Relief Sought: Evaluator be Mr. Baisden and Improvement plan (sic) be voided.

On March 19, 1999, a Level I decision denying the grievance was issued. Grievant appealed to Level II where relief was denied by Grievance Evaluator Charles S. McCann on April 19, 1999. Level III was bypassed, and the matter was submitted on the record at Level IV. The deadline for the parties' proposed findings of fact and conclusions of law was July 6, 1999, at which time this grievance became mature for decision. (See footnote 1)

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

Findings of Fact

1. Grievant is employed as a music teacher at Guyan Valley High School. 2. During the majority of the four years Principal Edward Smith has served as principal of this school, he has assigned the Assistant Principal, Mr. Gary Baisden, to complete Grievant's yearly evaluation.

3. During the 1998-99 school year, Grievant's planning period was the last period of the day.

(See footnote 2)

4. On December 1, 1998, Grievant received a satisfactory evaluation from Assistant Principal Baisden, pursuant to a classroom evaluation.

5. During the Fall semester of the 1998-99 school year, Principal Smith attempted to locate Grievant during her planning period to address a complaint made by a parent of a student who was in the building at the time. Grievant had left school early without notifying anyone or obtaining permission of either the Principal or Assistant Principal.

6. This matter was called to Grievant's attention, and she received a verbal warning. At the time of the first discussion, Grievant acknowledged she knew she was not allowed to leave the school without prior permission.

7. No disciplinary action, other than the verbal warning, was taken against Grievant for this violation, nor was she placed on an Improvement Plan at that time.

8. On a subsequent occasion during this same Fall semester, Principal Smith looked for Grievant during her planning period, and discovered she had left school duringher planning period without notifying or obtaining permission from the school principal, despite the prior warning for this behavior. Thus, Principal Smith was the administrator who was personally aware of two occasions when Grievant had left school without first obtaining permission.

9. After the second violation, Grievant met with Assistant Principal Baisden and Principal Smith on December 16, 1998.

10. At this meeting, the deficiencies in Grievant's behavior were noted and discussed.

11. At this meeting, Grievant agreed she was not to leave school during her planning period without prior permission, and that her actions were improper. She also agreed she should be available for parent conferences.

12. An Improvement Plan was discussed and presented for her review and signature.

13. Two deficiencies were identified on the Improvement Plan under the category of "Professional Work Habits." This Improvement Plan was to last for ninety days and Grievant was to be monitored by the school's administration.

14. The first deficiency dealt with Section E, "Performs assigned duties", and indicated Grievant had failed to adhere to work time rules and/or regulations.

15. The second area of deficiency was under Section B of that same category, "Interacts

appropriately with other educational personnel", and indicated Grievant needed to communicate regularly and effectively with students, co-workers, parents, guardians, and the community. 16. Grievant did not offer any suggestions for changes to the Improvement Plan at the time of the signing, nor did Grievant indicate she had any dispute or disagreement with the reasons for the Improvement Plan.

17. During the discussion of Grievant's deficiencies and the Improvement Plan, Principal Smith did not refuse or fail to consider anything Grievant had to say. He did not cut off any of Grievant's communication nor indicate he did not wish to hear what Grievant had to say in response to the areas of deficiencies of the Improvement Plan. (Grievant's testimony at Level II.)

18. Grievant did not "remember a whole lot" about the meeting. Although she was "a nervous wreck" because she was trying to quit smoking, and "she was in no emotional state to do much of anything that day," there is no indication Grievant asked for the meeting to be postponed, or requested additional time to consider the Improvement Plan further. (See footnote 3) There is also no indication Grievant informed Principal Smith or Assistant Principal Baisden of her excessive distress. Grievant has never offered any additional suggestions for the Improvement Plan. (Grievant's testimony at Level II.)

19. Grievant signed the Improvement Plan above a statement which read: "I acknowledge receipt of this plan and have had an opportunity to discuss it." There was no indication from Grievant's testimony that she was coerced into signing this statement.

Issues and Arguments

Grievant advances several arguments. The first is that Principal Smith cannot issue Grievant an Improvement Plan because he is not her direct supervisor as he was not the school administrator who completed her evaluation. Second, Grievant argues that because the December evaluation did not list any deficiencies, and Principal Smith had not conducted any classroom observations, an Improvement Plan cannot be issued. Third, Grievant argues she was not given an opportunity for input as is required by Policy 5310.

Respondent argues Principal Smith, as the principal of the building, is the supervisor of all the teachers in the building, and the fact that he delegated Assistant Principal Baisden to perform Grievant's yearly evaluation does not relieve him or prevent him from supervising Grievant or from issuing Grievant an Improvement Plan in an area in which he observes problems. Respondent refers

to W. Va. Code § 18A-2-9 which indicates the principal is responsible for the entire management of the school. Respondent notes Principal Smith gave Grievant this Improvement Plan himself because he was the one who had observed the deficiencies. Respondent also maintains Grievant had an opportunity to discuss the Improvement Plan, and to provide input if she so desired, when she met with both Assistant Principal Baisden and Principal Smith. Respondent argues Grievant was not prevented from making suggestions, and signed the Improvement Plan indicating she had discussed it. Respondent also asserted that, if indeed, Grievant was upset at the meeting, she needed to give the administrators that information, and ask to postpone the meeting or ask to give additional input or have further discussion at a later date.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

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 her 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).

The first issue to address is whether Principal Smith, by delegating or assigning Assistant Principal Baisden to complete Grievant's classroom evaluation, ceased to be Grievant's direct supervisor, such that he could no longer place Grievant on anImprovement Plan for inappropriate behavior he directly observed and had previously warned Grievant about.

W. Va. Code § 18A-2-9 discusses the authority and responsibility of a principal and states:

> Upon the recommendation of the county superintendent of schools, the county board of education shall employ and assign, through written contract, public school principals who shall supervise the management and the operation of the school or schools to which they are assigned. Such principals shall hold valid administrative certificates appropriate for their assignments.
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> . . .
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> Under the supervision of the superintendent and in accordance with the rules and regulations of the county board of education, the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which he is assigned.
>
> The principal may submit recommendations to the superintendent regarding the appointment, assignment, promotion, transfer and dismissal of all personnel assigned to the school or schools under said principal's control. Such recommendation shall be submitted in writing as prescribed by the superintendent. . . .

(Emphasis added).

Although policy 5310 was not submitted by Grievant, she avers it requires an Improvement Plan to be completed by the direct supervisor. Grievant argues that since Principal Smith had not been completing her evaluation he was not her direct supervisor, and thus, could not give her an Improvement Plan for a deficiency that Grievant agrees she possessed. It must be noted the Improvement Plan was given to Grievant in a meeting with both the Principal and Assistant Principal, and it was unclear from the record whatAssistant Principal Baisden's role in the process was. However, Grievant's argument will be addressed.

Nothing in the above-cited Code Section suggests a principal abandons his duties and responsibilities over his faculty by asking an assistant principal to perform certain classroom evaluations. There was no indication Principal Smith had ceased to be Grievant's supervisor.

To reach the conclusion that Grievant's principal is not her supervisor and cannot give her an Improvement Plan would be to raise form over substance. W. Va. Code § 18A- 2-9 specifically mandates "the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school."

(Emphasis added). Certainly, Principal Smith could have directed Assistant Principal Baisden to work with Grievant on an Improvement Plan, but since Principal Smith was the administrator who had seen the inappropriate behavior twice in a row, and had previously counseled Grievant about such wrong doing, it was perfectly proper for him to find Grievant's behavior deficient and to present an Improvement Plan to her and discuss it with her. This is especially true since the meeting was conducted with Assistant Principal Baisden present. Principal Smith is responsible for the school and personnel under his control. It cannot be incorrect for Principal Smith to place one of the faculty under his control on an Improvement Plan for behavior he himself observed.

The second issue raised by Grievant is that because the December 1998 evaluation did not find her performance to be unsatisfactory, Principal Smith cannot later find herperformance unsatisfactory without another evaluation. This question has previously been answered in the case of Meade v. Mingo County Board of Education, Docket No. 90-29- 103 (Jan. 30, 1991). Meade holds there is "no requirement for a formal evaluation" before an Improvement Plan is instituted. To hold otherwise would again seek to place form over substance. When a supervisor sees a deficiency in an employee's performance, places her on notice of the problem with a verbal warning, and the behavior is then repeated; there is no need for the supervisor to perform a formal evaluation. (See footnote 4) Meade, supra; Cohenour v. Greenbrier County Bd. of Educ., Docket No. 13-87-058-4 (June 22, 1987).

Before addressing the last issue, the question of credibility must be addressed. An Administrative Law Judge is responsible for determining the credibility of the testimony before her. Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1994). The fact that this testimony is offered in written form does not alter this responsibility. Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). Grievant's testimony about leaving school during her planning periods was evasive, and prior to cross-examination she indicated she had only left school once without permission. Grievant also indicated she was unaware there was a problem prior to being called to the office for the Improvement Plan meeting. This testimony is untruthful. Grievant had already been warned once about leaving school without permission. Perhaps what Grievant meant was that she did not know that Principal Smithhad discovered she had again left school without permission. Grievant also indicated she wished someone had just talked to her about the problem instead of writing up an Improvement Plan. This statement fails to recognize Grievant

had already been talked to once, and the error of her ways had been clearly identified . Further, Grievant indicated she did not remember much about the meeting, as she was "extremely distraught" because of the meeting, she then stated she was not given the opportunity to add anything, then stated she was in no emotional state to add anything, and then stated the reason for her emotional state was her attempt to quit smoking and an upcoming performance. This confusing group of statements by Grievant makes it extremely difficult to understand exactly what went on at the meeting, and does call into question Grievant's memory of events, her understanding of what occurred, and affects the weight that can be attributed to Grievant's statements about her input at the meeting.

Grievant avers the Improvement Plan must be invalidated as she had no input into it. Thomas, supra; Sutton v. Mineral County Bd. of Educ., Docket No. 28-88-110 (Dec. 9, 1988). The key questions become what is input, and can a discussion without additions suffice for input if at the discussion the employee does not make additional suggestions. The American Heritage Dictionary defines input as "contribution to or participation in a common effort." (2d college ed. 1991, at 664). While it is true the Improvement Plan was in written form when it was given to Grievant, there is no evidence to demonstrate that suggestions, additions, or changes from Grievant could not or would not have been incorporated into the document. This Improvement Plan was a relatively simple one indicating Grievant would not leave the school without prior permission and would keep alog of the parent contacts she made. Grievant was given an opportunity to speak, and indeed, she signed the Improvement Plan saying she had an opportunity to discuss it. It was clear Grievant agreed she had broken the rules, and she made no suggestions at hearing of ideas or additions she would have made to the Improvement Plan.

Grievant argues she did not attempt to add anything to the document because she was so upset from trying to quit smoking. There was no evidence Grievant informed Principal Smith or Assistant Principal Baisden of her inability to "think" and contribute at the time the Improvement Plan was presented to her. If Grievant's argument is accepted, it is foreseeable that employees could merely refuse to speak when Improvement Plans are formulated or presented, and then invalidate them on the grounds of lack of input. The undersigned Administrative Law Judge finds that while Grievant was not present during the initial formulation of this simple Improvement Plan, she was not prevented from making suggestions or additions or formulating changes. Certainly, Grievant's testimony

establishes she was not prevented from doing so by either Principal Smith or Assistant Principal Baisden. However, it does appear that Grievant's failure to have the input she now says she wanted was caused by internal stressors of which Principal Smith and Assistant Principal Baisden were unaware. Given this set of factors, the undersigned Administrative Law Judge finds Grievant was given the opportunity to discuss this simple Improvement Plan dealing with two specific areas. She did not add anything to the Improvement Plan nor was she prevented from doing so by Principal Smith or AssistantPrincipal Baisden. Thus, Grievant had the opportunity for input and did not, for whatever reason avail herself of this opportunity.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. This burden of proof holds true for evaluations and subsequent Improvement Plans, as their purpose is to provide feedback for an employee and a method for improving deficient performance. See Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995).

2. Grievant failed to demonstrate she should not have been placed on an Improvement Plan, or that it was put in place in an erroneous manner.

3. There is "no requirement for a formal evaluation" before an Improvement Plan is instituted. Meade v. Mingo County Board of Education, Docket No. 90-29-103 (Jan. 30, 1991).

4. As long as an employee has the opportunity for discussion of an Improvement Plan, and has the opportunity for input if desired, an Improvement Plan will not be later invalidated by a claim that the plan was previously prepared. Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Lincoln County. Any such appeal must be filed within thirty (30) daysof receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board

nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 31, 1999

Footnote: 1

Grievant was represented by Anita Mitter from the West Virginia Education Association, and the Board was represented by Attorney James Gabehart.

Footnote: 2

A planning period is the time a board of education is required to give a teacher during the instructional day for class preparation, and it is considered essential for quality instruction. See W. Va. Code § 18A-4-14(2).

Footnote: 3

Grievant also indicated she wished someone had come and talked to her instead of "going this route." It must be noted Principal Smith had already told Grievant earlier in the semester that she was not to leave school during her planning period.

Footnote: 4

Such behavior could be seen as insubordination, as the problem is not a deficiency in Grievant's professional skills, but appears to be evidence of a wilful failure to perform the duties of which she is aware. See Bierer v. Jefferson County Bd. of Educ., Docket No. 95- 29-558 (Apr. 8, 1996).