RICHARD HICKS,

Grievant,

v. **Docket No. 97-14-382** (See footnote 1)

HAMPSHIRE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Richard Hicks, grieves his transfer and demotion from the Administrative Principal position at Hampshire High School to the Curriculum and Planning Principal at Hampshire High School. This grievance has had a rather complex procedural history, which will be discussed in some detail below. This case became mature for decision on August 3, 1998, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2) This case was reassigned to the undersigned Administrative Law Judge for administrative reasons on February 11, 1999.

Procedural History

Grievant filed this grievance on July 14, 1997. Because Grievant is a principal, he had his informal grievance conference (See footnote 3) with Superintendent Gerald Mathias on July 1,1997; thus, there was no need to have a Level I conference.

A Level II hearing was conducted by Superintendent Mathias on July 21, 1997. At this hearing, Superintendent Mathias presented evidence which was included in the record, but he did not allow Grievant to cross-examine him on the documents or his statements. Grievant had alleged in his Statement of Grievance that the transfer was a demotion, and he repeatedly questioned Superintendent Mathias as to whether his transfer and demotion were for disciplinary reasons, as this factor would change the manner in which the transfer and grievance process should have been handled. Superintendent Mathias refused to answer this question as well. The Level II decision answered this question very clearly, however. This July 23, 1997 decision stated, "[t]he transfer and demotion was (sic) disciplinary in nature based on the improvement plans which were not met or only

minimum (sic) met and on the needs of the students at Hampshire High School . . . ."

Grievant appealed that decision to the Hampshire County Board of Education ("HCBOE") with a detailed statement of the problems he saw with the transfer, his treatment by the Superintendent and the Board, and the Level II hearing. One of his main contentions was that he was not allowed to cross-examine Superintendent Mathias atLevel II; and, thus, he did not know whether the demotion was disciplinary or not. This lack of knowledge affected his ability to present the proper evidence at the Level II hearing, as he did not know what evidence would be appropriate to place into the record. A Level III hearing was scheduled for August 11, 1997. At the Level III hearing, the issue of whether the grievance was timely filed was raised by HCBOE for the first time. (See footnote 4) Over Grievant's protests that HCBOE's attorney did not understand the point of his grievance; that he was not grieving his transfer, but his placement into a lesser position, HCBOE ruled that the grievance was untimely. Grievant was allowed to cross-examine Superintendent Mathias at this Level III hearing.

Grievant appealed to Level IV, and the grievance was originally assigned to Administrative Law Judge Jeffery Weatherholt. Since the parties had indicated the case could be submitted on the record, a date for submission for the parties' proposed Findings of Fact and Conclusions of Law was set by Administrative Law Judge Weatherholt. Shortly thereafter, he resigned from his position the Grievance Board, and the case was assigned to Administrative Law Judge Mary Jo Swartz to render the decision on the record. Upon review of the record, Administrative Law Judge Swartz ruled by letter dated May 7, 1998, that a Level IV hearing would be required, and since Grievant's transfer and demotion was disciplinary in nature HCBOE would have the burden of proof. This ruling was necessary
to correct any prior problems in the lower level proceedings. Administrative Law Judge Swartz noted that the burden of proof is on the employer in a disciplinary hearing.

Shortly thereafter, a new administrative law judge, Randy Miller, was assigned to the Elkins office, and the case was reassigned to him. A Level IV hearing was conducted by Administrative Law Judge Miller on July 6, 1998, and this case became mature for decision on August 3, 1998, after receipt of the parties' proposed findings of fact and conclusions of law. As previously noted, the case was then reassigned on February 11, 1999, to the undersigned Administrative Law Judge for administrative reasons.

Issues and Arguments

First, Grievant alleged he did not know he was demoted until he received his assignment for the 1997-1998 school year on June 30, 1997. Grievant's other main argument is that he was improperly demoted as he was not placed on notice that his transfer and demotion were for disciplinary reasons. Grievant averred he first received notice that his transfer and demotion were for disciplinary reasons when he received the Level II decision. He also contended he did not receive all his required due process rights, and Respondent did not follow the requirements in W. Va. Code § 18A-2-8 in his disciplinary demotion. (See footnote 5) Grievant also argued Superintendent Mathias was required to holda Level I conference instead of scheduling a Level II hearing.

Respondent maintained Grievant was properly transferred and demoted, and he received all due process rights to which he was entitled. Respondent also argued Grievant was aware his transfer was due to both administrative and disciplinary reasons as this was personally explained to him by Superintendent Mathias, and this explanation was followed by a letter reiterating the reasons for the transfer and demotion. (See footnote 6) Respondent recounted the multiple unsatisfactory evaluations and subsequent Improvement Plans Grievant received during his tenure as principal at Hampshire High School. Respondent also noted Grievant had difficulty with completing the tasks of a principal for almost the entire time that he held the position. Respondent described the ways HCBOE attempted to work with Grievant on the areas of his concerns about the new position, and reported that many concessions were made to Grievant to attempt to resolve this matter. Further, Respondent pointed out Grievant was very concerned about being embarrassed because of this transfer, and so it attempted to treat Grievant "respectfully" throughout the transfer process and stressed the administrative reason for the transfer and demotion over the unsatisfactory performance issue. Respondent and Superintendent Mathias note the transfer was an attempt to place the Grievant in a position in which he could use his many talents and strengths and not continue to be placed in situations in which he had obvious limitations. 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. For approximately ten years prior to his transfer and demotion, Grievant was the principal at Hampshire High School.

2. During the school years from 1989-1993, Grievant was not on an Improvement Plan, but certain sections of his evaluation consistently noted areas needing improvement. The areas Grievant was usually directed to correct included: 1) improvement in interpersonal communication with total staff; 2) increase staff involvement in discipline and attendance issues; 3) completion and completeness of evaluations; 3) improvement in parent communication; 4) improvement on low CTBS scores; (See footnote 7) and 5) development and implementation of school improvement plans.

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3. Grievant's evaluation at the end of the 1993-1994 school year indicated several problems requiring placement on an Improvement Plan. Grievant had not completed staff, faculty, and substitute evaluations in a timely and complete manner. The goals established by the faculty were not measurable and many appeared to have not been met in a satisfactory manner. Additionally, Superintendent Mathias noted that staff input and Superintendent Mathias's own observations indicated a lack of school discipline and a lack of "involvement of the total staff in a team approach to solve the numerous problems at Hampshire High School." Grievant indicated on this evaluation that he felt he should not be blamed for the failure of others to do their job. 4. As a result on the 1993-1994 evaluation, Grievant was placed on an Improvement Plan for the 1994-1995 school year with the following areas identified as needing change: 1) timeliness and completeness of evaluations, and 2) involvement of the staff in school discipline, especially in the enforcement of the Dress Code.

5. Grievant successfully completed the Improvement Plan on discipline, but even with extending the timelines on the Improvement Plan for dealing with evaluations, this area was only partially met.

6. Grievant's evaluation at the end of the 1994-1995 school year indicated several problems, and Grievant's failure to complete the Improvement Plan on evaluations successfully was discussed in detail. Specific evaluation problem areas were noted, and Superintendent Mathias indicated another Improvement Plan for this area would be needed.

7. This 1994-1995 evaluation also focused on the May 1995 Report of the visit by the West Virginia Department of Education's On-Site Review Committee from the Office of Accreditation and Recognition. Hampshire High School was found to be noncompliant in the student drop out rate. No other areas of noncompliance were noted, but multiple recommendations were made by the committee for improvement in the areas of: Lesson Plans, course credit, student Dress Code, and

library and computer facilities.

8. As a result on the 1994-1995 evaluation, Grievant was placed on an Improvement Plan for the 1995-1996 school year with the following areas identified as needing change: 1) timeliness of evaluations, and 2) increased monitoring and assistance in the development of faculty goals.

9. Grievant successfully completed this Improvement Plan. 10. Grievant's 1995-1996 evaluation indicated multiple problems, several of which required placement on an Improvement Plan. Grievant's school was unsatisfactory in the area of CTBS scores; as Hampshire High School's scores were low and the plan to remediate this problem needed more "aggressive focus/planning". Superintendent Mathias noted state testing would begin next Spring. An Improvement Plan would be needed in this area. Grievant continued to be satisfactory in the area relating to teacher evaluations. The area of Lesson Plans continued to be a problem as previously noted, Grievant was found to be unsatisfactory in this area, and an Improvement Plan would be required. Superintendent Mathias noted Hampshire High School continued to be on probation because of the high drop out rate, and Grievant was directed to develop a plan for rectifying this problem.

11. The evaluation of 1995-1996 also spoke to the Follow-up Report of the West Virginia Department of Education's On-Site Review Committee from the Office of Accreditation and Recognition received in March 1996. Hampshire High School was found to be noncompliant in two areas: 1) Lesson Plans; and 2) drop out rate. This committee noted the drop out rate Hampshire High School had increased over the last three years.

12. Grievant was placed on two Improvement Plans for the 1996-1997 school year. One was for the low CTBS scores, and the other one was for the multiple problems with Lesson Plans.

13. Grievant successfully completed the Improvement Plans, but Superintendent Mathias noted continuing concerns with the quality of the Lesson Plans completed by the faculty. 14. On January 30, 1997, Grievant received a follow-up letter to his mid-year evaluation conference. This letter reviewed the goals established for the 1996-1997 school year. Superintendent Mathias noted several difficulties with staff/teacher evaluations. Some were late, some difficult to read, and others did not appear to differentiate comments between teachers, and all appeared to be rated the same, with the same comments. Superintendent Mathias also noted discipline appeared to be a major concern and the Dress Code was still not being enforced. The drop out rate continued to be an area of concern. Grievant was directed to address the identified issues.

15. Grievant had another conference on February 25, 1997, which indicated continuing problems. Concerns continued to exist about the enforcement of the Dress Code, disciplinary issues, CTBS math strategies, and the drop out rate.

16. Grievant never grieved any of his evaluations or his placement on Improvement Plans at any time. He never grieved any irregularities in the Improvement Plans. (See footnote 8)

17. Grievant's 1996-1997 evaluation was completed on June 25, 1997. He continued to have problems in the areas of instructional leadership, completion of teacher evaluations, disciplinary issues, enforcement of the Dress Code, and a decrease in drop out rate, in order to achieve full accreditation. Grievant was not placed on an ImprovementPlan for the 1997-1998 school year even though some goals were not met, because he was being transferred to a new position. (See footnote 9)

18. At the February 25, 1997 conference, Grievant was informed of the strong possibility he would be placed on the transfer list because of possible administrative changes at Hampshire High School or within the Central Office.

19. This conference was followed by a letter from HCBOE again repeating the possibility of a transfer in assignment.

20. Grievant wrote Superintendent Mathias on March 4, 1997, requesting a conference about his proposed transfer and requesting the reasons for his transfer be placed in writing. Grievant noted he did not want a hearing before HCBOE on this issue.

21. Superintendent Mathias replied to this letter on March 6, 1997, scheduling a meeting for March 11, 1997. (See footnote 10) In this letter Superintendent Mathias reiterated the statement about possible changes in administrative positions and stated the following:

> A further explanation of this statement includes such items as: (1) plans to move the 9th graders to Hampshire High School will require additional staff there, including administrative staff, and it would only be good planning to have the administrators in place prior to moving the students in order to have a smoother transition, (2) the fact that you have been on an Improvement Plan for the past three years is of concern and a change may be in order to allow you to fully utilize your expertise, and, (3) the central office staff needs to be realigned due to escalating work load for all concerned.

22. On March 17, 1997, Superintendent Mathias met with Grievant pursuant to his request. At this meeting Grievant expressed interest in the position, but he also stated he was concerned about the transfer. The main issue for Grievant was his status, and he was concerned about "how he would be looked upon" since he would still be at the Hampshire High School, but no longer the

Administrative Principal. Grievant requested to meet with HCBOE.

23. Grievant met with HCBOE on March 24, 1997, and he discussed his concerns about the transfer. At this meeting, Superintendent Mathias did not again list all the reasons for the transfer as they had been stated in the March 6, 1997 letter and at the subsequent conference.

24. HCBOE voted to approve Grievant's placement on the transfer list at the meeting of March 24, 1997. At the time of the transfer, it was unclear what position Grievant would fill during the 1997-1998 school year, and he was placed on transfer for subsequent reassignment. It was hoped that he would be the Associate Principal of Curriculum and Planning at Hampshire High School, but the final planning and funding for this position had not been completed. Grievant received a letter dated March 25, 1997, confirming this transfer decision.

25. Grievant did not grieve his placement on the transfer list.

26. In May 1997, Grievant went to the home of the HCBOE president and discussed his concerns about placement. Superintendent Mathias did not find out about this discussion until Board President Helen Heatwold called Superintendent Mathias, told him of Grievant's concerns, and requested Superintendent Mathias to contact Grievant. 27. Superintendent Mathias called Grievant on May 20, 1997, and arranged to meet with him on May 23, 1997. At this meeting, Superintendent Mathias shared with Grievant the plan for him to be the Associate Principal of Curriculum and Planning at Hampshire High School. Grievant was aware of this position and its duties. This plan, as well as all the duties of the position were not yet formalized. Superintendent Mathias also reiterated that Grievant had not performed up to the expected standards during his tenure as the principal at Hampshire High School, and that certain sections had remained problem areas even with repeated Improvement Plans. Superintendent Mathias also indicated he believed the transfer would increase Grievant's opportunities for success, and Grievant would be able to utilize his strengths in this position.

28. Grievant took an active role in revising the Associate Principal of Curriculum and Planning Job Description, and he made many suggestions to change the original proposal. Some of the changes made at Grievant's request were an increase in the days of the contract from 240 to 245. (See footnote 11) This change allowed for 5 days of vacation time. The title was changed to remove the word associate. The requirement for this position to handle extra-curricular duties was removed and greatly decreased the hours required by the position. The position of Principal of Curriculum and

Planning was also identified as one that would be considered lateral to other principal positions for Reduction in Force purposes.

29. HCBOE voted to approve the Job Description for the Principal of Curriculum and Planning on June 1, 1997. Grievant was at this meeting and continued to protest the number of days and the pay of the Principal of Curriculum and Planning position. 30. HCBOE voted to transfer Grievant into the Principal of Curriculum and Planning position on June 16, 1997, and a letter was sent to that effect on or about June 26, 1997.

31. Grievant received that letter on June 30, 1997, and appeared in Superintendent Mathias' office very upset and without an appointment on July 1, 1997.

32. Grievant met with Superintendent Mathias at that time and informed Superintendent Mathias that the meeting was his informal grievance conference; however, Grievant did not file a written grievance until July 14, 1997.

33. Grievant does not grieve his transfer into the position of Principal of Curriculum and Planning, but grieves the fact that the position receives less pay; and, thus, he was demoted when he was placed into this position.

34. Grievant was transferred and demoted for both administrative and disciplinary reasons.

Discussion

This case involved many procedural errors, and Grievant alleges his grievance should be granted because of them. Many of these errors, such as inability to cross- examine Superintendent Mathias (Grievant was allowed to cross-examine Superintendent Mathias at both Levels III and IV), and the ruling that the grievance was untimely, were cured by later proceedings, thus these problems should not and will not be used to grant the grievance. The issues that remain are: 1) when did Grievant know his transfer was, in part, for disciplinary reasons; 2) when did he know he was being demoted; 3) were all the necessary due process rights granted to Grievant during his transfer and demotion; and 4) was Grievant's transfer and demotion for disciplinary reasons for good cause. **1. When did Grievant know his transfer and demotion were for disciplinary reasons**

Grievant alleges he did not know his transfer and demotion were for disciplinary reasons until he received the Level II decision. This allegation is not supported by the evidence. Grievant knew his transfer was, in part, for disciplinary reasons when he received Superintendent Mathias' letter of

March 6, 1997. Grievant had requested this formal statement of reasons, and the second reason given for Grievant's transfer was " the fact that you have been on an Improvement Plan for the past three years is of concern and a change may be in order to allow you to fully utilize your expertise." One reason for Grievant's confusion may have been the fact that his transfer and demotion were for both administrative and disciplinary reasons.

This fact was subsequently confirmed in the discussion with Superintendent Mathias on March 17, 1997, and was repeated during the May 23, 1997 discussion. Grievant was told in the May meeting that he had been unable to perform the duties associated with the Administrative Principal position, and this played a role in his transfer. Thus, Grievant knew or should have known as early March 6, 1997, that his unsatisfactory performance played a part in his transfer.

2. When did Grievant know he was being demoted

Grievant alleges he did not know his transfer would result in a demotion until he received the letter of June 26, 1997. Grievant was told in early March that he would most likely be placed in an associate principal position. Associate principal positions are for fewer days because of the decreased responsibility. Grievant knew early on that the number of days the Associate Principal position would be entitled to was 240, and that the salary a position received was based on the days of service. He lobbied for a change inthe length of the contract, and this was granted. The number of days was increased to 245; still not the number of days he had before - 252. Accordingly, Grievant either knew or should have known that he was demoted, at the time he was placed on transfer. This knowledge was demonstrated when Grievant first discussed his potential transfer as he was worried about his status, and he expressed concern about how others would perceive his change in position. He may have hoped the contract would be adjusted, and it was somewhat, but he knew it was a position with fewer days, and this knowledge was confirmed on June 1, 1997, when HCBOE approved the Curriculum and Planning Principal position.

3. Whether Grievant received all the due process rights to which he was entitled

HCBOE transferred and demoted Grievant pursuant to W. Va. Code § 18A-2-7 which focuses on the transfer. This Code Section states:

> The superintendent, 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 provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred . . . Any teacher or employee who

> desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May . . . At the hearing, the reasons for the proposed transfer must be shown.
>
> The superintendent at a meeting of the board on or before the first Monday in May shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year . . . . The list of those recommended for transfer shall be included in the minute record of such meeting and all those so listed shall be notified in writing, which notice shall be delivered in writing, by certified mail, return receipt requested, to such persons' last knownaddresses within ten days following said board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.

All the necessary procedures for transferring and demoting an individual pursuant to this Code Section were met. However, because Grievant's transfer and demotion were also for disciplinary reasons he was entitled to an additional set of protections which are covered under W. Va. Code § 18A-2-8.

W. Va. Code § 18A-2-8 states disciplinary charges :

> shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals pursuant to provisions of article twenty-nine [§ 18-29-1 et seq.], chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, except that dismissal for the conviction of a felony or guilty plea or plea of nolo contendere to a felony charge is not by itself a grievable dismissal. An employee charged with the commission of a felony may be reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges.

The West Virginia Supreme Court in Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment. However, the due process rights afforded an individual for less than a termination, or “a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.” Waite v. Civil Service Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing North v. Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)). Prior to a thirty- day suspension Waite, a civil service employee, had a sufficient property interest to

require notice of the charges and an opportunity to present her side of the story to the decision-maker. Waite at 170. Further, the West Virginia Supreme Court of Appeals hasrecognized that “due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case.” Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). Accordingly, a tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing. An employee is also entitled to written notice of the charges and an explanation of the evidence. Buskirk at Syl. Pt. 3; W. Va. Code §18A-2-8.

One point of clarification may be helpful. W. Va. Code §18A-2-8 speaks to disciplinary suspension and termination, not demotion. As a demotion frequently involves the same loss of money or status involved in suspension and termination, it is appropriate to apply the safeguards provided in the Code Section and in Wirt to a disciplinary demotion. Williams v. Cabell County Bd. of Educ., Docket No. 95-05-325 (Oct. 31, 1996).

Grievant 's letters from the Board telling him he was going to be transferred and then that he was transferred, made no mention of his unsatisfactory performance. However, this information was included in the letter requested by Grievant from Superintendent Mathias. No charges, as such, were presented to HCBOE, but obviously the Board was aware Grievant had consistently had trouble meeting a satisfactory level of performance of his duties as an Administrative Principal at Hampshire High School. Just as obviously they were aware of the failure of Hampshire High School to meet the required West Virginia Department of Education accreditation standards and the high drop out rate. The Board agreed with the transfer and demotion and accepted Superintendent Mathias' recommendation. Thus, it would appear that technically not every "T" was crossed and every "I" was dotted. However, the undersigned Administrative Law Judge cannot find how this failure harmed Grievant, or what could, or would, have been done differently if Grievant had received correction of these minor details. Grievant received notice, in writing, that one of the reasons for his transfer and demotion was his unsatisfactory performance, he had an opportunity to appear before HCBOE after he received this information, and he exercised his right to file a grievance.

Even if the undersigned Administrative Law Judge were to accept Grievant's argument that he did not know he was disciplinarily demoted until he received the Level II decision on July 30, 1997, this

argument does not appear to be helpful to Grievant's cause. (See footnote 12) Grievant completed his contract as Administrative Principal on June 30, 1997, and assumed the duties of the Curriculum and Planning Principal on July 1, 1997. There is only the time span of one month between his placement into the new position and "his" knowledge of the demotion. Also, by the time Grievant alleges he knew he was disciplinarily demoted, he had already filed a grievance about his demotion and had a Level II hearing. (See footnote 13) It is unclear what Grievant would have done differently if he had this knowledge earlier.

He also had knowledge of this disciplinary action when he presented evidence both at Level III and Level IV. He did not use these two hearings to contest that he had unsatisfactory evaluations, that he should not have been placed on the numerousImprovement Plans, or to demonstrate in any way that the disciplinary demotion was unjustified, and that he should not be removed from his position.

Accordingly, although there may have been minor technical difficulties with Grievant's transfer and demotion, there was no denial of his due process rights.

4. Whether HCBOE met its burden of proof and demonstrated Grievant's transfer and demotion was for good cause

In a disciplinary grievance, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). As this is at least, in part, a disciplinary action, HCBOE 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.” (See footnote 14) 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. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

As previously stated, 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, unsatisfactoryperformance, 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). W. Va. Code §18A-2-12 clarifies and codifies this statement and requires a county board of education's charge of unsatisfactory performance to be "the result of an employee performance evaluation pursuant to [W. Va. Code §18A-2-12]." W. Va. Code §18A-2-8. W. Va. Code §18A-2-12 requires a professional whose performance is "deemed unsatisfactory" to be given notice of these deficiencies. An Improvement Plan is then written to correct these deficiencies, and the employee is given an opportunity to improve. "If the next performance evaluation . . . shows that the professional is still not performing satisfactorily, the evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with [18A-2-8]." Id. 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. Id.

It is not necessary for a professional to currently be on an Improvement Plan to be dismissed for unsatisfactory performance. Williams, supra. All that needs to be shown is that the employee was on notice that his performance was unsatisfactory, and he had been given an opportunity to improve.

The March 6, 1997 letter from Superintendent Mathias indicated Grievant was being transferred both for unsatisfactory performance and expected changes in the administrative structure of the school system. As explained by Superintendent Mathias, he tried to put the best possible light on this transfer and demotion, and told Grievant he had strengths that could be better utilized in another position.

Grievant had been on an Improvement Plan for the last four years, and his performance remained unsatisfactory. It is noted that many of the same problem areas were cited over and over again on the Improvement Plans, and mid-year and year-end evaluations. Grievant did not contend his

performance was satisfactory, nor did he indicate his evaluations were incorrect or the result of some type of inappropriate actions on the part of Superintendent Mathias. Grievant also did not maintain he was inappropriately placed on Improvement Plans. At no time during Grievant's tenure as Administrative Principal at Hampshire High School did Grievant grieve his evaluations or his placement on the Improvement Plans.

In Grievant's case, he received repeated notices of his areas of difficulty, and although he would appear to improve while he was on an Improvement Plan, he would then “fall back” into his prior unsatisfactory performance, which would result in another Improvement Plan on the same issues after the next evaluation. Grievant's overall problems did not improve, and the problems with Hampshire High School increased as demonstrated by the rather sharp increase in the drop out rate .

Respondent has clearly proven the charge of unsatisfactory performance, and Grievant's supervisor, Superintendent Mathias, recommended Grievant be placed in another principal's position which would utilize his strengths. It must be noted that giventhe number of unsatisfactory evaluations and Improvement Plans, Respondent would have been within its rights to return Grievant to a regular teaching position or to terminate his contract altogether instead of placing him in another principal's position.

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

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. “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.

3. 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. 91-20-005 (Apr. 16,

1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

4. 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). 5. A professional employee, who is evaluated as unsatisfactory, must be given notice and an opportunity to improve. If the professional is still not performing in a satisfactory manner by the next performance evaluation, his supervisor may place him on another Improvement Plan or recommend him for dismissal. W. Va. Code §18A-2-12.

6. It is not necessary for a professional to currently be on an Improvement Plan to be dismissed. Williams v. Cabell County Bd. of Educ., Docket No. 95-05-325 (Oct. 31, 1996). All that needs to be shown is that the employee was on notice that his performance was unsatisfactory, and he had been given an opportunity to improve. Id. See W. Va. Code §18A-2-12.

7. W. Va. Code §18A-2-8 speaks to disciplinary suspension and termination, not demotion. As demotion frequently involves the same loss of money or status involved in suspension and termination, the safeguards provided in this Code Section and in Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), can be appropriately applied in a disciplinary demotion.

8. Although minor technical due process problems existed in Grievant's notice, these incidences were insufficient to reverse the decision of HCBOE to transfer and demote Grievant for administrative and disciplinary reasons.

9. HCBOE 's transfer and demotion will be upheld as it met its burden of proof and demonstrated Grievant was consistently unsatisfactory in his performance of his duties as an Administrative Principal.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hampshire County and such appeal must be filed within thirty (30) days of 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 18,1999

Footnote: 1

After this grievance was filed at Level IV, the parties received incorrect notice that the Docket No. was 97-14-383, not the correct Docket No. of 97-14-382.

Footnote: 2

Grievant was pro se, and Respondent was represented by Claudia Bentley, Esquire.

Footnote: 3

This informal conference was not scheduled by Grievant; he showed up at Superintendent Gerald Mathias office on July 1, 1997, while the Superintendent was involved with another administrator's evaluation. With the acceptance of the other employee, Superintendent Mathias met with Grievant. Grievant informed Superintendent Mathias, after this meeting, that the discussion they had just had was his informal grievance meeting.

Footnote: 4

It is clear pursuant to W. Va. Code § 18-29-3(a) that a board of education must raise the issue of timeliness either at or prior to Level II, for this defense to be considered; otherwise it is deemed waived.

Footnote: 5

Grievant also continued to argue that the lower levels of the grievance procedure were mishandled. While it is true that there were problems at certain points in the procedure, these issues were resolved by Administrative Law Judge Swartz's directive to conduct a Level IV hearing with the burden of proof on the Respondent. Additionally, while it is true that Superintendent Mathias did not allow Grievant to cross-examine him at the Level II hearing, Grievant was allowed to cross-examine Superintendent Mathias at both the Level III and the Level IV hearings. Grievant also appeared to want to amend his grievance at Level IV and make additional complaints about events that had occurred since he filed this grievance. As Respondent did not agree to allow Grievant to amend his grievance, these issues will not be discussed in this decision. It must also be noted thatthe proof presented on these issues by Grievant was sparse and confusing.

Footnote: 6

Respondent continued to argue the grievance was untimely filed. As previously noted, this argument cannot be raised

as it was not raised either at, or prior to, Level II.

Footnote: 7

This acronym refers to the Comprehensive Test for Basic Skills given to students to assess their mastery of the fundamental, required elements of knowledge at various stages of their academic career.

Footnote: 8

Grievant raised for the first time at Level II, the fact that he was not supervised by an Improvement Plan Committee, instead of Superintendent Mathias, when he was placed on an Improvement Plan for the second time, in June 1996. This allegation was not part of his original Statement of Grievance, and if Grievant felt that his Improvement Plan was incorrectly done, he should have grieved that issue at the time it occurred. This issue will not be added to this grievance.

Footnote: 9

Many of these same issues were noted on Grievant's mid-year review, and Superintendent Mathias noted he still believed Grievant was having difficulty providing instructional leadership for the faculty.

Footnote: 10

Because of family problems Superintendent Mathias was not able to conduct this meeting until March 17, 1997.

Footnote: 11

Grievant's prior contract as an Administrative Principal was for 252 days.

Footnote: 12

As this decision was issued on July 21, 1997, it is unclear why Grievant did not receive it until July 30, 1997.

Footnote: 13

It is noted that the typical disciplinary action is carried out immediately, and the employee is terminated, demoted, or suspended at the time of the action.

Footnote: 14

The rest of this Code Section discusses the methods and requirements for transferring an employee, and the superintendent's authority to suspend.