JOANNE HARMON,

Grievant,

v. **Docket No. 01-38-408**

POCAHONTAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Joanne Harmon ("Grievant") filed this grievance directly at level four when her probationary contract of employment as a classroom teacher was not renewed at the conclusion of the 2000-2001 school year. She seeks reinstatement to her previous position. A level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on August 20, 2001. Grievant was represented by counsel, William D. Turner, and Respondent was also represented by counsel, Gregory W. Bailey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 10, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant was employed by Respondent Pocahontas County Board of Education ("PCBOE") as a probationary classroom teacher during the 1998-1999, 1999- 2000, and 2000-2001 school years.

2. On performance evaluations during 1998 and 1999, although evaluated favorably, Grievant received comments from Principal Sue Hollandsworth stating that shemay need to improve in the area of communication, and was advised to "loosen up" on strictness with younger students. She was also advised to "[w]ork on flexibility--remember these are children we are working with." At that time, Grievant was assigned to Hillsboro Elementary-Middle School.

3. For the 1999-2000 school year, Grievant was assigned to Marlinton Middle School ("MMS").

4. Grievant received two performance evaluations during the 1999-2000 school year, completed by Principal Glen Wade. She received satisfactory ratings in all categories, with no comments, but Principal Wade noted at the end of each evaluation that he did not conduct the required number of formal observations.

5. Grievant was again assigned to MMS under a probationary employment contract for the 2000-2001 school year.

6. Sue Hollandsworth became principal at MMS in late October, 2000.

7. Shortly after becoming principal at MMS, Principal Hollandsworth received a complaint from a parent who was having difficulty communicating with Grievant. This parent (Mrs. Hammons) had a child in Grievant's class who was not keeping up with his assignments. When asked if he could do make-up work, Grievant refused.

8. Another parent, Mr. Jordan, requested a meeting with Grievant to discuss his son, who had been sent by Grievant to the principal's office after being involved in a fight. Principal Hollandsworth met with Grievant and Mr. Jordan, and the principal noted that Grievant was defensive and hostile with the parent during that meeting.

9. Based upon her experience with Mr. Jordan during the meeting described above, Grievant refused to meet with him in early 2001, at his request, unless lawenforcement officials were present. Grievant did this because Mr. Jordan had cursed at her and threatened to “have her job” during their previous discussion.

10. A third parent, Mrs. Barb, complained to the superintendent about Grievant's conduct during a telephone conversation about her child. Mrs. Barb described Grievant as “inflexible” and “intimidating.” Grievant contended throughout this proceeding that this conversation never took place.

11. On a performance evaluation dated December 1, 2000, Principal Hollandsworth gave Grievant favorable ratings in all categories, but made the comment “Interaction with parents still needs attention.” This comment was based upon the events which took place with Mr. Jordan and Mrs. Hammons.

12. Principal Hollandsworth conducted a formal classroom observation of Grievant on February 5, 2001. During that observation, she noted that Grievant did not provide positive communication, did not praise the students, and that the classroom had “no place for laughter or learning fun.” One student was being disruptive and refusing to complete the assigned work.

13. After the February 5, 2001, observation, Principal Hollandsworth met with Grievant. At Grievant's request, the principal reviewed the student progress reports Grievant had sent out recently, and found that they all contained negative comments. Also at Grievant's request, she reviewed the students' assignment books, which are sent home to the parents every day. Again, she found no positive comments.

14. Principal Hollandsworth conducted another observation of Grievant on February 15, 2001, noting Grievant's lack of smiling, praise for the students, and decoration in her classroom. 15. At a meeting on March 5, 2001, Mrs. Hollandsworth informed Grievant that she felt an improvement plan was necessary, and she had prepared a draft of such a plan. The draft contained five areas for improvement, including classroom decoration, praise of students, positive parent communication, and varied assignments and teaching methods to accommodate individual student learning abilities. One area of the plan was deleted. (See footnote 1)

16. Grievant disagreed with the plan's comments regarding parent contact. When Ms. Hollandsworth refused to remove this from the plan, Grievant would not agree to the improvement plan. She also informed Principal Hollandsworth that she felt she did not need an improvement plan. Grievant's notes of this meeting, dated March 5, 2001, state that she told Ms. Hollandsworth she would not go on an improvement plan until it was modified. The principal's signed statement on the draft plan states: “Met with Joanne at 10:30 a.m. As a result of this meeting Joanne stated that she does not need an improvement plan.” Grievant's signed statement, written just below the principal's comment, states: “There was a dispute regarding parent contact and Mrs. Hollandsworth would not adjust the plan.”

17. Principal Hollandsworth conducted another observation of Grievant on March 22, 2001, noting that the majority of Grievant's parent communication continued to be negative and that communication regarding student progress seemed to be more negative than positive.

18. Grievant prepared a response to this observation, but it was never received by Principal Hollandsworth. 19. Grievant was evaluated by the principal on March 22, 2001. She received an unsatisfactory rating in the area of classroom climate, with the following comments:

> Rules are stressed as evidenced by their presence in 2 or 3 places.
>
> Praise is verbal in class and criticism is much in evidence in written form.
>
> Assignments are all alike--may have fewer spelling words in some cases.

20. Also on the March evaluation, Grievant received an unsatisfactory rating in the area of communication, with the comment: “Much of the communication with parents continues to be negative--considered the letter sent home in the fall to be parental contact enough for the year.”

21. Comments in several of Grievant's students' assignments books for March and May of 2001 show that Grievant would note the child's grade score for that day and make an occasional comment such as “good,” “great,” or “super,” beside the scores.

22. At the level four hearing, Grievant stated that she only refused the improvement plan because it contained a time frame of one month for contacting the parents of approximately 70 students. However, she did not express this concern to either the principal or superintendent during their meetings concerning the improvement plan. Grievant had only stated that she disagreed that parent communication was insufficient and negative.

23. By letter dated April 24, 2001, Grievant was advised by the superintendent that her name was not included with those of probationary employees rehired for the upcoming school year.

24. In response to Grievant's request for the reasons for her nonrehiring, Superintendent Phares provided a detailed letter, dated May 1, 2001. In this letter, hediscussed Grievant's negative evaluations and observations and the substance contained in them, including the negative parent communication and the specific parents who had encountered problems with Grievant. He also discussed Grievant's refusal to accept the improvement plan prepared by the principal. He concluded by stating: “Your reluctance to accept assistance and resources and your apparent failure to recognize such deficiencies suggest an unwillingness to improve.”

25. Grievant previously filed a grievance when her probationary contract was not renewed at the conclusion of the 1999-2000 school year. (See footnote 2) Ms. Hollandsworth was not involved in that grievance and had no knowledge of it until just prior to the level four hearing in this matter.

Discussion

When a probationary employee's contract has not been renewed, it is the employee's burden to prove by a preponderance of the evidence that her non-retention was improper by showing that she did not receive a full and complete hearing on the reasons for the non-renewal of her contract; that the evidence did not support the reasons; and/or she was denied her rights under State Board Policy

5300. Warner v. Putnam County Bd. of Educ., Docket No. 97-40-548 (June 25, 1998); Toler v. Wyoming County Bd. of Educ., Docket No. 94-55-306 (May 4,1995). The rights in general of probationary employees who receive notice of termination were extensively discussed in Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991). Specifically, the case held that a county board of education may not refuse to rehire a probationary employeefor "just any, or no, cause," but that the board need not do more than afford the employee a "full and complete hearing which supports" that the reasons for the action are "substantive." There is no "for cause" standard in cases involving a Board's decision to terminate a probationary employee's employment per Code 18A-2-8a. Toler, supra.

When a board of education, as in this case, elects to merely not renew a probationary contract, it need only follow the provisions of Code § 18A-2-8a, which provides:

> The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last-known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.
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> Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

In the instant case, Grievant has made no allegation of any procedural defect in the manner in which she was notified of the non-renewal of her contract. Rather, Grievant alleges that she has been the victim of reprisal because of her prior grievance, that the reasons for her non-rehiring have not been shown, and that the provisions of State Board of Education Policy 5300 have been violated. Based upon the standard set forth above, the undersigned finds that Respondent has established substantive reasons for its decision not to renew Grievant's contract. Grievant was

repeatedly advised that her communications with both parents and students needed to be more positive. In spite of these warnings, Grievant did not even provide evidence of positive reinforcement to students until March of 2001. However, she failed to provide this information to the superintendent or Principal Hollandsworth, as she should have in order to obtain some leniency or a better evaluation. See Cordray, supra. Moreover, Grievant refused to accept the terms of the improvement plan drafted by Principal Hollandsworth, evidencing her attitude toward complying with her superiors' directives. Grievant has contended that she did not refuse to go on the plan, but merely asked that the provision regarding contacting all parents within thirty days be modified. However, both the superintendent and principal testified that Grievant made no such request during the March meeting, and she merely stated that she disagreed with the comments regarding her deficient communications with parents, refusing to accept the improvement plan.

Grievant also contends that her communications with students were not “unduly negative.” However, Grievant has apparently missed the point which Ms. Hollandsworth attempted to make repeatedly; that is, that her dealings with students were overall more negative than positive. Even after having been advised of this problem by the principal, Grievant failed to make any significant improvements in that area.

Grievant introduced into evidence photographs of other classrooms in her school in an attempt to dispel the principal's contention that Grievant's classroom was not sufficiently decorated. However, Grievant has once again “missed the point.” PrincipalHollandsworth made comments regarding the lack of decoration in Grievant's classroom when she was attempting to explain to Grievant that there was an overall lack of positive energy and reinforcement in her class.

As to the applicability of State Board Policy 5300, the West Virginia Supreme Court of Appeals has yet to provide a clear ruling as to whether this policy applies to probationary employees like Grievant. See Baker v. Bd. of Educ., 207 W. Va. 513, 534 S.E.2d 378 (2000). Nevertheless, Grievant has failed to prove her contention that she was not provided with an “open and honest evaluation”, or that the non-renewal of her contract was not “based upon such evaluation,” rather than “upon factors extraneous thereto,” as stated in Policy 5300. Grievant received two performance evaluations, and two formal teacher observations, within a five-month period. All of these evaluations/observations noted similar deficiencies, and conferences were held with Grievant after each one. Accordingly, there is no evidence whatsoever to support the conclusion that Grievant did not receive open and

honest evaluations.

Grievant further argues that her non-renewal violated Policy 5300, because it was based upon the extraneous factors of her expression of concerns about the improvement plan, along with retaliation because of her prior grievance activity. It is nonsensical for Grievant to contend that she was, in fact, entitled to an improvement plan in spite of her probationary status, but at the same time contend that her refusal to comply with the plan should not be used as a reason for non-renewal of her contract. Once again, Respondent has shown substantive reasons for its decision not to rehire Grievant.

West Virginia Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievanceprocedure either for an alleged injury itself or any lawful attempt to redress it." A grievant alleging retaliation must first establish a prima facie case by demonstrating:

(1) that he engaged in activity protected by the statute;

(2) that his employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken against him by the employer; and

(4) that the adverse action was the result of retaliatory motivation, or the action followed his protected activity within such a period of time that retaliatory motive can be inferred.

Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546 (June 24, 1998). Once a prima facie case of retaliation is established, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. If the employer successfully rebuts the presumption, the employee may offer evidence to demonstrate the reasons given by the employer were merely a pretext. Id.

Pursuant to the standard set forth above, Grievant has failed to establish a prima facie case of retaliation. While Grievant contends that Principal Hollandsworth's evaluations of her, which were previously positive, became “nitpicky” after her prior grievance was filed, this is simply not shown by the evidence. Grievant's 1998-1999 evaluations also noted problems with communication, both with parents and students, which were the basis of the criticisms of her performance in 2000-2001. In addition, Principal Hollandsworth was not involved in the prior grievance when Grievant's contract

was not renewed at the end of 1999-2000 and had no knowledge of it until recently. Accordingly, Grievant has failed to show that her non-renewal was the result of retaliation.

The following conclusions of law support the decision reached.

Conclusions of Law

1. When a probationary employee's contract has not been renewed, it is the employee's burden to prove by a preponderance of the evidence that her non-retention was improper. Warner v. Putnam County Bd. of Educ., Docket No. 97-40-548 (June 25, 1998); Toler v. Wyoming County Bd. of Educ., Docket No. 94-55-306 (May 4,1995).

2. A county board of education may not refuse to rehire a probationary employee for "just any, or no, cause," but the board need not do more than afford the employee a "full and complete hearing which supports" that the reasons for the action are "substantive." Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991); See Toler, supra.

3. A grievant alleging retaliation must first establish a prima facie case by demonstrating:

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Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546 (June 24, 1998).

4. The non-renewal of Grievant's probationary contract was based upon substantive reasons related to poor communication with students and parents, along with Grievant's failure to participate in an improvement plan. 5. Grievant has failed to establish a prima facie case of retaliation.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of

Pocahontas 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. 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.

Date: September 21, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

This area dealt with grading of particular students, and it is not relevant to the issues involved in this grievance.

Footnote: 2

Prior to the resolution of that grievance, Grievant was placed in the position at MMS for the 2000-2001 school year.