KATHY ADKINS,

Grievant,

v. **DOCKET NO. 03-03-080**

BOONE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Kathy Adkins filed this grievance on February 14, 2003, stating: "The grievant, a teacher at Scott High School, was recently put on a plan of improvement. The grievant feels that she has continuously been harassed by her principal, Mr. James Boothe [sic]. She also feels that he has shown favoritism toward other teachers at Scott High School." Grievant stated the relief sought as: "The grievant is asking that the harassment and favoritism cease and that the plan of improvement be declared null and void."

Having been denied at levels one and two, level three was waived, and Grievant appealed to the Grievance Board on March 17, 2003. The parties agreed to submit the matter for decision based on the lower-level record. Grievant was represented by Rosemary Jenkins, W. Va. Federation of Teachers, and Respondent was represented by Timothy R. Conaway, Esq. This matter became mature for decision on May 5, 2003, the deadline for the filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1) Based on a preponderance of the credible evidence contained in the record, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Boone County Schools as a teacher at Scott High School (SHS). She has fourteen years' seniority in Boone County, thirteen of which are at SHS.

2. James Booth, SHS Principal, placed Grievant on a plan of improvement from January 16,

2003, to May 30, 2003, citing deficiencies in her professional work habits, specifically, “absenteeism” and “reporting to work on time.”

3. The “Plan for improvement/Actions to be taken by employee” was listed as: “Employee will miss no more than the allowed number of days, i.e. fifteen per year or one and one-half days per month. Employee will report to work by 7:20 a.m. each day.”

4. Grievant was absent from work on either sick or personal leave on September 3, 4, 13, 23, and 27, 2002; October 4, 7, 8, 9, 10, 11, and 23, 2002; November 8, 12, 13, and 19, 2002; and December 13, 2002. She was absent for a half day on December 17 and 19, 2002.

5. Grievant was late for work by at least fifteen minutes on September 5, 6, 10, 12, 18, 19, 24 and 26, 2002; October 1, 2, 14, 16, 21, 24, 28, 29 and 30, 2002; November 6, 7, 14, and 15, 2002; December 2, 3, 4, 9, 10, 11, 16, 18 and 19, 2002; and January 2, 6, 8, and 10, 2003. On five of those days, she was late by at least one hour and 20 minutes.

6. Grievant, a 200-day employee, has available 15 days of sick and personal leave each year. She had used more than her yearly allotment by the end of the firstsemester of the 2002-2003 school year. Grievant used no leave for the 33 days she was tardy.

7. Principal Booth recorded Grievant's tardiness by standing outside his office near the entrance to the school each day, and recording notes on a pad he kept with him to take notes of issues faculty mention on their way into school, or by recording the infrequent occasions when Grievant would call in to report that she would be late.

8. Grievant's attendance has improved somewhat since the implementation of the Improvement Plan, but she attributes her improvement to the fact that her pay has been docked rather than to the improvement plan.

9. Grievant's most recent evaluation was satisfactory. However, on the evaluation, "professional work habits" is only one of six areas being evaluated, and Mr. Booth rated her satisfactory in the other five areas, which would improve even further if Grievant improved her attendance and tardiness.

10. Grievant had previously been placed on an Improvement Plan to address attendance issues in 1996.

11. Grievant did not carry any sick leave over into school year 2002-2003. She usually did not carry any sick leave over from one year to the next and in fact was usually docked for missing work

days in excess of her allotted leave.

12. Grievant regularly used sick days for days she was not actually sick, such as for court appearances or other personal reasons.

13. Mr. Booth discussed Grievant's attendance and tardiness with her on December 10, 2002, and told her an Improvement Plan would be forthcoming. Between that date and January 13, 2003, when the Improvement Plan was created, Grievant was late for work by at least 15 minutes on eight days, and was absent from work one entireday and two half-days. On December 13, Grievant used a sick day to go to a meeting with her lawyer. At that point, Grievant had no accumulated leave to use on the days she missed, and her pay was docked for the remaining absences.

14. Grievant only provided a doctor's excuse for one of her absences.

DISCUSSION

Grievant contends that her improvement plan is without merit, that her principal has continuously harassed her, and that he has shown favoritism to other SHS faculty. Respondent denies each allegation.

> 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." [Citations omitted.]

Turner v. Kanawha County Bd. of Educ., Docket No. 00-20-300 (Feb. 26, 2001); Beckley v. Lincoln County Bd. of Educ., Docket No. 99-22-168 (Aug. 31, 1999).

Grievant presented no evidence that even remotely suggests her Improvement Plan was improper. From September 5, 2002 to January 10, 2003, Principal Booth documented 33 days that Grievant was at least 15 minutes late for work. On five of those days, she was over one hour late. In the same period, Grievant missed work entirely 17 days, and missed work for half a day on two occasions. By December 19, 2002, approximately the first 80 days of school for the 2002-2003 school year, Grievant was either absent or tardy 47 days. Grievant disputed Principal Booth's record of the days she was tardy, but produced no evidence he had falsified his records. However,

her calling into question his truthfulness requires the undersigned to make a determination of credibility. Grievant's testimony is in conflict with Principal Booth's on several points, making it necessary to determine whose testimony is credible on these points. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. *Representing the Agency before the United States Merit Systems Protection Board* 152- 153 (1984). Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id*; Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47- 192 (Nov. 1, 1999).

Contrary to Grievant's assertion, it is her own testimony rather than Principal Booth's that is unreliable. Although the undersigned administrative law judge had no opportunity to observe the witness' demeanor while they testified, other factors observable from the record support that conclusion. Mr. Booth's testimony was straightforward and unembellished. He supported his contentions with contemporaneously-created written records. On the other hand, Grievant had no records to support her version of events, made many unsupported claims, has a strong motive for denying her impropriety, and admitted to dishonestly using sick leave to cover personal absences. On one occasion, she stated she had subpoenas for every day she was required to miss for a court appearance, but in fact she had no subpoenas for any day. At one point, she stated, "I think that yes,if I'm in court and they're requiring me to be there I should be able to take a sick day." Level two trans., p. 32. Her testimony was anything but straightforward, sometimes contradicting herself in the same sentence. One exchange on cross-examination illustrates the general tone of her testimony:

> Q You claimed these court days as sick days. Is that correct? You have to answer out loud.
>
> A Yes, sir.
>
> Q Even though you weren't sick.
>
> A I've been sick ongoing for ten (10) years, yeah.

Q But you weren't sick on these days you went to court.

A No. Well, I was sick but I had to go to court too.

Q You were sick and went to court.

A Yeah, I've been sick a long time.

Q So you didn't miss because you went to court. You missed because you were sick.

A Both.

Q You missed because of both.

A It makes you sick when you go to all this court. Look at these papers. I'm stressed, he's stressing me.

. . .

Q So every time, all during those sick, on each and every one of those six (6) days that you were in court, you were also ill?

A Yes, I was. I'm ill today, but I'm here. I've had a virus for five (5) days, but I'm here.

Level two transcript, pp. 32-33.

Bizarrely, Grievant admits the improvement in her attendance has not been due to the Improvement Plan, but because her pay is now docked when she misses work. This failure of the Improvement Plan to be effective is not evidence that it was improper, but is instead evidence of Grievant's lack of respect for her employer and her extreme lack of professionalism.

Under W. Va. Code § 18A-2-12, a professional employee *must* be placed on an Improvement Plan when her performance is deemed unsatisfactory, so that she has the opportunity to correct her deficiencies. That statute states:

A professional whose performance is deemed to be unsatisfactory shall be given

> notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.
>
> . . .
>
> Any professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If such 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 the provisions of section eight of this article.

State Board of Education Policy 5310 also addresses the requirements of an improvement plan. This policy states, in part,

> [The] improvement plan shall designate how the employee shall meet the criteria. The improvement plan shall: identify the deficiency(ies), specify the corrective action to remediate the deficiencies, contain the time frame for monitoring and deadlines for meeting criteria, but in no case shall an improvement plan be for more than one (1) semester in length, and describe the resources and assistance available to assist in correcting the deficiency(ies)."

126 W. Va. C. S. R. 142 § 11.

Far from being improper, Grievant's Improvement Plan was not only necessary and reasonable, it was imperative. Grievant's performance, in terms of attendance and punctuality, was seriously deficient, and the Improvement Plan was the proper method of correcting her performance, even if Grievant chose to ignore it and improve her performance for her own, self-serving reasons. Grievant should take careful notice that, if her performance remains unsatisfactory, W. Va. Code § 18A-2-12 contains the additional requirement that her principal "either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of section eight of this article."

Harassment is “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” West Virginia Code § 18-29-2(n). “Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the

employee cannot perform her duties without considerable difficulty." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22- 495 (Jan. 29, 1999).

Nothing in Grievant's evidence suggests there was anything improper in her principal's expectations that she attend to her duties faithfully and that she arrive at work on time. There was nothing unreasonable in his creation of an improvement plan to correct Grievant's unprofessional work habits. Grievant opined that she was being treated unfairly because she had not always agreed with Mr. Booth on faculty voting issues, which he would know about because he looked at her secret ballots. However, Grievant did not identify any improper consequences that flowed from these disagreements. Grievantclaimed the fact that she was required to sign in to work each day, after that practice had been discontinued for other faculty, was harassment. On the contrary, this requirement of her proper Improvement Plan seems reasonable not only to remind her of her accountability for her performance, but also to check her claim that Mr. Booth's record of her arrivals is false.

Favoritism is "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18- 29-2(o); Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000). The test to determine whether Grievant has established a *prima facie* case of favoritism requires Grievant to establish by a preponderance of the evidence:

> (a) that [s]he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded [her]; and,
>
> (c) that the difference in treatment has caused a substantial inequity to [her] and that there is no known or apparent justification for this difference.

Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievant has not established a *prima facie* favoritism claim, as she has failed to show that she is similarly situated to any other employee. Although she claimed other employees had missed several days without being put on an improvement plan, all the employees she identified were off on approved and planned leave, for continuous blocks of time, for required surgeries or medical treatments. Grievant identified none of these employees as having exhausted all of their sick leave. These situations are radically different from Grievant's irregular attendance pattern and habitual tardiness. Grievant as not proven her Improvement Plan was improper, that she was subjected to harassment or that other employees received favorable treatment. The following Conclusions of Law

support this decision:

CONCLUSIONS OF LAW

1. "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)." Turner v. Kanawha County Bd. of Educ., Docket No. 00- 20-300 (Feb. 26, 2001); Beckley v. Lincoln County Bd. of Educ., Docket No. 99-22-168 (Aug. 31, 1999).

2. Grievant did not meet her burden of proof in showing that her Improvement Plan was improper.

3. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3)reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dep't of Health and Human Serv., Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

4. Grievant's testimony was less credible than Respondent's witness, Mr. Booth.

5. West Virginia Code § 18-29-2(n) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” “Harassment has been found in cases in which a supervisor has constantly

criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See* Moreland v. Bd. of Trustees, Docket No. 96- BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Id.*; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

6. Grievant did not prove that she was harassed by her principal, Mr. Booth.

7. Favoritism is "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."W. Va. Code § 18-29-2(o); Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000). 8. The test to determine whether Grievant has established a *prima facie* case of favoritism requires Grievant to establish by a preponderance of the evidence:

> (a) that [s]he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded [her]; and,
>
> (c) that the difference in treatment has caused a substantial inequity to [her] and that there is no known or apparent justification for this difference.

Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

9. Once Grievant establishes a *prima facie* case of favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). *See* Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hogsett, *supra.*

10. Grievant did not establish a *prima facie* claim of favoritism.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone County. Any 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 GrievanceBoard. The appealing party must also provide the Grievance Board with

the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: May 20, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

No brief was received from Respondent.