JANET GARRISON,

Grievant,

v.

DOCKET NO. 03-40-096

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Janet Garrison, filed this grievance directly at level four on April 4, 2003, protesting her demotion from principalship at George Washington Elementary School. Grievant seeks reinstatement, back pay and attorneys' fees. (See footnote 1) A level four hearing was held in the Grievance Board's Charleston, West Virginia office on May 22 and September 8, 2003. This matter became mature for decision on October 1, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Rosalee Juba-Plumley, Esq., and the Putnam County Board of Education ("Board") was represented by Gregory Bailey, Esq., Bowles, Rice, McDavid, Graff & Love.

SUMMARY OF EVIDENCE

Joint Exhibit

Ex. 1 -

Transcript of Transfer/Demotion Hearing held before the Board on March 31, 2003.

LIV Board Exhibits

Ex. 1 -

January 15, 2003 Improvement Plan.

Ex. 2 -

January 15-March 25, 2003 Administrator Evaluation.

Ex. 3 -

1996-1997 Administrators Evaluation Summary.

Ex. 4 -

1997-1998 Administrators Evaluation Summary.

Ex. 5 -

1998-1999 Administrators Evaluation Summary.

Ex. 6 -

August-November 1999 Administrator Evaluation.

Ex. 7 -

November 1999-June 2000 Administrator Evaluation.

Ex. 8 -

2000-2001 School Year Administrator Evaluation.

Ex. 9 -

Policy 5310: Performance Evaluation of School Personnel.

Ex. 10 -

Unsigned, undated Improvement Plan.

Ex. 11 -

February 6, 2002 Improvement Plan.

Ex. 12 -

2001-2002 School Year Administrator Evaluation.

LIV Grievant's Exhibits

Ex. 1 -

GWES Stanford Achievement Test Scores from 1996-2002.

Ex. 2 -

May 30, 2002 letter from Sam P. Sentelle to Janet Garrison.

Ex. 3 -

Various charts recording GWES Achievement Test Scores.

Ex. 4 -

IASA Title I Schoolwide Program Plan for GWES 2002-2003.

Ex. 5 -

2001-2002 Unified School Improvement Plan for GWES.

Ex. 6 -

2002-2003 Unified School Improvement Plan for GWES.

Ex. 7 -

2001 Classroom Schedules.

Ex. 8 -

2002 Classroom Schedules.

Ex. 9 -

Custodian Check List.

Ex. 10 -

GWES Custodial Room Assignments.

Ex. 11 -

September 2002 calendar from Scholastic Planner.

Ex. 12 -

Undated chart showing Spring test results.

Ex. 13 -

Undated memorandum from Janet Garrison to Teachers re: Lesson Plans.

Ex. 14 -

Lesson Plans.

Ex. 15 -

September 2001-January 2002 Teacher Evaluation; Teacher Observation/Data Collection; Service Personnel Evaluation; Service Personnel Observation Form.

Ex. 16 -

Various memoranda from Janet Garrison to Teachers and Staff.

Ex. 17 -

Suggestions for the 2002-2003 school year, prepared by Janet Garrison.

Testimony

The Board presented the testimony of Jeff Wymer and Robert Hull. Grievant testified in her own behalf, and presented the testimony of Judy Roberts, Elise Cauthorn, and Ellen Pauley.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant has been an educator in the Putnam County School System for 35 years, and at the time this grievance was filed, was Principal of George Washington Elementary School ("GWES").

2. In 1990, Grievant was Putnam County Chamber of Commerce's "Teacher of the Year," earning her school $1,000 for educational materials.

3. Prior to becoming principal at GWES, Grievant had been the principal of both Liberty Elementary School and Confidence Elementary School.

4. At all times pertinent herein, and up until July 2002, Robert Hull was the Director of Early Childhood Education.

5. In November 2002, Mr. Hull was succeeded by Jeff Wymer.

6. In 1996-97, Grievant was principal of Confidence Elementary School. She received an overall satisfactory Administrators' Evaluation Summary from Mr. Hull for that year, with the following recommendation noted:

> It is recommended that Mrs. Garrison make a conscious effort to become more organized in the operation of the office and managerial duties of the school.

LIV R. Ex. 3.

7. Grievant's 1997-98 Administrators' Evaluation, also overall satisfactory, contained the following recommendations from Mr. Hull:

> It is recommended that Mrs. Garrison make a conscious effort to become better organized in the operation of the office and managerial duties of the school. The principal's office is extremely cluttered and disorganized. Thisnot only impedes efficient operation, but is also a poor example for staff and students as well as a bad impression to parents and visitors to the school. This was also a recommendation on last year's evaluation and has shown little or no improvement.
>
> It is recommended that an effort be made to complete required reports and correspondence in a timely fashion.
>
> It is recommended that Mrs. Garrison devise a plan to address the weak fifth grade test scores at Confidence Elementary.

LIV R. Ex. 4.

8. Grievant's 1998-99 Administrators' Evaluation, again satisfactory, contained the following recommendations from Mr. Hull:

> The overall organization and efficient operation of the school office continues to be a problem at Confidence Elementary. It is recommended that when Mrs. Garrison assumes her new duties at G.W. Elementary a concerted effort be made to maintain the well-organized and efficient office operation that the previous principal had established.

> It is recommended that an effort be made to complete required reports and correspondence in a timely fashion. Many reports, surveys, and request for information are late and require requests from the central office to obtain. The payroll report from Confidence Elementary was late EVERY pay period this year. This is a definite problem and must be rectified immediately. Also, the staff has complained that they are not notified of many informational items until the deadline is either past or at the last minute. Organizational skills must improve.
>
> WVEIS data is not entered by the school in a timely fashion. This must be a priority. Attendance data must be entered daily.

LIV R. Ex. 5.

9. The next year, 1999-2000, Grievant was Principal at GWES. Grievant's organizational skills were again called into question by Mr. Hull in an evaluation datedJanuary 10, 2000. (See footnote 2) Grievant received an overall rating of “Meets Standards” on this evaluation, but Mr. Hull noted under the heading, “Identified Deficiencies and Recommendations” that “[o]verall organizational skills must be enhanced and improved.” LIV R. Ex. 6.

10. Grievant's evaluation dated May 17, 2000, was also marked “Meets Standards” in all categories, but contained the following notation under the heading, “Suggestions”:

> It is suggested that Mrs. Garrison continue to work on her organizational skills in both personal work of the office, as well as in the overall operation of the school.

LIV R. Ex. 7.

11. One year later, Grievant's June 18, 2001 evaluation was marked “Unsatisfactory” in 5 categories and “Meets Standards” in 2 categories. The description of the deficiencies was prefaced by the following statement:

> Janet Garrison has been the principal of George Washington Elementary School for two years. During this time there has been a steady decline in the overall efficiency and effectiveness of the school, as well as the level of satisfaction from the community, school staff, and county level staff. A careful review of all available data reveals that George Washington Elementary is a school in crisis and in serious need of strong educational leadership.

LIV R. Ex. 8.

12. The first deficiency identified in the June 18, 2001 evaluation was “Lack of Instructional Leadership to enhance school effectiveness by improving instruction and augmenting student performance.” After reciting student performance statistics, theevaluation states: “There is an obvious problem with curriculum delivery and teaching at the intermediate level, especially in fifth grade.” Id.

13. The second deficiency identified in the June 18, 2001 evaluation was “Lack of cognitive skills to gather and synthesize information.” The evaluation states:

> The analysis and use of test score data, effective schools information, and performance evidence indicators, as required by the School Improvement Process, has yielded neither the necessary nor desired effects and changes.

Id.

14. The third deficiency identified in the June 18, 2001 evaluation was “Lack of ability to enhance the quality of the total school organization.” For the fifth time her evaluation noted problems with organization. Specifically, the evaluation stated:

> A sense of disorganization is evidence in all aspects of the school. The office area is disorganized and ineffectively run. Paperwork and reports are often late and must be requested numerous times. All personnel evaluations were late, many were backdated and most were dated for a day that was not in session. Many areas of the school (storage closets, etc.) are disorganized, dirty and cluttered. Observers use the term 'chaos' to refer to the overall atmosphere of the school.

Id.

15. The fourth deficiency identified in the June 18, 2001 evaluation as “Lacks ability to organize and delegate to accomplish goals.” In addition to the specific organizational shortcomings that were repeated, the specific description of the deficiency noted that “[g]oals established as a part of the goal setting process are seldom completed.” Id.

16. The fifth deficiency identified in the June 18, 2001 evaluation was “[d]oes not communicate effectively.” Specific shortcomings included:

> Exhibits poor listening skills. Often interrupts others when they are talking. Shows a lack of judgment when dealing with delicate and confidential matters; shares inappropriate information with teachers and parents; interferes with processes and

procedures by having inappropriate conversations outside of the normal setting.

Id.

17. An improvement plan was developed in response to the unsatisfactory areas identified in the June 18, 2001, evaluation by Grievant and Mr. Hull. *See* LIV R. Ex. 10. The improvement plan identified the deficiencies noted in the June 18, 2001, evaluation; listed corrective actions to remediate the deficiencies and resources and assistance available; established a time frame for monitoring progress, and a deadline for meeting the job responsibilities and performance criteria. LIV R. Ex. 11.

18. The time frame for the monitoring progress section established biweekly school visitations, and monthly monitoring conferences during the first semester of the 2001-2002 school year. LIV R. Ex. 11.

19. The initial deadline for meeting the performance criteria identified in this improvement plan was the conclusion of the first semester of the 2001-2002 school year. LIV R. Ex. 11.

20. The improvement plan was continued by the initiation of a virtually identical improvement plan dated February 6, 2002.

21. This “extension” of Grievant's improvement plan called for weekly school visitations and biweekly monitoring conferences during the second semester of the 2001- 2002 school year. LIV R. Ex. 11.

22. This “extension” of Grievant's improvement plan was to conclude at the end of the second semester of the 2001-2002 school year. LIV R. Ex. 11. 23. Mr. Hull visited GWES frequently, although not weekly, and had telephone calls with Grievant almost daily during the period of the improvement plan.

24. Grievant was evaluated again on June 25, 2002, in relation to her performance under the previously implemented improvement plan. Grievant showed some improvement, attaining “Meets Standards” in 5 areas and receiving “Unsatisfactory” ratings in 2 areas. Mr. Hull noted that, “[a] review of the portfolio reflects partial attainment of progress toward the meeting of the mutually established goals for 2001-2002. Evidence was provided to substantiate adequate progress in some areas and moderate progress in others. LIV R. Ex. 12.

25. The two areas rated “Unsatisfactory” were “[d]emonstrates instructional leadership to

enhance school effectiveness by improving instruction and augmenting student performance," and "[d]emonstrates cognitive skills to gather, analyze and synthesize information." LIV R. Ex. 12.

26. Under the section "Suggestions," Mr. Hull wrote:

> It is further suggested that Mrs. Garrison work with the central office to refine and streamline the improvement plan to be in effect until January 2003.

LIV R. Ex. 12.

27. Under the section "Identified Deficiencies and Recommendations," Mr. Hull wrote:

> While Mrs. Garrison has shown many improvements this year, there still remains many areas that need attention. Thus the improvement plan will remain in effect until January 2003 with refined goals and objectives to be developed at the beginning of the 2002-2003 school year.

LIV R. Ex. 12.

28. During the first semester of the 2002-2003 school year, Mr. Hull assumed another position with the Board. Jeffrey Wymer assumed Mr. Hull's responsibilities, including the supervision of Grievant, in November 2002.

29. As part of the transition of responsibilities, Mr. Hull, Mr. Wymer and Grievant met to review the status of Grievant's improvement plan. It was agreed that the improvement plan be modified to reflect Grievant's improvement in the several areas, as reflected in the June 25, 2002, evaluation.

29. Grievant submitted a written list of items that she suggested be included in her modified improvement plan. LIV G. Ex. 7. The suggestions were incorporated into the modified improvement plan.

30. The modified improvement plan was completed January 15, 2003, and identified the following deficiencies: "Lack of Instructional Leadership to enhance school effectiveness by improving instruction and augmenting student performance" and "Lack of ability to enhance the quality of the total school organization." The deadline established for meeting the terms of the improvement plan was the conclusion of the third nine weeks of the 2002-2003 school year. LIV R. Ex. 1.

31. As before, this improvement plan called for weekly school visitations and biweekly monitoring conferences from January-March 2003.

32. Mr. Wymer made at least 14 visits to GWES during the period of this improvement plan.

33. The modified improvement plan contained detailed corrective actions to be taken in order for Grievant to successfully complete the requirements of the plan. Grievant was evaluated upon her performance under the terms of her improvement plan on March25, 2003. She received “Meets Standards” in 6 areas, and “Unsatisfactory” in the 2 areas identified in her improvement plan. The actions and the subsequent findings of Mr. Wymer on Grievant's evaluation are as follows:

Lack of Instructional Leadership to enhance school effectiveness by improving instruction and augmenting student performance.

* Conduct a thorough analysis of all students achievement data to indicate areas of curricular weakness

Status: Analysis completed of 2001-02 SAT9 data and reflected in the School Improvement Plan. No analysis of Fall SAT9 pre-test conducted. This should have been completed to adjust curricular and instructional practices to maximize student performance.

* Conduct a thorough analysis of all teaching strategies and materials usage to gauge effectiveness

Status: No analysis documentation was available.

* Conduct a thorough analysis of daily schedules and class room practices to ascertain appropriate use of instructional time

Status: No documentation was available but schedule adjustments were made with CSR/Title I.

* Conduct a thorough analysis of instructional delivery, scope and sequence, and pacing to ascertain the coverage of WVDE Instructional Goals and Objectives

Status: No documentation available.

* Prepare a Plan of Action to remediate all deficiencies and discrepancies found during the four aforementioned analyses

Status: No plan available.

* Monitor classroom instruction routinely to ensure adequate and thorough delivery of the curriculum

Status: While classroom visits have been conducted, no documentation of regular visitations was available.

*
Monitor classroom instruction routinely to ensure the usage of appropriate teaching strategies

Status: No documentation available.

*
Monitor student progress on a routine basis to ensure mastery of the WV IGOS

Status: Reviewed student report cards and mid-terms. Analysis of SAT9 Pre-test was needed.

*
Develop individual intervention plans for all students scoring in the first quartile

Status: Intervention plans completed.

*
Meet individually with all parents of students with remediation plans to elicit home support and cooperation

Status: Verbally indicated meetings were held but no documentation was available.

*
Frequently monitor the progress of all students with intervention plans

Status: Methods of monitoring not clear.

*
Frequently monitor lesson plans for pacing and scope and sequence of IGO coverage

Status: Lesson plans were reviewed regularly.

*
Develop and implement a plan to remediate the deficiencies shown by the WV Writing Assessment

Status: Excellent progress on the Writing Assessment.

*
Administer the fall SAT9 pretest to determine student progress

Status: Test administered.

*
Conduct a thorough analysis of student pretest data

Status: No analysis conducted.

Lack of ability to enhance the quality of the total school organization

*
Establish and utilize an office management system whereby work can be organized and completed in an effective and efficient manner.

Status: Office seems to be organized and functioning in a satisfactory manner.

*

Create a business-like atmosphere in the school office and throughout the school.

Status: Improvements still needed in this area. Parents have been allowed to observe disciplinary interviews of other students. Even in situations where disagreements with parents are likely, the parents need to leave the meeting feeling that the principal is there to help their child and that the opinion of the parent is valued.

*

Work with the school secretary to establish an effective filing system

Status: Files appear to be in good order.

*

Develop and utilize a scheduling/planning tool that establishes deadlines for reports, etc. (e.g. Franklin planner).

Status: No scheduling/planning tool was being utilized.

*

Develop and maintain a classroom visitation and monitoring schedule that ensures the timely review of lesson plans, observation of classroom practices and completion of personnel evaluations.

Status: While I am confident that formal and informal observations have occurred, no visitation and monitoring schedule was available.

*

Work with custodial staff and other personnel to alleviate areas of clutter and devise a system to ensure it remains in acceptable condition.

Status: The building and grounds were in good order.

*

Establish a complete work schedule, task list, and monitoring tool for custodial staff.

Status: Custodial staff had been more closely supervised. No monitoring tools were noted.

*

Organize and schedule all school events and daily routines to alleviate the appearance of a chaotic atmosphere at the school.

Status: School event scheduling is satisfactory. Majority of events are regularly posted in the school newsletter.

LIV R. Ex. 1.

34. In March, 2003, Superintendent Sentelle notified Grievant he would recommend to the Board that she be demoted from principal to classroom teacher based upon her failure to satisfactorily achieve the goals set forth in her previous improvement plans.

35. A transfer/demotion hearing was held before the Board on March 31, 2003, whereafter the Board voted to accept Superintendent Sentelle's recommendation to demote Grievant from a principal to a classroom teacher.

36. Grievant filed this grievance on April 4, 2003. (See footnote 3)

DISCUSSION

As this is a disciplinary action, the Board has the burden of proving Grievant's unsatisfactory performance by a preponderance of the evidence. W. Va. Code §18-29-6. "Superintendents, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to the provisions in this chapter." W. Va. Code § 18A-2-7. The authority of a county board of education to discipline an employee must be based upon one or more ofthe 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).

W. Va. Code § 18A-2-8 provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. (See footnote 4)

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 (W. Va. 1985). W. Va. Code § 18A-2-12 clarifies and codifies this statement and requires that an unsatisfactory professional must be given notice and an opportunity to improve. If the individual is still not performing satisfactorily by the next performance evaluation, their supervisor may place them on another improvement plan or recommend them for dismissal. Id. It is not necessary for a professional to be on animprovement plan to be dismissed. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996).

Grievant does not deny that at the time of her last evaluation she did not submit documentation to support the various corrective actions she was to perform. However, she argues that much of the documentation could be found in varying forms, including the School Improvement Plan and Title I Plan which already existed when the January 25, 2003, improvement plan was established, and that Mr. Hull and/or Mr. Wymer could have found the information there. Of course, that is not what Grievant's improvement plan called for, and, if indeed, the requested information existed prior to the January 25, 2003 improvement plan, why did she not point that out to them when it was being developed.

Grievant provided extensive documentation at the level four hearing to establish she had, indeed, complied with the terms of the improvement plan, but none of this documentation was provided to Mr. Wymer or Mr. Hull at the time the plan was developed, or at the time of her June evaluation. Grievant's only response as to why she did not produce this documentation at the time was that she was “nervous.” This response only gives more credence to the Board's contention that Grievant is not a good administrator.

All of this information was provided after the fact, at the level four hearing. Even if this documentation had existed at the time of her evaluation, the undersigned cannot give it any substantial weight. It simply was not provided to her supervisors when they requested it. The undersigned will not review each element of corrective action with Grievant's after the fact responses. To do so would put the undersigned into the role of a super-evaluator. To the contrary, it is the undersigned's role to determine whether the Board's action was clearly wrong or arbitrary and capricious *at the time it was made*. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d1017 (4th Cir.

1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Grievant did not provide material or responses to the corrective actions during her improvement period, at her evaluations, or even at her demotion/transfer hearing beforethe Board. It was not until her level four hearing that Grievant finally presented documents which she alleged fulfilled the requirements of the improvement plan. In this case, it is a case of too little, too late. The Board was justified in concluding in March 2003 that Grievant did not satisfactorily fulfill the requirements of her improvement plan.

Grievant contends she received unsatisfactory evaluations based solely upon her school's student test scores. She presented evidence demonstrating that student test scores at GWES increased significantly while she was principal, and therefore, she improperly received unsatisfactory ratings. The evaluations and improvement plans themselves show that, while test scores, or rather an analysis of those scores, was one factor, there were many others which caused her to receive an overall unsatisfactory rating. Specifically, her organization skills had been deficient even before she became principal at GWES and continued to be a problem throughout her tenure there. Her inability to effectively organize was succinctly demonstrated by her inability to gather the information required by her improvement plan, or even to effectively communicate during her evaluation. While improved test scores reflect not only the principal's efforts, but the efforts of the teachers, students, and community as a whole, the other noted deficiencies are attributable solely to Grievant, and are more indicative of her inability to be a successful administrator.

As to the test scores themselves, Mr. Hull testified that it was not the test scores he was looking for from Grievant, but an analysis of those scores. At level four, Grievant presented color-coded charts showing test scores over a period of time. Mr. Hull testified that even had Grievant presented

him with this information during her period of improvement or at her last evaluation, it would not have met the requirement that ananalysis be prepared. The charts merely represent numbers, but no explanation with respect to those numbers, the changes that occurred, or a plan for the future, further evidencing a failure to "[d]emonstrate[s] cognitive skills to gather, analyze and synthesize information," as required by her improvement plan. *See* Finding of Fact No. 25.

Grievant contends her supervisors, Mr. Hull and Mr. Wymer, failed to live up to their portion of the improvement plan in conducting weekly or biweekly visits to GWES, and continually monitoring her progress. Mr. Hull visited GWES many times, but not necessarily on a weekly basis. However, he did make almost daily telephone calls to Grievant to inquire as to her progress. Thus, while he may not have made weekly visits to GWES, it is clear Mr. Hull was in constant contact with Grievant during the time of her 2001 improvement plan.

Mr. Wymer met with Grievant periodically after the implementation of the January 25, 2003 improvement plan to make sure things were taking place. Mr. Wymer made written notations showing 14 visits to GWES between November 2002 and March 2003, which, when taking into account holidays, results in a weekly visit during that time period. The only gap in supervision appears to be between August and November 2002, when Mr. Hull assumed another position, and before Mr. Wymer took over Mr. Hull's position.

Given the fact that Grievant's deficiencies had been identified and addressed by Mr. Hull nearly two years prior to her last evaluation, I find the lack of exact weekly visits during the term of the improvement plans to be harmless error. Moreover, the fact that, despite weekly visits from Mr. Wymer during the last period of improvement, Grievant failed to produce any documentation or explanation at her final evaluation indicates any more visits would not have resulted in Grievant receiving a satisfactory evaluation. The above Findings of Fact and Discussion are supplemented by the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code 18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. Unsatisfactory performance is among the causes listed in W. Va. Code § 18A-2-8 for which

an education employee may be disciplined. See, Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. Dismissal (or in this case, demotion) of a professional employee for unsatisfactory performance requires notice of the deficiency and an opportunity to improve. If, at the next performance evaluation, the professional is still not performing satisfactorily, another improvement plan may be issued, or the supervisor may recommend dismissal (or demotion). W. Va. Code § 18A-2-12; Syl. Pt. 3, Trimboli v. Bd. of Educ., 167 W. Va. 1, 254 S.E.2d 561 (W. Va. 1979).

4. The Board has met its burden of proof and proved its charge of unsatisfactory performance against Grievant. Given that the Board proved these charges by a preponderance of the evidence, its termination of Grievant's principal contract was not arbitrary and capricious. 5. The Board's action of terminating Grievant's administrative contract and placing her in a teaching position was a disciplinary demotion, pursuant to W. Va. Code § 18A-2-8, not a transfer, pursuant to W. Va. Code § 18A-2-7.

6. Grievant was afforded the due process protection she was entitled to at the time of her demotion. W. Va. Code § 18A-2-8; Bd. of Educ. of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (W. Va. 1994).

7. It is appropriate to review an employee's past performance evaluations and improvement plans, and the subsequent reoccurrence or continuation of identified problems, when deciding whether to remove that professional from her current position. This practice can establish a continuing pattern of behavior which has proven not correctable. See W. Va. Code 18A-2-12.

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

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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 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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MARY JO SWARTZ

Administrative Law Judge

Dated: October 21, 2003

Footnote: 1

The Grievance Board has no authority to award attorneys' fees.

Footnote: 2

This evaluation was performed under the 1999 amendments to Policy 5310, which were adopted by the State Board of Education on May 17, 1999. LIV R. Ex. 9.

Footnote: 3

Grievant did not grieve any of her previous evaluations or improvement plans prior to the grievance filed on April 4, 2003, protesting her demotion.

Footnote: 4

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 the Code Section are applicable to a disciplinary demotion. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996).