DEBRA SANTER,

Grievant,

v.

Docket No. 03-20-337

KANAWHA COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Debra Santer ("Grievant"), challenges her dismissal by the respondent, the Kanawha County Board of Education ("BOE"). Grievant brought this action directly to Level IV by filing a statement of grievance with the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on April 21, 2004. It was assigned Docket No. 04-20-150 but was subsequently consolidated with an earlier grievance, Docket No. 03-20-337, that arose out of Grievant's transfer from her position as Assistant Principal at Flinn Elementary School to a teaching position at Andrew Jackson Middle School.

As to her dismissal, Grievant alleged in her Statement of Grievance that "Grievant has been terminated by the Kanawha County Board of Education." For relief, she asked "to be reinstated to employment as Assistant Principal at Flinn Elementary with any and all benefits, attorney fees, plus 10% interest."

A Level IV hearing was conducted on September 30, 2004, during which Grievant was represented by attorney Joseph Albright, Jr., and BOE was represented by attorney James Withrow. The parties agreed to incorporate, as part of the Level IV record in thisgrievance, the transcript and certain of the exhibits from a pre-disciplinary hearing held on December 8, 2003, and January 5, 2004. (See footnote 1) The purpose of the pre-disciplinary hearing, which was conducted by Impartial Hearing Officer Anne W. Lambright ("Hearing Officer Lambright"), was to address Grievant's refusal

to participate in the improvement plan, her unsatisfactory performance in the areas of deficiency identified in the improvement plan, and her refusal to talk to the Deputy Superintendent.

BOE's exhibits 2 through 4 from the pre-disciplinary hearing were admitted as part of the Level IV record for the limited purposes of providing background and context. Although Exhibit 6 appears in the notebook (See footnote 2) of BOE's exhibits, it was neither offered nor received as evidence in this grievance. All other exhibits introduced at the pre-disciplinary hearing by either party were, by agreement of the parties, made part of the Level IV record.

This grievance initially matured for decision on December 16, 2004, upon receipt of BOE's proposed findings of fact and conclusions of law. No post-hearing submission was received from Grievant. On February 8, 2005, Grievant's counsel informed the undersigned that he had forwarded proposed findings and conclusions to the Grievance Board. He asked permission to re-submit them within a week. The grievance was placed in abeyance while this issue was addressed by the parties.

BOE objected to allowing such extension of time. Grievant did not respond to the objection. However, no ruling on the objection is necessary because, to date, Grievant has not tendered proposed findings of fact and conclusions of law. Therefore, the request for an enlargement of time is moot. This grievance is deemed to have matured for decision on February 15, 2005, which is one week after Grievant's counsel asked to be allowed to file out of time.

Overview

Grievant is challenging the propriety of her dismissal. The facts giving rise to her dismissal can be summarized fairly succinctly. Grievant was placed on an improvement plan to address unsatisfactory performance with respect to leadership, interpersonal skills, judgment, and sensitivity to her superiors. She refused to participate in the improvement plan in any meaningful way, expressing anger and resentment throughout the entire process. Ultimately, Grievant took it upon herself to declare that the improvement plan was “over.” This was at a point when she had not remedied the identified deficiencies that the plan was designed to address. In the aftermath of her refusal to participate in the improvement plan, Grievant added the icing to the cake of insubordination by hanging up on Deputy Superintendent Joe Godish. She was dismissed for insubordination and unsatisfactory performance.

This is a fair summary of the facts but it does not come close to conveying the tempestuous nature of Grievant's interactions with her colleagues and supervisors throughout the period the

improvement plan was supposed to be in effect. Nor does this dry recitation adequately portray the downward spiral that marked Grievant's behavior asshe became more hostile and vitriolic towards various individuals in the BOE hierarchy or, perhaps more accurately, anyone who disagreed with her.

What emerged from the record in this grievance was a portrait of an employee who was, quite simply, not supervisable.

Perhaps the most striking pattern in Grievant's conduct was her inability or refusal to move beyond old disputes with members of the BOE administration. The past events or perceived wrongs that led to Grievant's ill-will toward Dr. Ronald E. Duerring, Superintendent of Kanawha County Schools ("Superintendent Duerring"),and other members of the school system do not properly fall within the limited scope of this grievance. It is not necessary to know the source of the emotions to recognize that Grievant's unwillingness to relinquish her bitterness and anger doomed the improvement plan to failure and set the stage for Grievant's insubordinate conduct. Instead of treating the improvement plan as an opportunity to improve her relationship with her colleagues and her standing in her profession, Grievant clung to her righteous indignation, rejecting any suggestion that the source of some of her problems might lie in her own conduct.

Throughout the time the improvement plan was in place, Grievant persisted in believing that it was nothing more than a mechanism for harassing and punishing her. She questioned the motives of everyone who attempted to help her. For instance, Grievant suggested that the extended absence of the principal with whom she worked had been contrived so that the person substituting for the principal could spy on Grievant. She was seemingly convinced that BOE was trying to fire her. In the end, Grievant's own actions made this a self-fulfilling prophecy. As discussed more fully below, this grievance must be denied. After careful review of the entire record the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievant had approximately six years of experience as a teacher in Tennessee, followed by approximately fourteen years with BOE.

2 2. The most recent formal written evaluation of Grievant was signed by Grievant on May 30, 2002. It appears in the record as part of Grievant's Exhibit No. 2 from the pre- disciplinary hearing.

3 3. During her tenure with BOE, Grievant never received an unsatisfactory formal evaluation.

Related Actions

4 4. On or about September 13, 2002, BOE suspended Grievant for ten days and directed her to participate in an improvement plan. This disciplinary action gave rise to a grievance styled *Santer v. Kanawha County Board of Education*, Docket No. 03-20-092. A decision was issued by the Grievance Board on June 30, 2003. Exh.3. The Grievance Board found that BOE had not abused its discretion by suspending Grievant for ten days and requiring her to participate in an improvement plan. A written reprimand was deemed excessive in light of the suspension and, accordingly, BOE was directed to remove it from Grievant's file.

5 5. On July 29, 2003, the Grievance Board's decision was appealed to the Circuit Court of Kanawha County, where it was styled *Santer v. Kanawha County Board of Education*, Civil Action No. 03-AA-112. On February 18, 2004, the Circuit Court ofKanawha County granted Grievant's motion for an injunction and stay during the pendency of the appeal. Among other things, BOE was prohibited from requiring Grievant to participate in the improvement plan until the appeal was resolved.

6 6. The appeal was resolved on April 8, 2004, when Judge King entered the “Final Order Affirming Decision of Grievance Board,” in which he both lifted the stay and affirmed the Grievance Board's decision. Grievant attempted to appeal Judge King's decision to the Supreme Court of Appeals of West Virginia by filing a petition for appeal, styled *Santer v. Kanawha County Board of Education*, No. 041495, which was refused upon a unanimous vote.

7 7. Although the propriety of imposing an improvement plan (See footnote 3) was resolved in *Santer v. Kanawha County Board of Education*, Docket No. 03-20-092, the contents of the plan were not considered because it had not been drafted at that time. Exh.3.

The Improvement Plan

8 8. Superintendent Duerring directed Grievant to participate in an improvement plan. He asked Dr. Melanie Vickers (“Dr. Vickers”) to supervise the plan.

9 9. At that time, Dr. Vickers was Assistant Superintendent of Systems Support. She had previously served in Kanawha County as a teacher, an assistant principal, a principal, and Director of Personnel and Human Resources. She had supervised three other improvement plans for

professional employees and had served as a team member for improvement plans for service personnel. Tr.19. In addition, Dr. Vickers taught college-level courses on relevant topics, such as principalship, school improvement, leadership skills, and human relations.

10 10. The State Board of Education's Policy 5310 sets forth, among other things, the responsibilities of a school administrator. W. VA. CODE ST. R. § 126-142-18. In the event an administrator is deficient in one or more of those enumerated responsibilities, Policy 5310 authorizes the imposition of an improvement plan and, further, describes how such plan is to be developed and administered. W. VA. CODE ST. R. § 126-142-16 and - 17.

11 11. Dr. Vickers has taken the training offered by the State Department of Education on Policy 5310 “several times.” Tr.18. In her capacity as Assistant Superintendent of Systems Support, Dr. Vickers frequently gave advice and answered questions from administrators relating to the provisions of Policy 5310, evaluations, and plans of improvement. Tr.18-19.

12 12. The purpose of an improvement plan is “to help an individual to improve their job performance.” Tr.27.

13 13. Grievant refused to provide any comments or input regarding the contents of the proposed improvement plan developed by Dr. Vickers. Tr.21. Although Grievant refused to exercise her right to designate someone to serve on the improvement plan team, she told Dr. Vickers that she had no objection to the composition of the team as proposed by Dr. Vickers. Tr.22.

14 14. In addition to Dr. Vickers, the improvement plan team included Ms. Dorothea Fuqua and Ms. Marianne Annie. Ms. Fuqua was filling in as principal of Flinn ElementarySchool while Grievant's regular supervisor, Sharon Stutler, was on a leave of absence. Tr.24. Ms. Annie was Assistant Principal of Elk Elementary Center. Exh.9.

15 15. Dr. Bill Mullett and Mr. Rick Messinger agreed to act as “resources” during the course of the improvement plan. (See footnote 4) Dr. Mullett is a counselor with extensive experience in helping administrators. Tr.24, Exh.9. Mr. Messinger had served as a principal and, as a result, Dr. Vickers believed that he could provide insight into the working relationship between a principal and an assistant principal. Tr.24, Exh.9.

16 16. On April 10, 2003, the improvement plan team met with Grievant to review the components of the plan. Tr.25, Exh.9. The identified deficiencies that were to be addressed included Grievant's lack of leadership skills, poor interpersonal skills, poor judgment, and lack of sensitivity

regarding her superiors. Tr.28-29. These are identified as performance characteristics for administrators in Policy 5310. W. VA. CODE ST. R. § 126- 142-19.

17 17. Each member of the team was required to contact Grievant at least once a week. Tr.30. As a group, the team was to meet with Grievant once each month from April through June, 2003. Tr.30, Exh.9.

18 18. Grievant was required to keep a journal to record examples of cooperative efforts, conflict resolution, facilitating communication, positive interpersonal skills, good judgment and sensitivity, respectively. Tr.30, Exh.9. Entries were supposed to be comprised of key words recorded at the end of each day. The journal entries were to be shared with team members during weekly conferences.

19 19. The dates for all of the monthly meetings were provided to Grievant and all of the plan participants during the initial group meeting on April 10, 2003, so that they could keep their calendars clear on those dates. Tr.31.

20 20. Grievant assured Dr. Vickers that she would comply with the improvement plan. Tr.32.

21 21. Throughout the time the improvement plan was in place, Grievant continued to deny that she had any deficiencies in the areas the improvement plan was designed to address. She persisted in her belief that the improvement plan was punitive in nature. Exh.18, 25, 36.

22 22. Throughout the time the improvement plan was in place, Grievant continued to have problems with being late for meetings, despite having been cautioned that this was perceived as disrespectful. Exh.12, 15, 19. At the conclusion of a conference in April, Dr. Vickers specifically directed Grievant to “[b]e on time for scheduled meetings.” Exh.12.

23 23. There was a recurring problem with Grievant failing to report to school on time in the morning, even while the improvement plan was in place. Exh.19. Grievant refused to accept the directive from her supervisor, Ms. Fuqua, that Grievant was required to report to school by 7:00 a.m. Grievant ignored this directive and persisted in asserting that the workday for professional employees at Flinn Elementary School did not begin until 7:20 a.m. Exh.12, 14, 21. This controversy continued for an extended period of time.

24 24. Grievant postulated that the absence of her regular principal, Sharon Stutler, had been contrived so that Ms. Fuqua could “spy” on Grievant. Exh.13, 16, 19.

25 25. During a conference in the early stages of the improvement plan, Dr. Vickers asked

Grievant three times what she had learned from Ms. Fuqua that would help Grievantwith the improvement plan. Once Grievant responded that she had learned "'how to play the game.'" Exh.12. Otherwise, Grievant never answered the question. Dr. Vickers used this exchange to illustrate the difficulty of getting Grievant "to respond to the questions asked," which was why Dr. Vickers "found the conference exhausting[.]" Exh.12.

26 26. Contrary to her statement to Dr. Vickers that she did not object to the composition of the improvement plan team, Grievant told Ms. Annie that her inclusion on the team was intentionally humiliating to Grievant because Ms. Annie had less administrative seniority than she did. Exh.15.

27 27. At the conclusion of a meeting with the team on May 13, 2003, Grievant asserted that she would not be harassed, coerced or manipulated by "them." She also questioned whether she would be able to meet with the improvement team without her attorney being present. On that note, Grievant asked to be excused from the meeting. Exh.18.

28 28. During a conference in May, Dr. Vickers noted that Grievant had failed to make journal entries for that week. Grievant responded that she was not going to stop what she was doing during the day to make journal entries. Dr. Vickers reminded Grievant that journal entries were supposed to be key words recorded at the end of each day. Exh.20.

29 29. While reviewing journal entries during their next conference, Grievant complained to Dr. Vickers that what they were doing "was like third grade stuff." Exh.20. Grievant asserted that the improvement plan was "harassment." She disagreed with every suggestion or observation made by Dr. Vickers. Exh.20.

30 30. Throughout the period of the improvement plan, Grievant could not, or would not, separate her strong emotions regarding past events from the improvement plan. Exh.12, 15, 20, 25, 27, 38, 89. Therefore, Dr. Vickers suggested that it might be helpful to Grievant to avail herself of counseling services that were available to her as an employee benefit. Grievant rejected this suggestion.

31 31. By correspondence, dated June 18, 2003, Grievant asked Dr. Vickers to put her improvement plan on hold because she was taking a medical leave of absence, effective June 16, 2003. (See footnote 5) Exh.27, 35. Grievant faxed this correspondence at approximately 1:41 a.m. on June 19, 2003, directed to "Kanawha County Schools" to the attention of Dr. Vickers. Exh.27.

32 32. A team meeting on June 19 had been scheduled since the outset, as reflected in the

"implementation timeline" section of the written improvement plan. Exh.9.

33 33. The June 19 meeting took place despite Grievant's absence. Having concluded that Grievant "did not satisfactorily reach the Improvement Goals," the team recommended that the improvement plan be extended through October 1, 2003. Exh.26. A document entitled "Improvement Team Recommendation" was executed by the members of the team. Grievant signed a copy of the Improvement Team Recommendation on July 30, 2003, and included a notation that her signature "indicates receipt of notification only." Exh.26.

34 34. Possible outcomes identified in the Improvement Team Recommendation were "remaining in current placement, removal as assistant principal and placement as a teacher, or termination as an employee of Kanawha County Schools." Exh.26.

35 35. By correspondence, dated July 8, 2003, Superintendent Duerring specifically directed Grievant to make an appointment with Dr. Vickers "well in advance" of returning to work at the end of Grievant's medical leave. Exh.30.

36 36. Despite this express directive from Superintendent Duerring, Grievant did not make an appointment with Dr. Vickers in advance of returning to work. Instead, she sent a letter, dated July 28, 2003, directing Dr. Vickers to notify her "in writing via U.S. Mail" regarding the outcome of the improvement plan. Exh.31. If they needed to meet, Grievant instructed Dr. Vickers to make the arrangements and notify Grievant "as soon as possible." Exh.31.

37 37. Grievant wrote to Dr. Vickers on August 7, 2003, noting that she had not expected the June 19, 2003, meeting to take place because Grievant had already begun her medical leave of absence by that date. Grievant sought "an explanation." She also took the opportunity to "challenge the plans to resume" the improvement plan, which Grievant again characterized as "harassment." Exh.36.

38 38. Thereafter, Grievant persisted in demanding that Dr. Vickers provide her with documents or recordings of the June 19, 2003, meeting. Grievant also demanded documents relating to a meeting Grievant alleged took place on June 17, 2003. (See footnote 6) Her demands persisted, despite having been repeatedly told that there were no suchdocuments or recordings other than the "Improvement Team Recommendation" that had already been provided to her. Exh.78.

39 39. Correspondence of similar import, dated August 16, 2003, was faxed to Dr. Vickers. Exh.38.

40 40. Despite having been told that she needed a release from her doctor to return to work after her medical leave, Grievant returned to work on August 19, 2003, without the required release.

41 41. In an August 21, 2003, note to her principal, Sharon Stutler, Grievant described the improvement plan as “a bogus plan of improvement that was enabled to be written through likely illegal means and continued through improper activities, [which] does not exist as far as I am concerned.” Exh.41.

42 42. Dr. Vickers notified Grievant, the improvement team, Dr. Mullett, Mr. Messinger, and Grievant's principal, Sharon Stutler, that a team meeting would be held on August 29, 2003, to discuss the status of Grievant's improvement plan. Exh.42.

43 43. Grievant's response was a letter to Dr. Vickers, dated August 23, 2003, in which Grievant asserted, in part, as follows:

> With all due respect, your verbal denial of impropriety pertaining to two meetings, June 17 & 19, lacks credibility because everything related to a retaliatory and contrived plan of improvement has been and is improper. Please make note of the following:
>
> 1 1. Each and every alleged “deficiency” is baseless and contradictory to strengths identified within a series of professional evaluations.
>
> 2 2. As documented with the plan, my future employee status is contingent upon the outcome of said plan.
>
> 3 3. A well established pattern involved written reports following all meetings, whether one-on-one or small group. Your reluctance tofollow that pattern as it pertains to June 17 & 19 meetings is inconsistent and arbitrary.
>
> 4 4. Statements likely made during those meetings pertained to my alleged personality traits and job performance.

5 5.

I have an unquestionable right to be informed regarding statements made about me during the June 17 & 19 meetings.

6 6.

If cassette tapes and/or notes pertaining to those meetings exist, I would like copies. In addition, I am again formally requesting **written** documentation pertaining to June 17 & 19.

Exh.43 (spacing altered for readability).

44 44. In her August 23 letter, Grievant further asserted that

> [a] meeting scheduled for August 29 will not suffice as a substitution for a written report pertaining to June 17 & 19 meetings. Until a written report explaining the rationale for those meetings being held without me; detailing statements made and by whom; and identifying the specific grounds upon which the plan was continued, **I will consider the plan to be suspended, if not terminated.**

Exh.43 (emphasis added).

45 45.

Grievant followed the foregoing correspondence with a faxed message to Dr. Vickers, dated August 24, 2003, in which Grievant reiterated her demands for reports on the June 17 and June 19 meetings. Grievant “strongly suggest[ed] that the reports be thorough and factual” because she was certain that “the participants within those meetings will be subpoenaed to testify in a Court of Law, as opposed to Grievance Board hearings, and will be subject to charges and prosecution if they commit perjury.” Exh.44.

46 46. Dr. Vickers responded that Grievant had “received and signed the written statement from June 17 & 19 meetings.” She further noted that statements at the meetings related to “the written documentation during your plan, of which you have copies.” Finally, Dr. Vickers stated that the plan was neither terminated nor suspended, and the scheduled meeting would take place on August 29, 2003. Exh.45.

47 47. After two scheduling changes to accommodate Grievant, Dr. Vickers scheduled an improvement plan team meeting for October 9, 2003. (See footnote 7) Exh.77.

48 48. In an e-mail on October 2, 2003, Grievant chastised Dr. Vickers, as follows, for scheduling the improvement team meeting:

> If you will please review the last e-mail that you received from me, it stated that I, not we, would contact you to schedule a meeting shortly after receipt of the 6/17/03 documentation. I'm not sure how or when you concluded that contingency no longer applies. It is still very much in effect. **You've taken the liberty of notifying others of a date & time to meet.** May I assume that means that the documentation is en route to me and will arrive prior to 10/9/02? Otherwise, you may want to communicate with the Team members that the date & time are merely tentative, because **the meeting will not occur unless I have received the requested documentation.**

Exh.78 (emphasis added).

49 49. On October 8, 2003, Grievant sent another e-mail to Dr. Vickers in which Grievant reiterated that her attendance at the October 9 meeting was conditioned upon first receiving documents she believed were created in relation to a June 17, 2003, meeting. Exh.80. She claimed entitlement to such documents on her belief that she had “every right to know what was said about me within a meeting of individuals who had undoubtedly been recruited to defame me, with the primary function of creating written allegations to contradict legitimate evaluations.” Exh.80. She asked that Dr. Vickers “not plan to portray my refusal to attend a 10/9/03 meeting as an act of insubordination.” The rest of the e-mailcontains various allegations of wrongdoing on the part of the administration and the improvement team members.

50 50. Dr. Vickers again informed Grievant that she had already been provided the only document Dr. Vickers possessed relating to June 17, 2003. (See footnote 8) Exh.81.

51 51. Dr. Vickers expressly directed Grievant to attend the October 9 meeting. She indicated that the meeting would go forward even if Grievant were not in attendance. Exh.81.

52 52. Grievant did not attend the scheduled October 9 meeting because she was embroiled in student disciplinary matters at school. Ms. Stutler, who was in attendance at the scheduled team meeting, called the school to see if Grievant needed assistance. Grievant subsequently accused Ms. Stutler of calling to check up on her. Exh.79. Grievant also told Ms. Stutler that, if “they” asked her to, Principal Stutler would chew up Grievant and give her to “them” on a platter. Exh.79.

53 53. A team meeting, with Grievant in attendance, finally took place on October 14, 2003.

Exh.79.

The Extended Plan

54 54. Thereafter, it appears that Grievant was provided with a written "Improvement Plan - Extended for Debra Santer" ("Extended Plan"). (See footnote 9) The Extended Plan identified the same four areas of deficiency as the original improvement plan. 55 55. In addition to the corrective action proposed in the original improvement plan, the Extended Plan identified Bob Calhoun, Principal of Pinch Elementary, as a resource. Grievant was to observe Mr. Calhoun for one work day during a specified week in October and one work day during a specified week in November. Written exercises relating to case studies in school administration and supervision were also added to the proposed corrective action. Exh.84, 88.

56 56. With respect to the original version of the Extended Plan, (See footnote 10) Grievant sent a memorandum to Dr. Vickers, dated October 14, 2003, objecting to the assertion that the plan had been developed with her input. Grievant asserted that she did not agree with the improvement plan and, thus, felt a need to "reject the implication, in writing, that I participated in the creation of a defamatory document." Exh.83.

57 57. A revised version of the Extended Plan was issued in which the word "mutually" was deleted. Dr. Vickers noted in a memorandum to Grievant, dated October 15, 2003, that "[i]mprovement plans do not have to be mutually developed. Input is required and you were given the opportunity for input on April 7, 2003." Exh.83.

58 58. In further response to the Extended Plan, Grievant asserted that the improvement plan in her case did not conform to the requirements of Policy 5310, which Grievant interpreted to require unsatisfactory formal evaluations as a necessary precursor to an improvement plan. Exh.83. Grievant also informed Dr. Vickers of her belief that "[t]he policy defines the role of an improvement team as being only a resource. It does notallow team members to make value judgments in reference to an individual's performance." Exh.83. Grievant further expounded on these issues in a faxed communication (See footnote 11) to Dr. Vickers, dated October 16, 2003. Exh.87.

59 59. In her October 14, 2003, memorandum, Grievant also objected to the involvement of Mr. Calhoun in the improvement plan. Noting that "the individual who is the focus of the plan of improvement" is afforded "discretion to choose one team member," Grievant complained that "[a]ll current members were selected in advance at the discretion of the central office administrators, as

was Bob Calhoun." She apparently forgot that she had been offered the opportunity to name someone to the team but had declined to do so. Grievant then asked Dr. Vickers to contact her regarding "my choice of an individual who will replace Mr. Calhoun." Exh.83.

60 60. No one replaced Mr. Calhoun. Instead, at Grievant's request, Eric Lutz, Principal of Watts Elementary, was also added to the team. Exh.88. Two days of observing Mr. Lutz were added to the list of corrective actions to be undertaken by Grievant. Exh.88.

61 61. On or about October 15, 2003, Grievant rejected an offer of help from Dr. Mullett. Exh.85

62 62. On or about October 17, 2003, Grievant refused to schedule a meeting with Mr. Calhoun. Exh.85.

63 63. The conflict over the improvement plan came to a head on October 17, 2003. Grievant failed to appear for a meeting with Dr. Vickers on that date, whereupon Dr.Vickers informed Grievant that her "nonattendance demonstrates your uncooperativeness throughout the entire plan of improvement." Dr. Vickers informed Grievant that she viewed Grievant's failure to attend the meeting as "an act of insubordination." Exh.86.

64 64. In response, Grievant faxed a lengthy memorandum to Dr. Vickers, which contained a diatribe against the improvement plan, various administrators in the school system, BOE's lawyer, the hearing examiner who conducted the pre-disciplinary hearing that preceded Grievant's suspension, and the administrative law judge who upheld Grievant's suspension. Exh.89.

65 65. Further, noting that an appeal from the grievance involving her suspension was, at that time, pending before the Circuit Court of Kanawha County, Grievant prospectively cast aspersions on the integrity of the circuit court in the event that the ruling on appeal was not in her favor. (See footnote 12) Exh.89.

66 66. In terms of the improvement plan, Grievant asserted, in part, as follows:

> With the continuation of the POI [plan of improvement] being allegedly justified by my perceived anger toward and disregard for selected administrators, its purpose becomes obvious to the point of being laughable, but not quite. I have been opportunistically characterized as argumentative because I won't acknowledge "deficiencies" that don't exist. There's also the accusation that I'm obsessive compulsive because I refuse to separate the POI from the last three years, as though the POI came to exist in a legitimate way. Having been told not to talk about the events of the past, I'm to pretend that the POI is real instead. (See footnote 13)

Exh.89. 67 67. As Grievant acknowledged in the above-quoted memorandum, she refused to put her past disputes with the BOE hierarchy behind her. It is clear that, at various times throughout the improvement plan, Grievant was encouraged by various people to let go of the past and focus on the present. (See footnote 14)

68 68. After continuing to assert that her evaluations were of a high caliber and did not support implementation of the improvement plan, Grievant stated as follows:

> I'm sorry, but no matter how important job security is to a single working mom, I can't allow myself to be bullied into ill health again by those with a higher rank or intimidated by the threat of termination. I didn't crumble, but I did comply with the mechanics of the POI last spring. As far as I am concerned, **the defamatory and baseless POI is over**. Only in the event of an unlikely ruling in favor of KCS [BOE] by the Circuit Court, assuming that it's beyond being influenced, will I consider allowing myself to be demeaned while being held captive by a threat of unemployment. What will be, will be.

Exh.89 (emphasis added).

69 69. If the foregoing left any doubt as to Grievant's intention regarding the improvement plan, she further clarified her position by stating that “I wish to be left alone and allowed to do my job. I am asking each and every 'Team Member' to please stay away, at least until the next development in the legal proceedings.” Exh.89.

70 70. On direct examination by her counsel at the Level IV hearing, Grievant asserted that her intention in sending Dr. Vickers the foregoing memorandum [Exh.89], was to “ask that there be a stay . . . until a ruling was issued by Judge King on the appropriateness of the improvement plan.” 71 71. Grievant responded in the affirmative to her counsel's inquiry as to whether “[o]nce you got that ruling from Judge King, would you then have participated in the improvement plan if somebody had attempted to do that?”

72 72. After Judge King's decision in April 2004, no one approached Grievant about reinstating the improvement plan. Nor did Grievant ask to have the plan reinstated. 73 73. In light of Grievant's refusal to continue with the improvement plan, Dr. Vickers scheduled a final team meeting for October 24, 2003. Exh.91.

74 74. Grievant attended the final meeting but refused to sign the sheet documenting the presence of the various participants. Exh.92. Grievant may have made a brief statement but refused to engage in any interaction with the team members.

Transfer to the Classroom

75 75. By memorandum, dated October 24, 2003, the team members advised Superintendent Duerring that Grievant "did not successfully improve the deficiencies identified in her plan of improvement." Exh.93. They recommended that Grievant "be removed from her administrative position and placed into a teaching position for which she is certified." Exh.93.

76 76. Ms. Annie astutely summarized the situation at that point, as follows:

> Throughout this improvement plan process, Deb [*i.e.*, Grievant] has refused to recognize that any of her own actions have caused her to be in this predicament. She continues to be very angry, disrespectful and hostile toward her superiors. She still perceives herself to have been the victim of an unjust and cruel conspiracy, cannot see any other view point and does not see the need to make any changes in her leadership or interpersonal skills. I do not believe that she has met her goals in regards to managing interaction, interpersonal skills, judgment or sensitivity.

Exh.93 (in part). 77 77. Correspondence from Superintendent Duerring to Grievant, dated October 24, 2003, implemented the team's recommendation by informing Grievant that she would be returned to a classroom position but would continue to be compensated at her then- current rate "pending a hearing and recommendation" to BOE in the matter. Exh.94. She was assigned to a special education classroom at Andrew Jackson Middle School.

Refusal to Speak with the Deputy Superintendent

78 78. In addition, Deputy Superintendent Joe Godish telephoned Grievant on October 24, 2003, to inform her personally of the change in her assignment. Grievant refused to speak with Deputy Superintendent Godish and, in fact, actually hung up on him.

79 79. Deputy Superintendent Godish left messages for Grievant telling her to call him either at his home or his office. She called and left a message at his office on the following Sunday afternoon when, presumably, she could be relatively certain that he would not be there.

Disciplinary Charges

80 80. Thereafter, by correspondence, dated November 13, 2003, Superintendent Duerring advised Grievant that a hearing would be held on November 18, 2003, to consider whether to take disciplinary action against Grievant for the following:

1) You have failed to cooperate in and complete the plan of improvement that was instituted to help you improve your job performance, including refusals to meet with improvement team members and resistance to suggestions for improvement.

2 2) Your performance is unsatisfactory in the following areas (with reference to applicable sections of WV Board of Education Policy 5310):

a) You do not demonstrate strong leadership skills (19.6);
b) You exhibit poor interpersonal skills (19.5.1);

c) You display poor judgement (19.5.3);

d) You do not show sensitivity toward your superiors (19.6.3).

3) When the Deputy Superintendent contacted you by telephone on October 24th you would not talk to him and hung up.

Exh.1.

81 81. As previously noted, the pre-disciplinary hearing to address the above-listed charges was held on December 8, 2003, and January 5, 2004, before Hearing Officer Lambright.

Dismissal

82 82. By correspondence, dated February 12, 2004, Superintendent Duerring informed Grievant that, in her recommended decision, Hearing Officer Lambright “found that you chose not to comply with the improvement plan, failed to effect improvement in the identified areas and continued to be insubordinate to supervisors.” Superintendent Duerring adopted those findings as his own. He also adopted the recommendation that Grievant's “employment be terminated.”

83 83. Further action against Grievant was stayed as a result of the order entered on February 18, 2004, by the Circuit Court of Kanawha County in *Santer*, Civil Action No. 03-AA-112. The stay was lifted on April 8, 2004, when Judge King issued the order affirming the Grievance Board's decision.

84 84.

After the stay was lifted, Superintendent Duerring informed Grievant that he would recommend that she be dismissed. BOE accepted his recommendation. Grievant's employment was terminated, effective April 15, 2004.

85 85. Correspondence to Grievant from Superintendent Duerring, dated April 16, 2004, indicated that, in voting to dismiss Grievant, BOE adopted the findings and conclusions set forth in the recommended decision issued by Hearing Officer Lambright on February 6, 2004.

86 86. Grievant exercised her option to grieve her dismissal directly to Level IV.

Discussion

The statement of grievance in this case contains the simple assertion that “Grievant has been terminated by the Kanawha County Board of Education.” This is anincontrovertible statement of fact. Despite the instructions on the grievance form itself, Grievant did not identify any “statutes, policies, rules, regulations or agreements” she was claiming had been “violated, misapplied or misinterpreted.”

Grievant is challenging the propriety of her dismissal. In such case, the employer bears the burden of proving, by a preponderance of the evidence, the charges upon which the dismissal was based. W. Va. Code § 18-29-6; *Gross v. Kanawha County Bd. of Educ.*, Docket No. 02-20-090 (Aug. 30, 2002).

The grounds upon which an education employee may be suspended or dismissed are set forth in West Virginia Code section 18A-2-8. These include immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on a felony charge. In making a decision to suspend or dismiss an employee on the basis of one or more of these statutory grounds, BOE is required to act reasonably and not in an arbitrary or capricious manner. Syl. pt. 1, *Rovello v. Lewis County Bd. of Educ*., 181 W. Va. 122, 381 S.E.2d 237 (1989)(*per curiam*)(citing Syl. pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)).

Grievant's dismissal was based on her failure to participate in the improvement plan, her unsatisfactory performance in the four areas identified in the improvement plan, and her conduct in hanging up on Deputy Superintendent Godish. Each will be addressed in turn.

Insubordination - Refusal to Participate in the Improvement Plan

BOE asserts that Grievant's refusal to cooperate with, and participate in, the improvement plan, after having been directed by Superintendent Duerring to do so, constitutes insubordination. Insubordination has been defined as an employee's “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” *Butts v. Higher Educ. Interim Governing Bd*., 212 W.

Va. 209, 569 S.E.2d 456 (2002) (citing *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995)).

It is clear that Grievant did not agree that she had deficiencies. She was totally opposed to the improvement plan. Nonetheless, the Grievance Board has previously recognized and applied the "general axiom of employment law that 'an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' *Reynolds v. Kanawha- Charleston Health Dept.*, Docket No. 90-H-128 (Aug. 8, 1990)[.]" *Conner*, Docket No. 94- 01-394 (Jan. 31, 1995)(citations omitted).

Grievant did, in fact, take steps to challenge the propriety of BOE's decision to require her to participate in an improvement plan. Ultimately that challenge was resolved in BOE's favor. In the meantime, however, Grievant was required to comply with Superintendent Duerring's instruction to participate in the plan.

In addition to compliance with orders, an employer also has the right to expect "'that subordinate personnel not manifest disrespect toward supervisory personnel which undermine their status, prestige, and authority[.]'" *Thompson v. Logan County Bd. of Educ*., Docket No. 95-23-127 (July 17, 1995)(quoting *In re Burton Mfg. Co.*, 82 Lab. Arb.Rep. (BNA) 1228, 1234 (1984)). The writings generated by Grievant while the improvement plan was in place show an employee who did not comprehend her place in the hierarchy. She made numerous hostile and disrespectful remarks about superiors up to, and including, Superintendent Duerring. For example, in a memorandum dated October 17, 2003, Grievant accused Superintendent Duerring and others in the administration of testifying falsely under oath.

She wrote a memorandum to Dr. Vickers in which she, in essence, accused Dr. Vickers of lying to her. Specifically, Grievant told Dr. Vickers that her response "lacks credibility[.]" Consistent with her view that the improvement plan was somehow a gambit on the part of BOE to justify dismissing her, Grievant stated, in a lengthy memorandum, dated October 21, 2003, that "[c]entral office administrators will do whatever they deem to be in their own self-interests and this manufactured POI is the means to that end[.]" This memorandum was sent to Dr. Vickers, who, it appears, was a central office administrator at that time. Grievant also wrote "I consider . . . your mean-spirited harassment of me to be shameful and horribly disappointing[.]" She further stated that she had lost respect for Dr.

Vickers, just as she had for Superintendent Duerring and another administrator she named.

Grievant denied saying that she wanted certain administrators brought down. She did, however, acknowledge saying that she would “like to see them gone because they have 'brought down' the whole system, and that's hurting kids.”

It does not appear that Grievant recognized that both the substance and tenor of her communications with her superiors in the BOE hierarchy were problematic. Whenever stymied or frustrated, Grievant had a habit of lashing out and making vicious,unsubstantiated allegations about anyone who disagreed with her. Her attacks on her superiors in BOE were not merely intemperate, they were irrational and personal.

Grievant's attitude toward her superiors at BOE was not disguised in the least. It was not hyperbole when Ms. Annie opined that it would not be possible for Grievant “to work with and be evaluated by the very administrators that she despises.” Grievant was insubordinate in her failure to meet the expectation that she “not manifest disrespect toward supervisory personnel which undermine their status, prestige, and authority.”

Ultimately, Grievant took it upon herself to announce that the improvement plan was over. She directed the team members to leave her alone. This was rank insubordination on Grievant's part. Her efforts at the Level IV hearing to suggest that she was merely asking for a suspension of the improvement plan until she received a ruling from the circuit court is simply not supported by the record. Grievant is clearly an articulate, intelligent person. She did not ask to put the improvement plan on hold. She announced, in no uncertain terms, that the plan was “over.” Exh.89.

Not only was Grievant's unilateral decision to end the improvement plan insubordinate, Grievant's failure to participate in the plan in a meaningful way can also be properly described as insubordinate. Participation implies more than just going through the motions on a superficial level. This is all Grievant ever did in terms of the improvement plan, all the while condemning the process and almost everyone involved with it. This pretense of participation was insubordinate.

Furthermore, Grievant's refusal to comply with express directions from Superintendent Duerring was willful. Her actions were completely contemptuous of authority. Thus, to the extent that insubordination requires “that the employee's failure tocomply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination,'” this requirement has been met. *Zimowski v. Mineral County Bd. of Educ.*, Docket No. 98-28-050 (July 20,

1998).

Unsatisfactory Performance

Ironically, Grievant's conduct while the improvement plan was in place illustrates the very deficiencies that were identified as the basis for implementing the plan in the first place. The plan was intended to address 1) a lack of strong leadership skills, 2) poor interpersonal skills, 3) poor judgment, and 4) a lack of sensitivity toward superiors. The letter to Dr. Vickers, in which Grievant announced that the improvement plan was over, [Exh.89] provides just one overwhelming example of poor judgment, poor interpersonal skills, and a complete lack of sensitivity to more than one person whose position was superior to hers in the BOE hierarchy. Such deficiencies must inevitably have a negative impact on Grievant's leadership potential.

To the extent that Grievant's dismissal was predicated upon unsatisfactory performance, the record establishes that Grievant was fully informed about the aspects of her job performance that needed improvement. After these problems were identified for Grievant, she was placed on an improvement plan in which she was provided with guidance and support to help her make the needed changes. When Grievant did not demonstrate sufficient progress by the end of the original improvement plan, the plan was extended so that Grievant was given a further opportunity to correct the identified deficiencies in her performance as an administrator. This is all that is required prior to adismissal for unsatisfactory performance. *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002), W. Va. Code § 18A-2-12(f) and (h).

Grievant's assertion that the improvement team overstepped its authority by evaluating her performance and submitting a recommendation to Superintendent Duerring is without any legal basis. To the contrary, evaluation of the employee's progress (or lack thereof) is an integral part of the improvement plan process. W. Va. Code § 18A-2-12(h). By statute, where sufficient progress has not been demonstrated, a recommendation for additional corrective action or a recommendation for dismissal is supposed to ensue. W. Va. Code § 18A-2-12(h). The improvement team did not overstep its proper bounds in its efforts to assist Grievant in correcting her deficiencies, in reporting the lack of progress, or in recommending that she be returned to the classroom.

Unfortunately, Grievant rejected the idea that she had problems that needed to be corrected. She argues that she should not have been required to participate in the improvement plan in the first place. In support of this argument, Grievant points out that her formal evaluations, as set forth on the

forms provided by the State Department of Education, have never been unsatisfactory. As previously noted, the propriety of the improvement plan is not at issue in this grievance. Even if it were, BOE has correctly pointed out that Policy 5310 provides for imposition of an improvement plan when “an administrator's performance is unsatisfactory in any area of responsibility[.]”

There is nothing in the policy that requires that a formal written evaluation precede an improvement plan. *Beckley v. Lincoln County Bd. of Educ*., Docket No. 99-22-168 (Aug. 31, 1999)(quoting *Meade v. Mingo County Bd. of Educ*., Docket No. 90-29-103 (Jan. 30, 1991)). Unsatisfactory performance was noted and communicated to Grievant. Thiscomports with the State Board of Education's Policy 5300, which requires that an education employee be provided “open and honest evaluation” and an opportunity to improve job performance before such employee is transferred or dismissed. W. VA. CODE ST. R. § 126- 141-2.6. An improvement plan was implemented in accordance with the requirements of Policy 5310.

Unfortunately, Grievant could not, or would not, take advantage of the opportunity to correct the identified deficiencies in her performance as an administrator. In Grievant's portrayal of herself, nothing was ever Grievant's fault. Instead, she saw herself as the victim of conspiracies and corrupt practices. At various times, she accused a number of her supervisors, Dr. Vickers, Hearing Officer Lambright, counsel for BOE, various members of the improvement plan team, the Grievance Board, and even the Circuit Court of Kanawha County of either conspiring against her or being susceptible to improper influence. With this type of thinking, it is no surprise that Grievant did not use the opportunity provided by the improvement plan to correct the deficiencies in her leadership skills, interpersonal skills, judgment, or sensitivity to those who held higher positions than she in the BOE hierarchy.

Insubordination - Refusal to Speak with Deputy Superintendent Godish

Grievant hung up the telephone on Deputy Superintendent Godish. This was so clearly insubordinate that it need not be discussed further.

Similarly, Grievant was insubordinate when she refused to respond in any meaningful way to messages from Deputy Superintendent Godish directing her to call him at his office or his home. Grievant chose to call his office on a Sunday afternoon, when it could be presumed that he would not be present. She did not avail herself of the morereasonable option of calling him at home, as she had been instructed to do. In this way, Grievant met her objective of avoiding talking to Deputy

Superintendent Godish while being able to declaim that she had, in fact, complied with his instructions and returned his call. Such superficially compliant behavior is insubordinate.

BOE bears the burden of proving the grounds for Grievant's dismissal from employment. This burden was easily met through little more than Grievant's own words, as contained in her own ill-conceived and blatantly disrespectful memoranda and correspondence. In addition, she hung up the telephone when Deputy Superintendent Godish attempted to speak with her about a change in her assignment. Thereafter, she did not comply with his request to contact him. On such a record, Grievant's dismissal for insubordination cannot be deemed arbitrary and capricious.

To the extent that Grievant's dismissal was attributable to her unsatisfactory performance in terms of leadership skills, interpersonal skills, judgment, and sensitivity to her superiors, BOE established that she was informed about the deficiencies and given opportunities to correct them. Not only did she fail to correct the areas in which her performance was unsatisfactory, Grievant rejected the help that was offered in the form of an improvement plan and an extended improvement plan. As the old saying goes, you can take a horse to water but you cannot make it drink. Grievant was offered a veritable lake of assistance but refused to partake.

Due Process

Grievant's claim that she was denied due process is without merit. She was given notice of the charges upon which Superintendent Duerring based his recommendation to BOE that Grievant be dismissed. She was given an opportunity to be heard on thosecharges during the pre-disciplinary hearing. Furthermore, she retained the higher salary of an assistant principal while the disciplinary process took its course, even after she was returned to the classroom. This is sufficient. Syl. pt. 3, *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). *See also*, *Wines v. Jefferson County Bd. of Educ*., 213 W. Va. 379, 582 S.E.2d 826 (2003).

Credibility

It is clear that, by the time the improvement plan was implemented, Grievant's perception of events was being colored by feelings of anger and bitterness toward Superintendent Duerring and other members of his administration. While making no judgment as to the validity of such feelings, their existence plays a role in determining Grievant's credibility because they clouded her ability to perceive events clearly. Therefore, to the extent that Grievant's testimony diverged from the testimony of Dr. Vickers, Grievant's testimony is given less credence. This is not to say that Grievant

testified falsely, merely that her view of events was so distorted that it is hard to rely upon her accuracy in recounting them. *Kincaid v. W. Va. Parkways Econ. Dev. & Tourism Auth*., Docket No. 04-PEDTA-179 (December 21, 2004).

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. BOE bears the burden of establishing, by a preponderance of the evidence, the charges upon which Grievant's dismissal was based. W. Va. Code 18- 29-6, *Gross v. Kanawha County Bd. of Educ*., Docket No. 02-20-090 (Aug. 30, 2002). 2 2. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, a preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997)." *Harvey v. Summers County Bd. of Educ*., Docket No. 01-45-360 (Sept. 20, 2001).

3 3. West Virginia Code section 18A-2-8 provides, in pertinent part, that a board of education may dismiss an employee for "[i]mmorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge."

4 4. A board of education's authority to dismiss an employee pursuant to West Virginina Code section 18A-2-8, "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.'" Syl. pt 4, *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002)(quoting Syl. pt. 3, *Beverlin v. Bd. of Educ.*, 158 W.Va. 1067, 216 S.E.2d 554 (1975)).

5 5. Insubordination has been defined as an employee's "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 569 S.E.2d 456 (2002)(citing *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995)). 6 6. "[I]nsubordination may legitimately form the basis for imposing sanctions upon college or public school employees." *Butts v. Higher Educ. Interim*

Governing Board, 212 W. Va. 209, 211, 569 S.E.2d 456, 458 (2002)(internal citations omitted).

7 7. Superintendent Duerring was Grievant's superior in the BOE hierarchy and held the authority to direct her to participate in an improvement plan.

8 8. Imposition of the improvement plan has already survived judicial scrutiny at the circuit court level. The validity and reasonableness of requiring Grievant to participate in an improvement plan has already been resolved. Even if it had not, “[e]mployees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Grievant did not have the discretion to ignore the directions that she participate in an improvement plan.

9 9. In general, absent a threat to health or safety, an employee must comply with the supervisor's order until such time, if any, that the employee brings a successful challenge to the validity of the questioned order. *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Participation in the improvement plan did not constitute such a threat to health or safety.

10 10. Grievant's refusal to cooperate with, and participate in, the improvement plan “was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination.” *Bierer v. Jefferson County Bd. of Educ*., Docket No. 01-19-595 (May 17, 2002)(citing *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan 31,1995)). 11 11.

“'Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.'” *Bierer v. Jefferson County Bd. of Educ*., Docket No. 01-19-595 (May 17, 2002) (quoting *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 20, 1988), *aff'd* 182 W. Va. 294, 387 S.E.2d 529 (1989)).

12 12. The improvement plan was properly instituted and conducted, consistent with the pertinent provisions of Policy 5310. It also comported with the provisions of West Virginia Code section 18A-2-12(f), requiring notice of deficiencies and a plan of remediation when a professional employee's performance is deemed unsatisfactory.

13 13. Grievant willfully refused to comply with the directive that she participate in the improvement plan and, in so doing, was insubordinate.

14 14. Grievant willfully refused to speak with Deputy Superintendent Godish by hanging up on him. In this, Grievant was insubordinate.

15 15. Grievant's superficial and meaningless compliance with the directive to phone Deputy Superintendent Godish is tantamount to a refusal. Such noncompliance rises to the level of insubordination. *McKinney v. Wyoming County Bd. of Educ*., Docket No. 92-55-112 (Aug. 3, 1992)("Generally, no amount of compliance short of full compliance can defeat a claim of insubordination.")

16 16. The State Board of Education's Policy 5300 provides, in pertinent part, that

> [e]very employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluationof his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/her job performance, prior to the terminating or transferring of his/her services, and can only do so with the assistance of regular evaluation.

W. VA. CODE ST. R. § 126-141-2.6 (2005).

17 17. The deficiencies in Grievant's skills as an administrator were properly brought to her attention and she was afforded an opportunity to correct the problems in her performance before BOE relied upon Grievant's unsatisfactory performance as part of the basis for her dismissal. This satisfies the requirements of both Policy 5300 and West Virginia Code section 18A-2-8.

18 18. BOE has proven, by a preponderance of the evidence, the charges upon which Grievant's dismissal was based.

19 19. BOE has correctly argued that Grievant's continued employment by BOE was not possible in light of her "antagonism toward those in leadership positions, her belief that individuals were conspiring against her and her continued failure to accept any responsibility for her own shortcomings[.]" The resulting decision to dismiss Grievant was reasonable. It cannot be considered arbitrary or capricious.

20 20. BOE afforded Grievant due process in notifying her of the grounds for her proposed dismissal and affording her a hearing in which she could dispute those grounds. Grievant's due process rights were not abridged.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County. 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 West Virginia Code section 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date:

April 22, 2005

_____

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

References to pages in the transcript of the pre-disciplinary hearing shall appear herein as "Tr.__." References to BOE's exhibits shall appear as "Exh.__."

Footnote: 2

There are some gaps in the notebook containing BOE's exhibits because some of the exhibit numbers were reserved and never used. Certain exhibit numbers pertain to multiple documents, as reflected in the "Document List" at the beginning of the exhibit notebook.

Footnote: 3

BOE's decision to require Grievant to participate in the improvement plan has already passed muster and will not be revisited in the instant grievance.

Footnote: 4

The improvement team is authorized to "identify additional resources" to help the employee for whom the improvement plan was developed.

Footnote: 5

According to a handwritten notation on Grievant's correspondence, Dr. Vickers received the June 18, 2003, letter on June 20, 2003. Exh.27. In a memorandum dated June 19, 2003, Dr. Vickers stated that it was received by facsimile transmission on June 19. Exh.35. The earlier date, which is more favorable to Grievant, is accepted for purposes of this decision.

Footnote: 6

The record is unclear as to what, if anything, relating to Grievant took place on June 17, 2003.

Footnote: 7

Grievant wanted to move the meeting to a date when the attorney who was representing her at that time could attend. However, after several date changes to accommodate this request, Grievant's attorney informed counsel for BOE that she would not be attending any of the improvement team meetings. Exh.74.

Footnote: 8

As noted, it is unclear what, if anything took place on June 17. It appears that the Improvement Team Recommendation resulted from a June 19 meeting, but the two dates seem to have been used interchangeably by Dr. Vickers.

Footnote: 9

Ms. Fuqua was not identified as a member of the team during the Extended Plan, presumably because Principal Stutler had returned and could participate on the team.

Footnote: 10

The first version of the Extended Plan is not part of the record. The versions admitted as Exhibits 84 and 88 incorporate changes made in response to some of Grievant's objections.

Footnote: 11

The faxed communication consists of two documents. Exh.87.

Footnote: 12

See the reference to the circuit court in the excerpt from Grievant's memorandum as set forth in Finding 68, below.

Footnote: 13

Although there were references to Grievant being obsessive or obsessing about certain past events, there does not appear to be any reference, other than this, to Grievant as obsessive/compulsive.

Footnote: 14

This is most likely the source of Grievant's complaint that she received pressure from Dr. Vickers and other members of the team "to discontinue litigation and voice agreement with components" of the improvement plan. Exh.50. This assertion was controverted by Dr. Vickers at Level IV and is not otherwise supported by the record.