THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

BRENDA RATLIFF,

Grievant,

v. **Docket No. 06-21-158**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Brenda Ratliff, filed this grievance against the Lewis County Board of Education ("LCBOE" or "Board") over her unsatisfactory evaluation and the resulting Improvement Plan. Her Statement of Grievance stated:

> Evaluation/observation is arbitrary and capricious, and without factual basis. The unsatisfactory performance is unsubstantiated by the evidence. The evaluation is fatally flawed in that the data noted on the observation was not honest. Negative incidents reported on the observation did support not unsatisfactory rating on the grievance (sic) evaluation.
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> **Relief Sought**: The unsatisfactory rating in the classroom climate section of the evaluation be changed to satisfactory and the plan of improvement be stopped. All evidence of an unsatisfactory evaluation and the plan of improvement be expunged from her personnel file.

The grievance was denied at Levels I and II, and Level III was by-passed. Grievant

appealed to Level IV on May 17, 2006, and the parties agreed to submit the case on the record developed below. This case became mature for decision on June 19, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by Frank Caputo, Staff Representative of the American Teachers Federationof West Virginia ("ATF"), and LCBOE was represented by Harry Rubenstein, Esq. of Kay, Casto, and Chaney.

Issues and Arguments

Grievant asserts her performance in the area of "Classroom Climate" was satisfactory. Grievant also avers the three observations did not placed her on notice her students were "disruptive," and her performance was unsatisfactory. Grievant defines disruptive as "characterized by unrest or disorder or insubordination" and as "violent," "riotous" and "unruly," and Grievant asserts her students were merely talkative, and she lets them talk. (See footnote 1)

Respondent asserts Grievant had sufficient problems to earn an unsatisfactory rating in the "Classroom Climate" area on her evaluation for the first semester of the 2005 - 2006 school year. This rating was supported by the three observations conducted by Grievant's supervisor during the semester.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a teacher at Lewis County High School. 2. Although Grievant was employed as a substitute for much of the 2004 - 2005 school year, the 2005 - 2006 school year was Grievant's first year of regular employment.

3. Because Grievant had between 0 to 2 years of experience, she must be

evaluated twice during the school year. Each semester's evaluation must be based on three observations, and, with one of these evaluations, the teacher must have prior notice of the evaluation. Policy 5310.

4. Because Grievant was a new teacher she was assigned a mentor teacher, Jenna Pettit, to assist her. (See footnote 2) Ms. Pettit had received the required mentor training.

5. Grievant and Ms. Pettit attended a training at the first of the school year that explained how the mentor process worked, and what the participants could expect from each other.

6. Ms. Pettit found Grievant to appear receptive to her suggestions at first, but the same issues were discussed over and over without Ms. Pettit noting any change in Grievant's classroom performance or behavior when she observed her. By mid-November, Ms. Pettit started pushing Grievant to make the changes noted in October, but Grievant did not modify her behavior or teaching methods. Ms. Pettit noted Grievant had "Classroom Climate" problems, these problems were more than students being talkative, and Grievant frequently complained to Ms. Pettit about the way one of her students acted. By January, Ms. Pettit found Grievant to be "verbally aggressive, almost combative" when given feedback and sarcastic to constructive criticism. Additionally, Grievant adamantly deniedthere were any problems in her classroom. Ms. Pettit became frustrated and resigned as Grievant's mentor in February 2006.

7. Principal Elizabeth Parmer assigned Assistant Principal Pam Wilt to evaluate Grievant. Assistant Principal Wilt had received the required training to perform evaluations.

8. Assistant Principal Wilt observed Grievant three times during the first semester, on October 21, 2005, December 14, 2005, and January 12, 2006. Following each of these observations, Grievant received a copy of the observation, and a discussion of the observation within the required five day period. Grievant was given prior notice of the

October observation. During these discussions, Assistant Principal Wilt gave Grievant verbal suggestions for improvement. Grievant was allowed to submit addendums to these observations.

9. On the October 21, 2005 observation, Assistant Principal Wilt noted there were no class rules posted, and this was an important requirement. Assistant Principal Wilt also noted students were talking after a worksheet was given out. Assistant Principal Wilt recommended Grievant move around the classroom during class time to ensure the students were actively engaged in class work. Ms. Pettit frequently made this same suggestion. (See footnote 3)

10. On the December 14, 2005 observation under "Classroom Climate," Assistant Principal Wilt noted students were talking while roll was taken, Grievant had trouble finding the correct page number for the lesson, and found Grievant needed to work more with students individually to create a positive learning environment. AssistantPrincipal Wilt also noted in the "Instructional Management System" section that three of her students were "not working at all," she needed to walk to the students' desks to help them focus on the task at hand. At the end of this observation, Assistant Principal Wilt noted her concerns. She pointed out to Grievant that her students were passing notes, and only appeared to be working while they were actually doing nothing.

11. In Grievant's response to this observation, she stated a student told her she was not a good teacher, and the principals did not support her and wanted to be rid of her. Grievant stated Assistant Principal Wilt was kind to students who were disrespectful to her, which indicated Assistant Principal Wilt must approve of these students' behavior. Basically, Grievant found almost all the comments made by Assistant Principal Wilt to be incorrect.

12. Assistant Principal Wilt met with Grievant and her union representative prior to the third observation and gave Grievant an approximate time for the third observation.

13. On the January 12, 2006 observation under "Classroom Climate," Assistant

Principal Wilt noted students were talking even after the assignment was given. Assistant Principal Wilt also noted under the "Instructional Management System" section that students were not transitioning well because they were talking. At the end of this observation, Assistant Principal Wilt also noted a student had been drinking soda during class, and another student was blowing chalk dust off an eraser, and this could be dangerous.

14. Grievant received her semester evaluation on January 18, 2006, and received a unsatisfactory in the area of "Classroom Climate." Assistant Principal Wilt noted students were very talkative while Grievant was attempting to provide classroominstruction, and this "disruptive behavior" does not provide a consistent learning environment." Grt. No. 4. Grievant was "shocked" to find the word disruptive on her evaluation.

15. LCBOE is attempting to find Grievant another mentor teacher, and Grievant has continued to work with a Central Office Administrator and Principal Parmer during the Spring semester. (See footnote 4)

16. The word disrupt means "to interrupt or impede the progress, movement, or procedure" (The American Heritage Dictionary 408 (2d college ed. 1991)), or "to interrupt the continuity or bring disorder to" (The Pocket Oxford Dictionary 149 (2th ed.1993)). The word disruptive is defined as "to interrupt the normal course or unity of." Merriam Webster Collegiate Dictionary 336 (10th ed. 1993.)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-

6. "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). The issues raised by Grievant will be addressed individually.

"Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving her case by a preponderance of the evidence. Baker v. Fayette County Bd. of Educ., Docket No. 94-10- 427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981); Thomas v. Greenbrier Bd. of Educ., Docket No. 13-87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." Turner v. Kanawha County Bd. of Educ., Docket No. 00-20-300 (Feb. 26, 2001)(quoting Beckley v. Lincoln County Bd. of Educ., Docket No. 99- 22-168 (Aug. 31, 1999)).

The standard for assessing an evaluation or improvement plan grievance is the arbitrary and capricious standard. "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.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-

322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Dunkel, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

A professional employee must be placed on an improvement plan when her performance is deemed unsatisfactory, so that she has the opportunity to correct her deficiencies. In this regard, W. Va. Code § 18A-2-12 states:

> (f) A professional whose performance is considered to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.
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> . . .
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> (h) Any professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If such evaluation shows that the professional is still not performing satisfactorily, the evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of section eight of this article.

W. Va. Code § 18A-2-12(3)(A) & (D) states the purpose of an evaluation is to "[s]erve as a basis for the improvement of the performance of the personnel in their assigned duties . . ." and "[s]erve as a basis for programs to increase the

professionalgrowth and development of professional standards." Evaluations should contain the standards for "satisfactory performance and the criteria for professional personnel to be used to determine whether the performance of each professional meets such standards . . .". W. Va. Code § 18A-2-12(4).

State Department of Education Policy 5310 provides that the immediate supervisor is responsible for the employee's evaluation, and he or she must share the evaluation with the employee. The employee has a right to attach a written addendum to the evaluation. 126 C.S.R. 142 §§ 10.4, 10.5, and 10.6. Jones v. Braxton County Bd. of Educ., Docket No. 97-04-311 (Apr. 28, 1998). Assistant Principal Wilts was Grievant's immediate supervisor, and she shared her observations and the evaluation with Grievant. Grievant did attach written addendums. (See footnote 5)

Grievant's evaluation rated her performance unsatisfactory in the area of "Classroom Climate," and Grievant has challenged this evaluation. An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in State Department of Education Policy 5310 and W. Va. Code §18A-2-12. See Brown, supra; Wilt v. Flanigan, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a grievant disagrees with her unfavorable evaluation does not indicate it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013(Sept. 30, 1988). See Rider v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-348 (Apr. 7, 2000).

Grievant did not establish her evaluation was incorrect or conducted in an arbitrary and capricious or unfair manner. The evidence demonstrated Grievant was observed three times as required and each of these observations were shared with Grievant, and she had an opportunity to respond. Grievant's overall performance in "Classroom Climate" was unsatisfactory, "Performance is not consistently acceptable in meeting performance criteria." 126 C.S.R. 142-8.1.4. Each observation noted Grievant's students

were talking and not paying attention, and Grievant herself frequently complained to Ms. Pettit and in her addendum that some of her students did not treat her with respect. These types of behavior are disruptive.

While Grievant may not agree with Assistant Principal Wilt's assessment, the undersigned Administrative Law Judge cannot overturn Grievant's evaluation unless Grievant proves the evaluation was "such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded." Kinder, supra. See Turner, supra; Beckley supra. Such showing has not been made in this case.

Grievant's assertion she was not put on notice that her students were "disruptive" as she defines the term is without merit. It is unknown where Grievant obtained her definition of disruptive, but it is clear from Finding of Fact 15 that the typical definition of does not equate disruptive with violent or riotous. Grievant's students talked when they should be working, disturbed other students, and one was actually blowing chalk dust off an eraser without correction from Grievant. As clearly stated by Ms. Pettit, Grievant's students were more than "just talkative." Suggestions by Ms. Pettit and Assistant PrincipalWilt, to walk the classroom to monitor students and other suggestions, were met by Grievant's assertion that she did do this, when they had observed she did not. Grievant's continued assertions that there are no problems in her classroom when there are, appear to be counter-productive to any positive change that could occur if she were to admit there are some area where she could use some help, after all she is new to the teaching profession. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education

received by the students. Thus, Grievant has the burden of proving her case by a preponderance of the evidence." Baker v. Fayette County Bd. of Educ., Docket No. 94-10- 427 (Jan. 24, 1995).

2. The Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate "such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded." Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981); Thomas v. Greenbrier Bd. of Educ., Docket No. 13-87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." Turner v. Kanawha County Bd. of Educ., Docket No. 00- 20-300 (Feb. 26, 2001); Beckley v. Lincoln County Bd. of Educ., Docket No. 99-22-168 (Aug. 31, 1999). 3. The arbitrary and capricious standard is used in assessing whether an evaluation should be set aside.

4. "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.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Dunkel, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary

and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts. 5. An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in Policy 5310 and W. Va. Code §18-2-12. See Brown, supra; Wilt v. Flanigan, 170 W. Va. 385, 294 S.E.2d 189 (1982).

6. The mere fact that a grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988). 7. Grievant's observations and subsequent evaluation were performed correctly, fairly, and competently in all respects. The procedural requirements set by Policy 5310 were met.

8. Grievant did not meet the standard set for satisfactory performance as stated by Policy 5310: "Performance is consistently adequate in meeting performance standards" in the area of "Classroom Climate." 126-142-8.1.3.

9. Grievant did not establish a violation of W. Va. Code § 18A-2-12, or State Board of Education Policy 5310.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Lewis 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.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: July 31, 2006

Footnote: 1

At Level II, Grievant asserted her Improvement Plan was invalid as she had not been allowed any input. The Statement of Grievance was not amended to include this complaint, and this change was not agreed to by the parties. A review of the record revealed Grievant did have input to her Improvement Plan. Grievant selected the teacher to be on the Improvement Plan Committee, and requested her union representative be placed on the Improvement Plan Committee, and this request was granted. Additionally, Grievant was shown the draft of the Improvement Plan twice before she signed it, and she did not make any comments, and she selected the county she would visit to observe another teacher. Test. Parmer.

Footnote: 2

Although Ms. Pettit's first observation of Grievant did not occur until October, she began helping Grievant in July 2005.

Footnote: 3

Although Grievant stated she moved around the classroom all the time, this assertion was not supported by the evidence.

Footnote: 4

Grievant continues to have problems.

Footnote: 5

Assistant Principal Wilt did not receive addendums to the January 2006 observation and the semester evaluation, and this document was not in LCBOE's files. Accordingly, it appears the first time LCBOE had notice of these responses was at the Level II hearing.