WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD (See footnote 1)

TERRYN RISK,

Grievant,

v.

Docket No. 07-15-056

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Terryn Risk, initiated this grievance against the Hancock County Board of Education (HCBE) on December 13, 2006, contending that the November 30, 2006 performance evaluation he received was unfair and inaccurate. As relief, he requests the Evaluation and attached Plan of Improvement be removed from his personnel file.

The parties agreed to submit this case on the record developed below. Grievant was represented by Owens Brown of West Virginia Education Associations, and Respondent HCBE was represented by William T. Fahey, Esq., Assistant Prosecuting Attorney. The matter became mature for decision on May 31, 2007, the deadline for filing of the parties proposed findings of fact and conclusions of law. This case was transferred to the undersigned on August 31, 2007, for administrative reasons.

Synopsis

Grievant asserts his November 30, 2006 Performance Evaluation is unfair and as written, creates an ambiguous and confusing grading scale that does not exist pursuant to standard practice (Hancock County School Bus Drivers Evaluation/Observation Report). Grievant seeks to have the

Evaluation and associated Improvement Plan removed from his personnel file.

Respondent maintains the Evaluation as written is valid, reasonable, and not in violation of any applicable policy, regulation, or statute.

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

Findings of Fact

1. Grievant, Terryn Risk, is employed by the Hancock County Board of Education (HCBE) Transportation Department as a bus operator.

2. A job performance evaluation is performed, at a minimum, two times annually for 'Continuing Contract Employees' performing Grievant's job duties. See Hancock County Board of Education Employee Evaluation Policy Statement.

3. The Hancock County School Bus Driver Evaluation/Observation Report Form contains 43 categories in which the bus operator is traditionally given a rating of “outstanding”, “effective”, “ineffective” or “not applicable”.

4. Timothy Reinard, Transportation Coordinator of Hancock County Schools, evaluated Grievant's job performance and presented him with a written evaluation dated November 30, 2006. 5. Coordinator Reinard utilized the Evaluation/Observation Report Form, but was of the opinion that greater explanation was needed beyond the customary pigeonholing of the traditional grading scale.

6. On Grievant's November 30, 2006 Performance Evaluation, Coordinator Reinard choose to mark the effective and ineffective rating simultaneously on three of the 43 categories with footnoted comment providing further explanation.

7. Historically, prior evaluators had marked only one specific rating.

8. The three categories on the Evaluation Form in which Coordinator Reinard determined Grievant to be effective/ineffective were:

I) Employee relations with Students;

ii) Employee relations with Administration;

and

iii) Develops rapport with and is sensitive to children.

9. On the Evaluation Form under the section for Evaluator's Comments, Coordinator Reinard

provided; “Terryn's present skills in dealing with Students and Administration have become ineffective. He and I realize the need to try something different. We will work on securing help with Behavior Management, Intervention skills, discipline and communications to improve the situation.”

10. During the course of Grievant's evaluation, Grievant was advised of concerns regarding his interaction with school administrator(s) and completion of student discipline reports.

11. In his additional notes, Coordinator Reinard reported, “Terryn disagrees with communications/dealing with administrators being a problem and I have noted this item. I have no findings on administration and believe this is a matter of perception.” 12. After reviewing tapes of Grievant interacting differently with students he knew, as opposed to treating all students similarly, Coordinator Reinard, determined Grievant needed to develop better rapport with the students.

13. HCBE Service Personnel Evaluation Policy provides for an improvement plan when an employee's performance is declared ineffective.

14. Subsequent to Grievant receiving three effective/ineffective ratings on his performance evaluation and follow-up dialogue with Coordinator Reinard, an Improvement Plan was established for Grievant, the sole requirement was attendance at two (2) sessions of a behavior management program.

15. Identified as “Additional notes”,Coordinator Reinard provided; “I have told Terryn that this evaluation and the associated Improvement Plan is not to be considered a negative but rather a tool to increase his skill set and give him exposure to techniques that may better his methods of dealing with Children and Administrators.”

17. The Behavior Management Program, among other activities, was designed to assist employees in learning how to deal appropriately with student behavior and discipline on the school bus.

18. Grievant attended, enjoyed and benefitted from the training (Grievant acknowledges the behavior management program was beneficial).

DISCUSSION

Generally, a grievant alleging that he has received an improper evaluation bears the burden of establishing, by a preponderance of the evidence, that there was "such an abuse of discretion on the evaluator's part that the primary purpose of the evaluation process was confounded." Dancy v. Raleigh County Bd. of Educ., Docket No. 95-41-168 (Sept. 7,1995). See Brown v. Wood County Bd.

of Educ., 184 W. Va. 205, 400 S.E.2d 213 (1990); Oni v. Bluefield State College, Docket No. 93-BOD-515 (Dec. 30, 1994); Jarrell v. Raleigh County Bd. of Educ., Docket No. 93-41-341 (Sept. 16, 1994). See also Higgins v. Randolph County Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981). This determination recognizes that the purpose of most evaluations and subsequent improvement plans are to correct rather than to discipline. Dancy, supra; Oni, supra. Thus, Grievant bears the burden of proof that his evaluation was unfair and inaccurate, and that good cause exists for the removal of the statements at issue. Myers v. Wetzel County Bd. of Educ., Docket No. 94-52-530 (May 19, 1995). See Rupich v. Ohio County Bd. of Educ., Docket No. 89- 35-719 (June 29, 1990).

It is readily apparent that Coordinator Reinard believed, in the categories indicated, that Grievant's conduct should be charted somewhere in the grey area between effective and ineffective (additional comment, through footnote documentation regarding this rating and related issues was provided). While this approach was not what Grievant had experienced in prior evaluations, it is not incorrect, nor a significant deviation from past practices. School officials must conduct the evaluations of school employees in an open and honest manner. Brown v. Wood County Bd. of Educ., 400 S.E.2d 213 (W.Va. 1990); Wilt v. Flanagan, 170 W. Va. 385, 294 S.E.2d 189 (1982). The overall purpose of the instant evaluation was to promote an improvement in performance. 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 and W. Va. Code §18A-2-12. See Brown, supra; Wilt v. Flanigan, supra, The mere fact that a grievant disagrees with his 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).

Reasonable discretion is afforded an evaluator as to what he or she determines to be noteworthy on an employee's evaluation. While Grievant does not appreciate Coordinator Reinard's decision to mark an effective/ineffective rating on three categories of his evaluation, the subsequent Improvement plan did provide assistance and benefit to Grievant. A primary purpose of an evaluation is to serve as a basis for the improvement of the performance of personnel in their assigned duties.

"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 his 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.

There is no evidence of record that establishes Coordinator Reinard acted with malice or any other inappropriate motive. Conversely, there is testimony in the recordproviding Coordinator Reinard's motivation was to improve Grievant's skill sets; to assist him with how to deal more effectively with behavior problems of students. Further, in accordance with the proper purpose of an evaluation and subsequent improvement plan, Grievant did in fact benefit from the Behavior Management sessions. Lastly, there is no reliable evidence of record that establishes Coordinator

Reinard's evaluation of Grievant was conducted in an arbitrary and capricious or unfair manner.

Grievant has failed to demonstrate that the November 30, 2006 evaluation was inaccurate and unreasonable; therefore, the Evaluation and subsequent Improvement Plan will stand.

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 his 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 of applicable policy, regulation and statute. 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 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). See also Rider v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-348 (Apr. 7, 2000).

7. The evaluation process utilized by Grievant's Supervisor, Transportation Coordinator Reinard, was not inconsistent with the Hancock County Board of Education Service Personnel Evaluation Policy.

8. Grievant did not establish his evaluation was incorrect or conducted in an arbitrary and capricious or unfair manner.

9. Grievant failed to demonstrate a factual or legal basis in support of his request that the November 30, 2006 Evaluation and associated Improvement Plan be removed from his personnel file.

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

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. Va. Code § 18-29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party tosuch 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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Landon R. Brown

Administrative Law Judge

Date: September 24, 2007

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18- 29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.