WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD[1]

CHRISTINE ZIRKLE,
Grievant,

v. **Docket No. 07-15-050**

HANCOCK COUNTY BOARD
OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Christine Zirkle, initiated this grievance against the Hancock County Board of Education (HCBE) on December 13, 2006, contending that the performance evaluation she received was unfair and in violation of applicable standards. As relief, she requests specific statements be removed from the evaluation.

The parties agreed to submit this case on the record developed below. Grievant was represented by Owens Brown of West Virginia Education Association, 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.

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[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 Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va.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, which continue to control the proceedings in this case.

Synopsis

Grievant asserts her November 29, 2006 performance evaluation, 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). Further, Grievant believes the evaluation is unfair because it unduly memorializes event(s) which could be misconstrued and have a negative impact upon her future employment. Grievant seeks to have specific statements removed, contending the evaluation is improper, arbitrary and capricious.

Respondent asserts the Transportation Coordinator (Grievant's Supervisor) made a good faith effort to evaluate and document Grievant's job performance. Further, 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 Finding of Fact.

Findings of Fact

1. Grievant, Christine Zirkle has been employed as a bus operator by the HCBE for 27 years.

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

3. Timothy Reinard, Transportation Coordinator of Hancock County Schools, evaluated Grievant's job performance and presented her with a written evaluation dated November 29, 2006.

4. The November 29, 2006 evaluation was the first one conducted on Grievant by Coordinator Reinard after his appointment to the position in August of 2006.[2]

5. The Hancock County School Bus Driver Evaluation/Observation Report Form contains 43 categories in which the bus operator can be given a rating of 'outstanding', 'effective', 'ineffective' or 'not applicable'.

6. Coordinator Reinard utilized the Evaluation/Observation Report Form, but was of the opinion that greater explanation was needed beyond the customary pigeon-holing of the traditional grading scale.

7. Coordinator Reinard choose to mark the effective and ineffective rating simultaneously on two of the 43 categories with a footnote to explain this rating.

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

9. On the evaluation form in the category "Employee relations with" . . . "Public" and "Students", where Coordinator Reinard utilized the approach of marking both effective and ineffective with a footnote in the "Evaluator's Comments:" section of the evaluation, Supervisor Reinard notes: "The complaints I get on Mrs. Zirkle deal with the 'perception'

[2] While this was the first time Supervisor Reinard evaluated Grievant, he testified that he had 22 years of management experience, received specific training in evaluating employees and had not only done appraisals and performance evaluations, but he also designed them.

of ‘disparity of treatment’ of Black Students. I do not believe Mrs. Zirkle would discriminate against anyone based on my conversations with her.”

10. The second notation of Coordinator Reinard in the “Evaluator’s Comments” section of the evaluation, provides; “I have talked to her once about moving the bus before all students are seated and believe the matter was taken care of.”

11. Prior to the November 2006 written performance evaluation, on at least two occasions, Coordinator Reinard met with Grievant and discussed complaints received pertaining to her.

12. Grievant agrees that the evaluation form accurately reflects discussions and conversations held between herself and Coordinator Reinard.

13. The complaint concerning the issue of disparity of treatment took place in September of 2006.

14. The issue concerning moving the bus while students were not seated took place in November of 2006.

15. Coordinator Reinard’s comments demonstrated he investigated complaints and found them to be without a basis in fact, but discussed with Grievant the possible perception of discrimination in the segregation of white and black students.

16. Coordinator Reinard discussed with Grievant the moving of the bus before all students are seated, and Grievant assured him that greater caution would be exercised in the future.

17. Coordinator Reinard is charged with evaluating and documenting Grievant's job performance, and marked the evaluation form as he did to provide greater information to Grievant about her performance.

DISCUSSION

Generally, a grievant alleging that she 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 is to correct rather than to discipline. Dancy, supra; Oni, supra. Thus, Grievant bears the burden of proof that her 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. Through footnote documentation these ratings were clarified. 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 instant evaluation, as a whole, was not negatively worded or presented in threatening tone, and the overall purpose 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 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).

Reasonable discretion is afforded an evaluator as to what he or she determines to be noteworthy on an employee's evaluation. It was within Coordinator Reinard's purview to document information which provides insight to his evaluation/rating of Grievant's performance of job duties and tasks. While Grievant does not appreciate Coordinator Reinard's inclusion of certain information on her evaluation, 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 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 the comments provided by Coordinator Reinard were provided with malice or any other inappropriate motive. In fact, there is testimony to the contrary. Nor, is there evidence tending to indicate the comments provided were inaccurate. Grievant acknowledges that the evaluation form accurately reflects discussions and conversations held between herself and Coordinator Reinard. 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 29, 2006 evaluation was inaccurate and unreasonable; therefore, that evaluation 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 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 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. Generally, reasonable discretion is afforded an evaluator as to what he or she determines to be noteworthy on an employee's evaluation.

8. 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.

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

10. Grievant failed to demonstrate a factual or legal basis in support of her request that the evaluation materials in question be altered and/or removed from her November 29, 2006 Evaluation.

11. 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 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

LANDON R. BROWN
ADMINISTRATIVE LAW JUDGE

Date: September 14, 2007