THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TAMMY DANIELS,

Grievant,

v. **DOCKET NO. 06-50-257**

WAYNE COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Tammy Daniels, filed this grievance on June 1, 2006, stating:

Violations of *WV Code* 18-29-2, sections “m” and “o” and 18A-2-12 with regard to grievant's evaluation and improvement plan. Grievant contends that discrimination has occurred involving her evaluation.

Her stated relief sought is to have the improvement plan and evaluation removed from her personnel file.

The parties agreed to submit this case on the record developed at Level II. Grievant was represented by Susan Hubbard of West Virginia Education Association, and Respondent was represented by David Lycan, Esq. The matter became mature for decision on November 13, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts her unsatisfactory evaluation was the result of discrimination and favoritism. Respondent asserts the evaluation and improvement plan were fair and not the product of discrimination or favoritism. Respondent avers Prinicipal Holland made a good faith effort to increase the professional growth and development of Grievant. Based on a preponderance of the evidence,

I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by Respondent during the 2005-2006 school year as a Kindergarten teacher at East Lynn Elementary.

2. Near the end of the 2005-2006 school year, Grievant received an unsatisfactory evaluation and improvement plan. The unsatisfactory evaluation and improvement plan were the result of two incidents that occurred during the year, both involving interaction with parents.

3. The first incident occurred at the beginning of the school year. Grievant was meeting with parents of her incoming Kindergarten class during orientation. In response to a question by a parent, Grievant informed the parents that there would be “no free play.”

4. Principal Rhonda Holland overheard Grievant's comment. When Principal Holland heard this comment, she interrupted and addressed the parents. She told them the Kindergarten schedule had not changed and students would have breaks at lunch. She then stated that Kindergarten was an activity-based program.

5. Principal Holland documented the incident on an observation form. She also held a conference with Grievant to discuss the situation.

6. The second incident occurred May 5, 2006. A parent went directly to Grievant's room. School had already begun.

7. The parent saw that her child was put up front facing the board, and the parent told Kristi Baker, Kindergarten Aide, that it was child abuse making a child face the wall.

8. The parent then asked to speak with Grievant in private. 9. Grievant left her students in the care of the Kindergarten Aide, Ms. Baker, and took the parent into the art room in another part of the school to speak with her. The parent was concerned about an incident that occurred on the playground earlier that week.

10. During the discussion, both Grievant and the parent spoke with raised voices. The discussion was heard by two fellow employees who were having breakfast in an adjoining room.

11. Ms. Baker had been on playground duty at the time the incident occurred.

12. Grievant told the parent she needed to talk to the Aides who were on playground duty at the time this occurred. Grievant had tried to talk to the Aides and they would not listen to her.

Grievant told this to the parent.

13. As Grievant and the parent left the art room, they ran into Linda McComas, a custodian, and there was a discussion of the playground incident.

14. Grievant took the parent back to the Kindergarten classroom to speak with Ms. Baker.

15. Ms. Baker stepped into the hallway at Grievant's request. Grievant remained in the hallway with Ms. Baker and the parent, leaving the children without an adult physically present in the classroom.

16. While Grievant and Ms. Baker were in the hall, the door to the Kindergarten classroom remained opened. Grievant was able to view her students.

17. The parent began to address Ms. Baker concerning the issue. The child was also called into the hallway by her mother and brought into the discussion.

18. This parent and Ms. Baker had a difference of opinion in the past.

19. Principal Holland was alerted to the situation by Ms. McComas, who came to Principal Holland's office and informed her there was an angry parent in the hall. 20. Principal Holland asked the parent to come to her office.

21. Grievant's unsatisfactory evaluation stated: “Ms. Daniels failed to provide an enviroment that supports learning when she called the aide out into the hallway to meet with an angry parent. In so doing she interrupted what should have been instructional time, left the students without close supervision and exposed them to overhearing/observing a possible confrontation between the aide and the parent.”

21. The improvement plan designed for Grievant began near the end of the 2005-2006 school year and concluded at the end of the first nine weeks grading period of the 2006-2007 school year.

Discussion

"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 professional growth 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). Principal Holland is Grievant's supervisor, and she shared her observations with Grievant who did not attach a written addendum.

Grievant's evaluation was rated as unsatisfactory in the areas of Classroom Climate, Communication, and Professional Work Habits. 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 grievantdisagrees 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 presented demonstrated Grievant lacked good judgement in bringing the parent back to the classroom to discuss her concerns with Ms. Baker. While Grievant and the parent testified at Level II that their voices were not raised and the parent was not angry, there were several witnesses who overheard the conversation. The custodian was concerned enough to get Principal Holland from the office.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't. of Health & Human Res.ources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health and Human Resources*, Docket No. 95- HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness'information. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

In this instance, Grievant had an interest in showing the parent was not upset. The parent, who clearly was upset, may not be able to accurately perceive how her actions and words were communicated to those observing the incident. Conversely, Principal Holland obtained five written statements from other employees who have no interest in the outcome of this proceeding. Those statements all concur that the parent and Grievant were speaking in raised voices. Clearly, Grievant showed poor judgement in this instance.

With respect to the comment made by Grievant at the beginning of the year, the undersigned does not believe Grievant necessarily showed an error in judgement. However, it is not the undersigned's role to substitute her judgement for that of Principal Holland.

Grievant claims she is a victim of discrimination and favoritism. "*W. Va. Code* § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001).

In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Favoritism is defined by *W. Va. Code* § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *Rice v. Putnam County Bd. of Educ.*, Docket No. 00-40-011 (May 4, 2000).

Grievant offered little evidence to indicate she was similarly-situated with another employee. She testified about a separate incident that occurred concerning an irate parent in the hallway with another teacher. However, Principal Holland explained that in that situation, the parent had voluntarily gone to the classroom, where in Grievant's situation, Grievant had taken the parent back to the classroom. Grievant believed the other teacher did not receive disciplinary action, but also conceded she was speculating.

Grievant failed to prove she was similarly situated to other employees, and therefore, she has not carried her burden of proving there was discrimination. With respect to her claim of favoritism, she has failed to prove another employee received preferential, exceptional or advantageous treatment.

Therefore, Grievant did not carry her burden of proof and this grievance must be denied.

The following conclusions of law support this discussion:

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). 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)).

2. 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 andcapricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

3. 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.

4. *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 professional growth 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).

5. 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).

6. 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).

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

8. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR- 371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health and Human Resources*, Docket No. 95- HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dep't. of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

9. "*W. Va. Code* § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001). 10. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet

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11. Favoritism is defined by *W. Va. Code* § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *Rice v. Putnam County Bd. of Educ.*, Docket No. 00-40-011 (May 4, 2000).

12. Grievant did not prove she was a victim of discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne County. Any such appeal must be filed within thirty 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.

DATE: January 30, 2007

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Wendy A. Campbell

Administrative Law Judge