**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JACQUELYN CARTER,**
**Grievant,**

**v.** **Docket No. 2008-0196-NicED**

**NICHOLAS COUNTY BOARD OF EDUCATION,**
**Respondent.**

## DECISION

Jacquelyn Carter ("Grievant") initiated this proceeding against the Nicholas County Board of Education ("BOE") on or about August 11, 2008, alleging that she was improperly dismissed from her position as a first grade teacher at Cherry River Elementary School. Her "Statement of Grievance" provides that

> On or about August 4, 2008, Grievant was terminated from her position with Nicholas County Schools for unsatisfactory job performance in failing to complete all aspects of her employee improvement plan. Said termination was arbitrary and capricious, discriminatory,[1] not for just cause, without factual basis, and/or a violation of procedures, policies, and/or law, including but not limited to Policy 5310 and W.Va. Code §18A-2-12.

As relief, "Grievant seeks to be reinstated into her position; to receive all applicable back pay and benefits; to be made whole; and any other relief that the hearing evaluator deems appropriate."

A Level Three evidentiary hearing was held before the undersigned Administrative

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[1] The Grievant has presented no evidence of discrimination. Nor was the issue addressed in the Grievant's proposed findings of fact and conclusions of law. Hence, this charge is considered abandoned and not addressed. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

Law Judge ("ALJ") on January 14, 2009, in Charleston, West Virginia. Grievant appeared by and through her representative, John Estep, AFT-West Virginia. The BOE appeared by and through its counsel, Richard S. Boothby, Esquire, with the law firm of Bowles Rice McDavid Graff & Love, LLP. This matter became mature for decision on February 12, 2009, the date proposed findings of fact and conclusions of law were due. Both parties have submitted proposed findings of fact and conclusions of law.

**Synopsis**

Grievant, a first grade school teacher, was properly evaluated and placed on a plan of improvement. She failed to achieve the requirements outlined in her improvement plan and her performance was deemed unsatisfactory. As a result thereof, the BOE, at the recommendation of the Superintendent, terminated her employment upon proper notice and hearing.

The Grievant's principal assisted in drafting her improvement plan, conducted progress monitoring observations of the Grievant's performance during her improvement period and drafted her final evaluation. He found that the Grievant's performance in the area of "classroom environment" was unsatisfactory.

At the Level Three hearing, the Grievant offered no evidence in support of her grievance and she does not challenge the finding that her performance was unsatisfactory. The BOE has met its burden of proving by a preponderance of the evidence that Grievant's job performance was unsatisfactory. Grievant was provided a full and fair opportunity to correct her performance and she failed to do so. There is no indication that any error in the improvement plan or evaluation occurred. Grievant's dismissal was not arbitrary, capricious or contrary to law. Accordingly, this grievance must be **DENIED**.

The following findings of fact are based upon a thorough review of the record produced in this matter:

**Findings of Fact**

1. The Grievant, Jacquelyn Carter, was employed by the Nicholas County Board of Education as a first grade teacher at Cherry River Elementary School for the 2007-2008 school year.

2. Cherry River Elementary, like all elementary schools in Nicholas County, uses the Reading First model for classroom reading instruction. *See* Level Three, Testimony of Superintendent Beverly Kingery; Level Three, Testimony of Principal Timothy Bennett. Reading First is a scientifically proven, research-based method of reading instruction that was developed as a result of the requirements of the No Child Left Behind Act. *Id*. Reading First focuses on five primary areas of reading skill: (1) phonemic awareness, (2) phonics, (3) reading fluency, (4) vocabulary and (5) text comprehension. Central to the Reading First model is the gathering of data on each child's abilities in each of the five areas, so that the teacher may address each child's particular reading skills weaknesses.[2] The use of learning "stations" around the classroom is a staple feature of the Reading First program, in which children move from station to station around the room working on lessons designed by the teacher to assist the children in acquiring specific reading skills.

3. The classroom teacher in a Reading First classroom must monitor students working at each station, while assisting other students who are working directly with her. The ability to create and maintain a classroom climate that is conducive to learning and

[2] For a more detailed explanation of one such data-gathering tool, DIBELS, see pages 39-40 of the Board of Education Hearing Transcript.

maximizes student on-task time is *essential* for success with the Reading First instructional model.

4. The Grievant was provided with Reading First teaching methods training at the beginning of the 2007-2008 school year. *See* Level Three, Testimony of Principal Timothy Bennett.

5. Sarah Weber, a reading mentor teacher, taught the 90-minute *daily* reading block in the Grievant's classroom to model proper reading instruction for the Grievant. She remained in the Grievant's classroom, modeling proper instruction using the Reading First method, longer than she did in the classrooms of other teachers for whom she provided similar modeling/training. The Grievant was supposed to be observing and learning from Ms. Weber's modeling of Reading First methods so that she could independently teach the reading block in her classroom like any other first grade teacher, without any additional supports. *See* Level Three, Testimony of Superintendent Beverly Kingery.

6. On October 30, 2007, pursuant to the requirements of West Virginia State Board of Education Policy 5310,[3] the Principal of Cherry River Elementary School, Timothy Bennett, conducted his first observation of the Grievant as she taught her first grade classroom. *See* Board of Education Hearing, Board Exhibit A-5. Principal Bennett, on the observation form, noted that Grievant's classroom management plan indicated that small groups would rotate in 15 minute intervals. Principal Bennett noted that Grievant's first group lasted for 25 minutes. Under the handwritten heading of "suggestions/recommendations," Principal Bennett noted that he had reviewed the "reading

[3] 126 C.S.R. 142 (commonly referred to as Policy 5310).

mentor teacher's log" and observed that Grievant was not utilizing all of the suggestions made therein for Grievant to improve instructional practices. Under this same heading, Principal Bennett noted that Grievant needed to better utilize the time during which the "peer teacher" was modeling reading instructional strategies because Grievant needed to prepare to take a lead role with "peer support reducing." Grievant met with Principal Bennett to review this observation and signed the same on November 5, 2007.

7. On November 8, 2007, Superintendent Kingery went to Cherry River Elementary to observe a number of classroom teachers, as is her practice, including Grievant. *See* Level Three, Testimony of Superintendent Beverly Kingery. The Superintendent drafted notes regarding her observations that day, which were not intended to be, nor were they used as, formal observations under Policy 5310. Board of Education Hearing, Board Exhibit A-8. Board of Education Hearing, Testimony of Superintendent Beverly Kingery, 24. The Superintendent noted that Grievant was not prepared to do the lesson that Ms. Weber had asked her to prepare. Board of Education Hearing, Board Exhibit A-8. The Superintendent also noted difficulty with student transitions from one activity to the next, students being off-task, wasted time due to lack of organization, poor use of instruction time by Grievant and that, in general, Grievant's students were not working at the level expected.

8. On November 24, 2007, Principal Bennett conducted his second observation of Grievant's classroom teaching. *See* Board of Education Hearing, Board Exhibit A-6. On the observation form, Principal Bennett addressed Grievant's need to create and maintain a classroom environment that supports learning by suggesting to the Grievant, in writing, that she "establish better classroom procedures for transition and stations . . . . " Board

of Education Hearing, Board Exhibit A-6. Principal Bennett also suggested that Grievant "maintain professional behavior when frustrated" and "avoid loud volume and harsh tones that are emotionally counterproductive to student learning." *Id.* Grievant met with Principal Bennett to review this observation and signed the same on December 12, 2007.

9. On November 30, 2007, Principal Bennett presented Grievant with a letter of reprimand as a result of Grievant's use of an inappropriately loud and harsh voice with her first grade students. *See* Board of Education Hearing, Board Exhibit A-7. In particular, Principal Bennett noted that Grievant was yelling at a student to "get your book and get to the next station," a reference to the aforementioned learning stations used in the Reading First model. *Id.*

10. During its meeting on December 31, 2007, the Nicholas County Board of Education granted permission to employ a teacher "for teacher support at Cherry River Elementary from December 10, 2007 through January 11, 2008 as needed." Board of Education Hearing, Board Exhibit B. Ms. Karen Thosteson was the support teacher engaged specifically to assist Grievant, as a result of the December 31, 2007, meeting. Level Three, Testimony of Superintendent Beverly Kingery. Employing another teacher for support is an exceptional and rare occurrence. Mrs. Thosteson assisted the Grievant with instructional techniques on several occasions during this time period.

11. On January 4, 2008, Principal Bennett conducted a third observation of Grievant's classroom, although Policy 5310 only required him to conduct two observations prior to drafting an evaluation. *See* Board of Education Hearing, Board Exhibit A-9. Principal Bennett suggested that Grievant's "transition from activity to activity needs to be fluent with purpose and reviewed regularly," again a reference to the Reading First model

of students moving from one station to another as they work to develop particular reading skills. Grievant met with Principal Bennett to review this observation and signed the same on January 16, 2008.

12. On January 24, 2008, Principal Bennett drafted his evaluation of Grievant's teacher performance. *See* Board of Education Hearing, Board Exhibit A-10. Principal Bennett noted three areas in which Grievant's performance was unsatisfactory. Thereafter, the Grievant was given an improvement period. Grievant and her representative assisted in the drafting of the improvement plan. On January 31, 2008, Principal Bennett provided Grievant with the opportunity to select an administrator and a professional educator to serve on her improvement team. *See* Board of Education Hearing, Board Exhibit A-11. Each person requested by the Grievant opted not to serve on her improvement team. Level Three, Testimony of Principal Timothy Bennett. Grievant's improvement team generally consisted of three individuals: Principal Bennett, Janet McNeel[4] and Teresa Morris.

13. On February 25, 2008, Grievant received a copy of her improvement plan. *See* Board of Education Hearing, Board Exhibit A-11. The three areas of deficiency listed in the plan were (1) "demonstrates accurate and current knowledge of phonetic skills such as consonant sounds, vowel sounds, and sounds made by blending consonants and/or vowels" (2) "create and maintain a classroom environment that supports learning"[5] and (3)

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[4] It is noted that Mrs. McNeel testified that she was not formally invited to be on the improvement team. However, she reported to Principal Bennett regularly and provided significant support to the Grievant.

[5] The improvement plan provided that "[s]pecifically, Ms. Carter will develop and use turn taking strategies to ensure all students are called to participate in learning activities.

"preview the content and lessons in all subjects taught." Under each area of deficiency, Grievant was provided with the "action to correct the deficiency" and "assistance and resources." *Id.* On March 4, 2008, Principal Bennett conducted a progress monitoring observation of Grievant's classroom. *See* Board of Education Hearing, Board Exhibit A-13. Grievant received a copy of Principal Bennett's written notes on March 5, 2008, and a post-observation conference was held on the same day.

14. Further progress monitoring observations were conducted on March 18, 2008,[6] April 21, 2008, and May 6, 2008. *See* Board of Education Hearing, Board Exhibits A-14, A-15, and A-16. Principal Bennett conducted a post-observation conference for each of these progress observations. Grievant received copies of written notes from Principal Bennett's observations on the day of the observations. After nearly every post-observation conference, Grievant was provided a written document with suggestions on how she could improve her performance.

15. Janet McNeel, a former teacher of thirty-eight years and member of Grievant's improvement committee, assisted the Grievant in her performance and found that the Grievant had problems with classroom management. The Grievant did not follow Mrs.

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In addition, Ms. Carter will develop and implement a classroom management plan, which includes room arrangement, teacher proximity, and effective transition from one activity to the next."

[6] On April 8, 2008, Grievant was observed by Rebecca Wood. Rebecca Wood was the Reading First Project Director for the West Virginia Department of Education and had been a first grade teacher for nearly forty-one years. She observed and discussed classroom management techniques with the Grievant for approximately forty-five minutes. She observed that Grievant's students were not on task. On April 9, 2009, Grievant was observed by Teresa Morris, improvement team member and principal of "Dixie." The entire school name of "Dixie" is unclear.

McNeel's modeling or instruction. The last day Mrs. McNeel worked with Grievant was May 4, 2008. Level Three, Testimony of Janet McNeel.

16. Starting on or about May 15, 2008, Grievant was provided with no more supports in her classroom than any other teacher at Cherry River Elementary. Level Three, Testimony of Superintendent Beverly Kingery; Testimony of Principal Timothy Bennett. After May 15, 2008, Principal Bennett noted on several occasions that Grievant's classroom climate had begun to deteriorate. *See* Board of Education Hearing, Board Exhibit A-17.

17. On June 2, 2008, Principal Bennett drafted the "Improvement Plan Final Evaluation." *Id.* The "Improvement Plan Final Evaluation" indicated that the Grievant's performance was satisfactory in two of the three areas listed on the initial improvement plan. However, Grievant was found to be unsatisfactory in the area of "create and maintain a classroom environment that supports learning." Specifically, the final evaluation provided that

> [u]nder the guidance of a mentor, you developed an attention getting process of counting down from five and announcing, 'My turn.' The mentor teacher helped you create and post a management chart to assist students with timely transitions. You had previously implemented an assertive discipline procedure for inappropriate behavior. My observations, find that given your level of support there is still unsatisfactory performance in creating and maintaining a classroom environment to support learning. I am convinced that your discipline procedures are not well established. During a conference on May 19, 2008, we discussed a situation in which you threw a student's paper in the trash because he started his spelling test before instructed. I advised you that a more appropriate consequence was needed because this incident was emotionally disturbing for the child. Your suggestion was to give the student his paper last to reduce the opportunity for inappropriate behavior. You were instructed to implement your classroom management procedures and turn the student's 'dot' if inappropriate behavior occurs. Prior to entering your room on May 27, 2008, I heard you repeatedly tell a student to 'sit down and be quiet'. You next changed your tone and said, 'I

> am going to take your paper and give you a zero!' This incident is further evidence of emotional distress that is counter productive to the learning environment. The reoccurring use of inappropriate consequences is continued evidence that your management is unsatisfactory. Additional evidence of unacceptable management practice occurred during my observation May 21, 2008. Students were paired for partner reading and you were moving around the room making notes on a grouping diagram. I noticed that several student pairs were off task. As you circulated around the room, many students had lost their place and were not reading out loud or tracking along. After you helped them find their place, they quickly lost it and were soon off task. One pair of students actually closed their books and started flipping them over. As you came near, they opened their books and you helped them find the story. When you walked away the students started talking about a picture in the story, instead of oral reading practice. The partners at the front of the room started making noises and laughing at each other, no redirection was given. The off task and inappropriate behaviors did not result in the administration of consequences established by your discipline procedures. The inconsistent application of disciplinary procedures combined with the use of inappropriate consequences does not create and maintain a classroom environment that supports learning.

Grievant signed the "Improvement Plan Final Evaluation" on June 2, 2008. Grievant was unable to maintain a classroom environment that was conductive to learning. She utilized improper disciplinary techniques with young, first grade students. These techniques were patently inappropriate. Grievant's performance was unsatisfactory.

18. Grievant was afforded a full and fair opportunity to correct her performance and did not do so.

19. On June 18, 2008, Superintendent Kingery mailed a certified letter to the Grievant stating the necessity that she come in to speak with the Superintendent to discuss the results of her "Improvement Plan Final Evaluation." Board of Education Hearing, Board Exhibit A-18. The letter informed the Grievant that a meeting was scheduled for July 1, 2008, at 10:00 a.m. in the Superintendent's office. It advised Grievant that if there was a scheduling conflict the Grievant should inform the Superintendent on or before June 26,

2008. Grievant signed for that certified letter the next day, June 19, 2008. *Id*. *See also* Level Three, Testimony of Superintendent Beverly Kingery. Grievant never personally contacted the Superintendent about the status of her employment or her job performance.[7] *See* Level Three, Testimony of Superintendent Beverly Kingery. *See* Board of Education Hearing, Board Exhibit A-18.

20. On July 10, 2008, Superintendent Kingery drafted and mailed a letter to the Grievant, notifying her that the Superintendent planned to recommend her termination to the Board of Education at a hearing to take place on August 4, 2008. *See* Board of Education Hearing, Board Exhibit A-19.

21. On August 4, 2008, an open hearing was held before the Board of Education on the recommendation that Grievant's employment be terminated. The Board of Education voted to terminate Grievant's employment after that hearing. On August 5, 2008, notice of her termination was sent to Grievant. *See* Board of Education Hearing, Board Exhibit B.

**Discussion**

As this grievance involves a disciplinary matter, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. 156 C.S.R. 1 § 3; *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the

[7] The record indicates that the Grievant's representative contacted Superintendent Kingery the day before the meeting and stated that the Grievant would be at the beach for a few weeks and was unable to meet on the scheduled day.

evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*. *See Adkins v. Smith*, 142 W. Va. 772, 98 S.E.2d 712 (1957).

The issue in this grievance is whether the Respondent has proven, by a preponderance of the evidence, that its dismissal of the Grievant was appropriate. This ALJ finds that the Respondent has met its burden and there is no indication that an error occurred in the improvement plan or evaluation process. WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." WEST VIRGINIA CODE § 18A-2-8 goes on to state, in part, that:

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, 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.

> (b) A charge of *unsatisfactory performance* shall not be made except as the result of an employee performance evaluation pursuant to section twelve [§ 18A-2-12] of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

(Emphasis added). Hence, where a board or superintendent charges unsatisfactory[8] performance, it must evaluate the classroom teacher's performance and provide the teacher the opportunity to conform his or her performance prior to dismissing the teacher. This opportunity for improvement must take place within the confines of a remediation or improvement plan.

WEST VIRGINIA CODE § 18A-2-12 concerns remediation or improvement plans. Paragraph (f) provides that:

> 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.

Paragraph (h) goes on to state that:

> Any professional 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 may be taken concerning the original performance evaluation. If the evaluation shows that the professional is still not performing satisfactorily, the evaluator either shall make additional recommendations for improvement or may recommend the dismissal of the professional in accordance with the provisions of section eight [§ 18A-2-8] of this article.

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[8] As used in this Decision, "unsatisfactory" means the teacher's "[p]erformance is not consistently acceptable in meeting performance criteria." 126 C.S.R. 142 § 8.1.4.

The West Virginia Department of Education ("WVDOE") has promulgated rules interpreting and applying these statutes. 126 C.S.R. 141 (commonly referred to as Policy 5300); 126 C.S.R. 142. Generally, WVDOE administrative rules provide that a teacher's direct supervisor is charged with observing and evaluating a teacher's performance while under an improvement plan and an "improvement team" monitors the teacher's performance within the confines of the remediation plan.[9] However, it is the teacher's supervisor who retains sole authority for evaluation. *Id*. at § 12.3. "Any decision concerning . . . termination of employment should be based upon such evaluation, and not upon factors extraneous thereto." 126 C.S.R. 141 § 2.6.

Though the Grievant presented no evidence at the Level Three hearing, she presents two general challenges to her dismissal. Grievant does not challenge the merits of Principal Bennet's final evaluation. First, the Grievant argues that the application of the improvement plan was flawed. Secondly, Grievant argues that upon completion of the plan, the evaluator, Principal Bennett, did not recommend dismissal and, therefore, dismissal is inappropriate. In recognition of the particular facts presented, Grievant's arguments are unpersuasive.

In this matter, the Grievant's performance was not satisfactory and she was placed upon a remediation or improvement plan on February 18, 2008. The improvement plan listed three areas of deficiency. The first area of deficiency concerned the Grievant's

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[9] 126 C.S.R. 142 § 12.4. states that "[t]he improvement team shall monitor the improvement plan and may: a) conduct observations and conferences, b) provide training to assist the teacher in meeting the performance criteria outlined in the plan, and c) identify additional resources."

demonstration of "accurate and current knowledge of phonic skills . . . . " The second area of deficiency addressed the Grievant's creation and maintenance of "a classroom environment that supports learning." The final area of deficiency concerned the implementation and explanation of lesson plans. It was the obligation and duty of the Principal of Cherry River Elementary School, Timothy Bennett, to evaluate the Grievant.

Grievant and her Representative were involved in the development of the improvement plan. *See* Board of Education Hearing, Exhibit A-11. Level Three, Testimony of Principal Timothy Bennett. Nevertheless, Grievant challenges the application of the improvement plan. In a rather terse and nebulous manner, she avers that "(a) [t]imelines of [the] plan were not followed; (b) [p]rogress monitoring and conferences were not held in accordance with the conditions of the plan; and (c) [t]he Grievant was not afforded the benefit of an improvement team as per the provision of Policy 5310." *Grievant's Proposed Findings of Fact and Conclusions of Law*, proposed conclusion of law 13. The Grievant has presented no direct argument or application of the law or facts for these three arguments of error. Moreover, she presented no evidence at the Level Three hearing. This ALJ is left on his own to decipher these general averments.

Generally, this Grievance Board will not intrude on the evaluations 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 policies have 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 County 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). An evaluation would not be properly conducted if it were not "open and honest" and based on the requirements in the previously stated policies and statutes. *See Brown v. Wood County Bd. of Educ.*, 154 W.Va. 205, 400 S.E.2d 213 (1990); *Wilt v. Flanigan*, 170 W.Va. 385, 294 S.E.2d 189 (1982).

There is some indication that the time lines of the plans were not stringently followed. 126 C.S.R. 142 § 11 discusses improvement plans. However, it sets no stringent guidelines or time requirements except for providing that the improvement period cannot last for more than one semester. *Id*. at 11.2.3. The only evidence on this issue suggests that the Grievant called in sick on several days and there were a few snow days during the improvement period. The improvement period was extended to account for these missed days. It cannot be said that the decision extending the plan was unreasonable. In fact, it likely gave the Grievant more time to improve her performance. Relatedly, insofar as the Grievant argues that progress conferences and monitoring were not held in accordance with the plan, this ALJ finds no error. The evidence provides that the Grievant was evaluated numerous times. In every instance she was given the evaluator's notes. Post-observation conferences were held after the observations to discuss the Grievant's performance. She was provided the opportunity to improve her performance.

Next, the Grievant avers that she was not afforded an improvement team. The evidence suggests that Grievant listed several individuals she desired to serve on her improvement committee. *See generally* 146 C.S.R. 122 § 12 (discussing improvement teams). However, all of the individuals selected by the Grievant chose not to participate.

The Grievant did not disagree with anyone actually placed on the team. *See* Level Three, Testimony of Principal Timothy Bennett. Grievant was afforded an improvement team. There is no evidence that the BOE had any role in the Grievant's selections refusing to participate, and there is no legal precedent permitting the BOE to force an individual to serve on an improvement committee. Nor is there any indication that the refusal of these individuals to participate had any effect upon the outcome. There was no flaw in the evaluation process and the Grievant received an open and honest evaluation, improvement period and opportunity to improve.

The Grievant's final argument is that Principal Bennett did not recommend dismissal and, therefore, dismissal is inappropriate. WEST VIRGINIA CODE § 18A-2-12(h) provides that upon completion of the remediation or improvement plan,

> [i]f the evaluation shows that the professional is still not performing satisfactorily, the evaluator either shall make additional recommendations for improvement or may recommend the dismissal of the professional . . . .

On June 2, 2008, an "Improvement Plan Final Evaluation" was executed. The evaluation, conducted by Principal Bennett indicated that the Grievant had made satisfactory improvements in the areas of (1) "accurate and current knowledge of phonic skills" and (2) the implementation and explanations of lesson plans. However, it indicated that the Grievant's performance was not satisfactory in the area of creating and maintaining "a classroom environment that supports learning." The evidence suggests that Principal Bennett did not recommend dismissal to Superintendent Kingery.

After the final evaluation, Grievant was asked by Superintendent Kingery to attend a meeting to discuss her performance; however, the Grievant did not personally contact

or meet with the Superintendent. Read *in pari materia*,[10] WEST VIRGINIA CODE §§ 18A-2-7, 18A-2-8 and 18A-2-12, grants the Superintendent, with the approval of the county board, the authority to dismiss a teacher where the teacher has been placed on an improvement plan and fails to conform performance to a satisfactory level. Where a grievant has been (1) given a full and fair opportunity to improve (2) fails to improve and (3) is not currently on an improvement plan, a superintendent may dismiss a teacher. *See Balis v. Braxton County Bd. of Educ.*, Docket No. 98-04-094 (Jan. 22, 1999); *Kern v. Wayne Co. Bd. of Educ.*, Docket No. 95-50-260 (March 27, 1996). *See generally Ingram v. Monongalia Co. Bd. of Educ.*, Docket No. 03-30-220 (Nov. 21, 2003).[11] The Grievant's argument is unpersuasive.

The authority of a county board of education to dismiss a teacher under WEST VIRGINIA CODE § 18A-2-8 "must be based upon the just causes listed therein and must be

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[10] This statutory rule of construction provides that "statutes which relate to the same persons or things" should be considered together to "assure recognition and implementation of the legislative intent." *Longwell v. Bd. of Educ.*, 213 W. Va. 486, 491-492, 583 S.E.2d 109, 114-115 (2003). In this instance, the statutes at issue relate to the dismissal of a teacher where her performance is unsatisfactory.

[11] A contrary finding would be inconsistent with the statutory scheme. Pursuant to the plain language of the statute, an evaluator makes mere recommendations and is not statutorily vested with the authority to dismiss a teacher. If Grievant's interpretation of this statute were adopted, the evaluator would be vested with sole authority and neither a superintendent nor a board of education would be able to dismiss a teacher where the teacher's performance is unsatisfactory and the evaluator continually recommends improvements. "A statute should be read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syl. Pt. 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908).

exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, __ S.E.2d __, 2009 W. Va. LEXIS 2 (2009).

"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 are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 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)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*.

Respondent BOE has proven, by a preponderance of the evidence, that the

Grievant's performance was unsatisfactory. The Grievant's deficiencies were called to her attention and the BOE afforded the Grievant the opportunity to correct her performance. Even after implementation of the improvement plan and significant guidance, Grievant was unable to conform her performance to acceptable standards. "A teacher works in a sensitive area in a schoolroom. . . . That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." *James v. West Virginia Board of Regents*, 322 F. Supp. 217, 230 (S.D. W. Va. 1971)(citation omitted). In this particular circumstance, there is no indication that the BOE's decision was "unreasonable, without consideration, and in disregard of facts and circumstances of the case" or contrary to law. *Eads, supra*.

The following conclusions of law are appropriate:

**Conclusions of Law**

1. In a disciplinary matter the burden is upon the Board to prove the charges against the employee by a preponderance of the evidence. *Perkins v. Greenbrier County Bd. of Educ.*, Docket No. 94-13-019 (Aug. 12, 1994).

2. When grounds for a school employee's dismissal include charges relating to incompetency or conduct which is deemed correctable, the Board must also establish that it complied with the provisions of West Virginia Board of Education Policy 5300 requiring it to inform the employee of her deficiencies and afford her a reasonable period of time to improve. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W.Va. 732, 274 S.E.2d 435 (1987).

3. The authority of a county board of education to dismiss an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, __ S.E.2d __, 2009 W. Va. LEXIS 2 (2009).

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).

5. There is no indication a violation of WEST VIRGINIA CODE § 18A-2-8 or WEST VIRGINIA CODE § 18A-2-12 occurred.

6. Grievant's improvement plan and evaluation was performed correctly, fairly, competently and in accordance with the relevant law and administrative rules.

7. Grievant did not meet the standard for "satisfactory performance" as provided in Board of Education Policy 5310 and the Respondent's decision to dismiss the Grievant was not arbitrary, capricious, unreasonable or contrary to law.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**Date: April 8, 2009**

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**Mark Barney**
**Administrative Law Judge**