THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PEGGY WEBSTER,
Grievant,

v. **DOCKET NO. 2009-1380-WooED**

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This Grievance was filed March 27, 2009 by Peggy Webster, a classroom teacher employed by the Wood County Board of Education. She states that an "Evaluation dated 3/10/09 and related observations are in violation of State BOE Policy 5310 and WV Code § 18A-2-12." As relief, she seeks "the evaluation be removed from her personnel file."

A level three hearing was held in the Grievance Board's Charleston office on December 2, 2009. Grievant was represented by Cassandra Bradshaw of the West Virginia Education Association, and Respondent was represented by Dean Furner, Esq. The matter became mature for decision on January 4, 2010, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant received an unsatisfactory performance evaluation based in part on student and parent complaints. Grievant acknowledged some problems with her classroom climate and her relationship with her students and their parents, but Respondent did not consider all necessary factors. The grievance was granted as the evaluation was not "open and honest" as required by policy, and its conclusions were arbitrary and capricious.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant is employed by Respondent as a classroom teacher at Parkersburg High School, but at all times relevant to this grievance, she taught at Williamstown High School (WHS), also in Wood County.
2. During the 2008-2009 school year, her second year at the school, Grievant was observed teaching in her classroom by Assistant Principal Steve Buffington on three occasions: October 23, 2008, January 9, 2009, and February 12, 2009.
3. Each of the "Teacher Observation/Data Collection" forms contains an area for comments under seven criteria: Programs of Study, Classroom Climate, Instructional Management Systems, Student Progress, Communications, Professional Work Habits, and Technology Standards.
4. The first observation of Grievant was during a Creative Writing class on October 23, 2008. It was a dark and stormy class. With one exception, Mr. Buffington observed nothing negative during this class, and noted that the lesson was appropriate; students were on-task, cooperative, and enthusiastic; and the lesson was well planned. The exception was that Grievant had failed to keep Edline, the school system's online grade and assignment reporting system, updated.
5. Mr. Buffington's comments for this observation, however, were not confined to his class observation, as he noted that there had been several complaints from students and parents about punctuality of grade reporting, confusion over class goals and expectations, and Grievant using her cell phone in class. Essentially the

same negative comment regarding unspecified complaints was repeated in four of the evaluation areas, and it was noted the complaints mainly had to do with another class.

6. Grievant's English 11 class was observed by Mr. Buffington on January 9, 2009. The only negative he noted in his direct observation was "Observed were some students not wanting to put forth a maximum effort to get the necessary information but to take shortcuts." Again, the same comments about "several complaints" being made to the office, cell phone use in class, and a note that several students walked out of the room one day in protest. Edline was still not updated, but it was noted there were difficulties with the connection.

7. The final observation of Grievant by Mr. Buffington was again of an English 11 class, on February 12, 2009. There were no negative comments on the observation form, and it was noted that several of the deficiencies discussed in earlier observations had been corrected or addressed.

8. On March 10, 2009, Grievant received a performance evaluation based on these observations.

9. Of the seven areas of evaluation listed on the evaluation form, Mr. Buffington rated Grievant as "Unsatisfactory" on five: Programs of Study, Classroom Climate, Instructional Management System, Communication, and Professional Work Habits. She met standards in the areas of Student Progress and Technology Standards.

10. As used on the Teacher Evaluation form, "Meets Standards" means "Performance is consistently adequate in meeting performance criteria." "Unsatisfactory" is

defined as “Performance is not consistently acceptable in meeting performance standards.”

11. Under “Programs of Study,” Mr. Buffington noted that Grievant “demonstrates current knowledge of her subject” and that “lessons have been varied.” He also remarks that “There is some question by administration and students as to the relationship of some of the assignments to the suggested course materials for some of her classes.” There are five criteria listed under this evaluation section.

12. The unsatisfactory rating for the “Classroom Climate” section of the evaluation was supported with the following comment: “Students are expected to excel at a high level. Often students question assignments and do not desire to explore new options of learning. Numerous complaints from students about Mrs. Webster’s favoring of some students, both in discipline and grading.” This section contains nine evaluation criteria.

13. The “Instruction Management System” section, which should be based on eighteen separate criteria, noted that “There has [sic] been several student and parental complaints about assignments made and the confusion surrounding these assignments, their significance, purpose and relationship to their class objectives.”

14. “Communication” was rated unsatisfactorily due to “Lack of effective communication with students and parents has generated a general disruption of the learning process in the room.” This negative comment addresses two of the five evaluation criteria.

15. The “Professional Work Habits” section notes “Mrs. Webster’s biggest obstacle to her being an effective teacher in the classroom is that she has not gained the

respect of her students, parents or the community in general. While she strives to bring new ideas to the classroom she cannot convince the students of its relevance to the subject matter." This comment only addresses two of the seven performance criteria.

16. Under a section entitled, "Identified Deficiencies and Recommendations," Mr. Buffington stated, "has to change teacher, student and parental relationships. She does not have the respect of the students or community. Needs to work on ways to become a more effective teacher so she may bring more creative learning to the students. Discipline in the classroom needs to be even and consistent. Adversarial mood of the classroom needs to be eased."

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."[1] As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence.[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 policies" has been confounded. [3]

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[1]*Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10- 427 (Jan. 24, 1995).

[2]Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

[3] *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,

Therefore, for an evaluation to be valid, it must have been made in a manner that was not arbitrary and capricious. "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."[4] Further, 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 (126 C.S.R. 142 (2006)) and W. VA. CODE §18A-2-12.[5]

WEST VIRGINIA CODE §§ 18A-2-12(3)(A) & (D) states the purpose of an evaluation is to "[serve as a basis for the improvement of the performance of the personnel in their assigned duties . . ." and "[serve 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). However, before the purpose and goals of an evaluation can come into play, the evaluation must have been conducted according to the Policy 5310 requirements.

Grievant contends that her evaluation was not made directly, but was instead made based chiefly on student and parent complaints. She argues that the reliance on these

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1999)); *Ratliff v. Lewis County Bd. of Educ.*, Docket No. 06-21-158 (July 31, 2006).

[4] *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

[5] *See Brown, supra*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982).

outside complaints denied her an "open and honest" evaluation, violating the requirement in section 7.2 of Policy 5310 that "All monitoring and/or observations of the employee shall be conducted openly." Respondent counters that observations are not limited to things one may see with the naked eye.

A common theme does run through all of Grievant's negative evaluative remarks – that she has poor rapport with her students and their parents, and fails to convince her students of the relevance of her lessons. It appears that the teacher was evaluated negatively because her students and their parents made complaints about her rigor and teaching style.

As asserted by respondent, nothing in Policy 5310 limits an evaluation of a teacher only to matters observed in the classroom. The evaluation must be based on the criteria listed in the Policy, and for some teachers classroom observations must be used, but the observations are not the sole basis for gathering the information needed to assess whether the criteria have been met. That said, the classroom observation forms, quite clearly, are to be based on what is observed during that time, and in this case, Mr. Buffington inappropriately included data by reference to student and parent complaints and opinions, none of which are verified by the observations.

That is not to say, however, that these issues should not be covered in the formal Evaluation document. The same comments about complaints do appear there, and the evidence adduced at the hearing confirmed that Grievant knew what these complaints were about, that they had been made, and she had discussed them with administration. She admitted that an entire class of students walked out of class one day in protest over a test. She stated she did use her phone in her classroom, both during class and during

lunch time. However, the classroom observations entirely failed to support the complaints. Overall, the observations were positive, with the exception of references to parent and student complaints.

Grievant also contended that her unsatisfactory evaluations were, essentially, pre-ordained. She believes the complaints were due to her high expectations conflicting with the low performance and motivation of her students. Her students told her at the beginning of the year that they would get rid of her, because she was not from Williamstown. Significant is the fact that Grievant's own observations of her classes are not positive, and she characterized it as a bad environment.

Grievant knew about the unpopularity of her teaching style with her students, sought help from the administration, and got none. In July 2008, she emailed Pat Peters, Principal of WHS, with her concerns about the student attitudes, problems posting grades to Edline, how to handle late assignments from students, and various other items. She received no response. Many of these same concerns turned out to be the problems she was having as identified in her evaluation. However, the reliance on simply the number of complaints rather than the verified substance of the Complaints defeats the purpose of the evaluation process. Nowhere in the evaluation documents are the complaints addressed in a constructive manner, nor are they even validated as anything more than plain grousing. Respondent could take advice from the grievance code itself, which recognizes that "The number of grievances filed against an employer by an employee is not, per se, an indication of the employer's or the employee's job performance." W. VA. CODE § 6C-2-3(r).

It was arbitrary and capricious to include the parent and student complaints in the performance evaluation, without some evidence that the complaints were justified by

Grievant's performance and conduct. While they were and should be valid concerns of the administration, Mr. Buffington's reliance on the mere existence of the complaints ignored many factors that should have been considered. It is true Grievant knew about the complaints, acknowledged many, and discussed them with her supervisors, nothing in the evidence suggests that she did anything unprofessional.

Given the purpose of the evaluation process, "To promote professional growth and development and assure quality performance in West Virginia schools," and "To provide evaluation data as one basis for sound personnel decisions,"[6] all of the concerns addressed were reasonable and necessary, but the overall evaluation did not rise to the level of an unsatisfactory rating. As stated above, Grievant must prove her claim that she was unfairly evaluated by a preponderance of the evidence, and while there is a strictly defined set of performance criteria, meeting those criteria is, in large part, subjective to the evaluator. "A preponderance of the evidence is evidence of greater weight or more convincing than the 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the Grievant has not met this burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). In this case, there is no question that Grievant had significant problems teaching at Williamstown High School, whether of her own making or not. Nevertheless, the evaluation criteria comprise 55 separate standards in seven categories, and Mr. Buffington's "stacking" of the

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[6]126 CSR 142 § 2.1.1.

same few complaints as negative aspects of each category was unjustified. Grievant has met her burden of proving that her evaluation was arbitrary and capricious, and was not conducted openly and honestly.

The following conclusions of law support this discussion:

Conclusions of Law

1. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary, therefore Grievant has the burden of proving her grievance by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10- 427 (Jan. 24, 1995); Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).
2. The standard of review for an evaluation is to determine whether it was arbitrary and capricious. *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988); *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)); *Ratliff v. Lewis County Bd. of Educ.*, Docket No. 06-21-158 (July 31, 2006).
3. "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).

4. An evaluation must also be conducted in an "open and honest" manner, and based on the requirements in State Department of Education Policy 5310 (126 C.S.R. 142 (2006)) and W. VA. CODE §18A-2-12. *See Brown, supra*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982).

5. Grievant's evaluation was not conducted in an open and honest manner, and was arbitrary and capricious.

6. For the foregoing reasons, this grievance is hereby **GRANTED.**

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 W. VA. 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).

March 10, 2010

M. Paul Marteney
Administrative Law Judge