THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WALLACE WOODRUM,
Grievant,

v. **Docket No. 2011-0529-BooED**

BOONE COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant, Wallace Woodrum, filed a grievance against Respondent on October 11, 2010. The statement of grievance reads, "Respondent terminated Grievant in violation of W.Va. Code 18A-2-8, 18A-2-12a, Boone County School Staff Evaluation Policy AEAAA, & Respondent's evaluation document." For relief, Grievant seeks "reinstatement to his position, compensation for lost wages with interest & all benefits, pecuniary and nonpecuniary. Grievant also seeks removal from his personnel file of all documents related to and referencing Grievant's termination."

Grievant elected to proceed directly to a level three hearing as authorized by W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on February 1 and September 29, 2011, before the undersigned at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by John Everett Roush, Esq., West Virginia School Service Personnel Association. Respondent was represented by Timothy R. Conaway, Esq., Conaway & Conaway Attorneys at Law. This matter became mature for decision upon final

receipt of the parties' proposed findings of fact and conclusions of law on November 1, 2011.

Synopsis

Respondent asserts that Grievant failed to successfully perform his cleaning duties as a Custodian III and that he abused work hours by socializing during his eight hour work shift. Respondent asserts that Grievant was terminated in compliance with W.Va. Code § 18A-2-12a and Respondent's Policy AEAAA. Respondent argues that Grievant's evaluations were "open and honest" and that he was given repeated opportunities to improve his work deficiencies. Grievant asserts that he did not spend excessive time chatting at work and stayed on task. Grievant argues that the evaluation forms are flawed and that he should have been given the opportunity to work with an improvement team.

There is no indication on the evaluation form as to how an employee earns points. There is no guidance on the evaluation form on what to do about counting areas that are marked not applicable (N/A) to the custodian being evaluated. Respondent did not consistently use the same method for counting areas marked N/A.

Respondent failed to establish the charges against Grievant by a preponderance of the evidence. Respondent violated W.VA. CODE § 18A-2-8, W.VA. CODE § 18A-2-12, and Policy AEAAA by failing to implement procedures for the staff evaluation policy, failing to conduct evaluations in an open and honest manner, and relying on arbitrary and capricious evaluations to support a decision of dismissal.

Findings of Fact

1. Grievant was employed by Respondent as a Custodian III at Sherman High

School at all times relevant to this grievance.

2. In 1985, Respondent enacted Policy AEAAA[1] which deals with the evaluations of staff. The Policy was enacted pursuant to State Board of Education Policy 5300.[2] Respondent's Policy AEAAA was repealed in August 2010. Policy AEAAA was in effect when Grievant received his evaluations relevant to the present grievance.

3. West Virginia State Board of Education Policy 5300 (Policy 5300) provided that:

> Every employee is entitled to know how well he/she is performing his/her job and should be offered the opportunity of an open and honest evaluation of his/her performance on a regular basis... Every employee is entitled to the opportunity of improving his/her job performance prior to terminating or transferring of his/her services and can only do so with the assistance of regular evaluation.[3]

4. Policy 5300 specified that each county board of education has the responsibility to (a) develop and implement a staff evaluation policy and (b) implement written administrative procedures related to the components of the county's staff evaluation policy.[4]

5. Policy AEAAA states that an employee may request the services of an improvement team or the employee may be referred to an improvement team when the immediate supervisor determines he/she can no longer provide improvement for the

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[1]Grievant's Exhibit No. 3, Boone County School Staff Evaluation Policy AEAAA.

[2]The legislature codified the specific improvement plan language from Policy 5300 within W. VA. CODE § 18A-2-12a. The policy is now referred to as Policy 5310, 126 C.S.R. 142.

[3]*See Id.*

[4]*See Id.*

employee. The Policy defines improvement team as two persons selected to provide assistance and counsel to the employee in meeting job performance requirements.[5]

6. Respondent's evaluation form used to evaluate custodians pursuant to the requirements of Policy AEAAA contained twenty-three separate areas that constituted different areas of performance responsibility. The employee could receive a rating of "does not meet the performance standard" or "meets performance standard" for each of the twenty-three areas. Not all of the areas of performance contained in the form were applicable to Grievant. In instances where the performance responsibility was not applicable, the rating was marked "N/A".

7. The evaluation form contains the following language:

> Interpretation of Performance Rating Points
> 46 points = Maximum Points Possible
> 31 points or below = Does Not Meet Performance Standards
> 32 points = Meets Performance Standards
>
> A score of 31 points or below requires an Improvement Plan to be developed cooperatively by the Immediate Supervisor and the Employee to address all identified deficiencies.[6]

8. There is no indication on the evaluation form as to how an employee earns points. There is no guidance on the evaluation form on what to do about counting areas that are N/A to the custodian being evaluated.

9. Respondent has operated under the assumption that each of the twenty-three performance areas are worth 2 points. Each time an employee receives a rating of

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[5] *See* Grievant's Exhibit No. 3, Boone County School Staff Evaluation Policy AEAAA.

[6] *See* Grievant's Exhibit No. 1 and Respondent's Exhibits No. 7 & 14, Grievant's evaluation forms.

does not meet the performance standard, Respondent subtracts 2 points from the 46 total possible points.

10. Grievant was employed as a substitute custodian prior to being employed as a regular custodian. Grievant was employed as a regular custodian in or about the 2000-2001 school year. Grievant was transferred to Sherman High School in or about the 2005-2006 school year.

11. Allan Halley became the principal at Sherman High School in the 2006-2007 school year.

12. Grievant's evaluations rated him as Meets Performance Standards every year from May 2000 to May 2007.

13. By letter[7] dated September 8, 2006, Principal Halley advised Grievant that his performance had been deficient in several respects as to cleaning. The letter stated that Principal Halley had observed Grievant on the school security cameras talking to individuals, such as persons filling the vending machines, during his work shift. Principal Halley advised Grievant that talking with people should be done on his 30 minute lunch break. Specifically the letter stated that Principal Halley had observed Grievant talking on:

August 29, 2006	15 minutes
August 30, 2006	17 minutes
August 31, 2006	8 minutes
September 5, 2006	14 minutes
September 7, 2006	27 minutes

The letter warned that "if this problem is not resolved and the quality of your work area does not improve, further action may be taken."

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[7]Respondent's Exhibit No. 1, letter dated September 8, 2006.

14. Principal Halley conducted Grievant's evaluation dated May 25, 2007. Grievant was rated as does not meet the performance standards in three of the twenty-three performance areas. Six performance areas were marked N/A. In the comments area, Principal Halley noted in part that "the upstairs and stair wells have not been swept or mopped on a daily basis. It has been observed that classroom windows are not cleaned on a regular basis.... you have been observed wasting time to talk with the snack vendors." Grievant received a final evaluation rating of Meets Performance Standards.[8]

15. With Respondent subtracting 2 points for each performance area on the evaluation that does not meet the performance standard, Grievant's rating of does not meet the performance standard in three of the twenty-three areas resulted in a total score of 40 total points. A total score of 40 points qualifies as a rating of Meets Performance Standards, which Grievant received on his evaluation on May 25, 2007.

16. In a letter to Grievant dated February 22, 2008, Principal Halley stated that Grievant had been neglecting some of his cleaning duties. The letter also stated that Principal Halley had reviewed security cameras and viewed Grievant one evening turning out the building lights at 9:39 p.m. when his shift was not over until 10:00 p.m. The letter informed Grievant that he was to be placed on an Improvement Plan.[9]

17. The period of Grievant's Improvement Plan[10] was from February 25, 2008 to June 8, 2008.

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[8] *See* Respondent's Exhibit No. 2, Grievant's May 25, 2007 evaluation form.

[9] *See* Respondent's Exhibit No. 3, letter dated February 22, 2008.

[10] *See* Respondent's Exhibit No. 4, Grievant's Improvement Plan dated February 25, 2008.

18. In April 2008, Grievant suffered a work-related injury which resulted in his absence from work. Grievant's final evaluation for the year could not be conducted due to his absence. Grievant's Improvement Plan was extended for the first semester of the 2008-2009 school year.[11]

19. By letter dated December 3, 2008, Principal Halley pointed out certain areas of the school assigned to Grievant that were not adequately cleaned. In the letter, Principal Halley reminded Grievant that he was on an Improvement Plan and stated that Grievant's performance had not improved.[12]

20. Principal Halley conducted Grievant's evaluation dated May 29, 2009.[13] Grievant was rated as does not meet the performance standards in six of the twenty-three performance areas. Six performance areas were marked N/A. In the comments area, Principal Halley noted in part that "the upstairs and stair wells have not been swept or mopped on a daily basis. It has been observed that classroom windows are not cleaned on a regular basis..." Grievant received a final evaluation rating of Does Not Meet Performance Standards.[14]

21. Grievant's 6 performance areas marked as does not meet the performance standard resulted in 12 points being subtracted from the possible 46 points. A total rating

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[11]*See* Respondent's Exhibit No. 5, Principal Halley's letter dated May 14, 2008, documenting the extension of Grievant's Improvement Plan.

[12]*See* Respondent's Exhibit No. 6, letter dated December 3, 2009, from Principal Halley to Grievant.

[13]Respondent's Exhibit No. 7, Grievant's evaluation form dated May 29, 2009.

[14]*See* Respondent's Exhibit No. 2, Grievant's May 25, 2007, evaluation form.

score of 34 points would have placed Grievant within the final rating of Meets Performance Standards. However, in conducting the May 29, 2009, evaluation, Principal Halley subtracted two points for each performance area that was marked as N/A to Grievant. Because there were 6 performance areas marked as N/A, Grievant's total score was reduced by an additional 12 points. Grievant's total score of 22 resulted in a rating of Does Not Meet Performance Standards.

22. Principal Halley did not consistently calculate the treatment of performance areas marked as N/A on Grievant's evaluation forms. Grievant's May 25, 2007 evaluation and May 29, 2009 evaluation were calculated differently. In regards to Grievant's May 25, 2007 evaluation, if Principal Halley would have determined performance areas that are N/A to the employee count as two points that the employee does NOT receive, then the 6 N/A performance areas would have brought Grievant's total points down from a 40 to a score of 28. A score of 28 points qualifies as a rating of Does Not Meet Performance Standards. Principal Halley did not subtract two points for each performance area that was marked N/A to Grievant on the May 25, 2007 evaluation.

23. On October 9, 2009, Grievant met with Principal Halley to develop an Improvement Plan for Grievant. The Improvement Plan stated that Grievant was deficient in performance areas: cleaning each room daily, working with building supervisor as directed, cleaning windows as needed, and observing established work hours. The Improvement Plan was to begin October 9, 2009 and end on January 15, 2010.[15]

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[15] *See* Respondent's Exhibit No. 8, Grievant's Improvement Plan dated October 9, 2009.

24. On November 5, 2009, Principal Halley prepared and delivered a letter[16] to Grievant advising him that on November 4, 2009, Principal Halley had reviewed the building and found that several items on Grievant's duty list were not completed. The letter further stated, "I would like to remind you that you are on an improvement plan, and with this type of neglect of your duties, it may be difficult to show improvement."

25. By letter dated November 20, 2009,[17] Principal Halley notified Grievant that several items on Grievant's duty list had not been completed. Principal Halley had reviewed the building before the students arrived on Friday, November 20, 2009. Areas of concern in the letter included unswept rooms, dust on the tops of lockers, 6 trash cans were not emptied, unswept restroom in the long hall, unswept boys shower room, and dirty upstairs janitor's closet. The letter further stated, "I would like to remind you that you are on an improvement plan, and with this type of neglect of your duties, it may be difficult to show improvement."

26. On January 20, 2010, Principal Halley made a building and grounds review of the school and noted his observations of the school's condition on an observation sheet.[18] Principal Halley observed several problems with cleanliness in areas that had been assigned to Grievant.

27. By letter to Grievant dated January 20, 2010, Principal Halley detailed the

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[16]Respondent's Exhibit No. 9, letter dated November 5, 2009.

[17]Respondent's Exhibit No. 10, letter dated November 20, 2009, from Principal Halley.

[18]*See* Respondent's Exhibit No. 11, Building and Grounds Review/Observation sheet dated January 20, 2010.

problems in cleanliness that he had found in his review of the building. The letter called to Grievant's attention several areas of concern: pop spills on floor in long hall, dirty stairwell, dirty upstairs janitor's closet, unbuffed rooms on Grievant's schedule, and absent daily check sheets.[19] The letter further stated, "As we near the end of your improvement plan period, I would like to remind you that you are on an improvement plan, and with this type of neglect of your duties, it may be difficult to show improvement."

28. By letter to Grievant dated January 26, 2010, Principal Halley detailed a review of the building that he had completed before the students arrived on Monday, January 25, 2010. Principal Halley stated that several rooms and a handicapped restroom had not been swept or mopped. The letter further stated, "I would like to remind you that you are on an improvement plan, and with this type of neglect of your duties, it may be difficult to show improvement."[20]

29. Grievant's work shift is usually from 2:00 p.m. to 10:00 p.m. During the months of October, November, December and January, high school and junior high school indoor athletic events are held regularly at Sherman High School. The events are not always finished by 10:00 p.m.[21]

30. Principal Halley conducted Grievant's evaluation dated April 15, 2010. Grievant was marked as does not meet the performance standards in eight of the twenty-

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[19] *See* Respondent's Exhibit No. 12, letter dated January 20, 2010, from Principal Halley.

[20] *See* Respondent's Exhibit No. 13, letter dated January 26, 2010, from Principal Halley.

[21] *See* level one hearing transcript page 98, testimony of Principal Halley.

three performance areas. Six performance areas were marked N/A. In the comments area, Principal Halley noted in part that Grievant "was on an improvement plan earlier this year. There was no improvement.... The result of this evaluation reflects seven areas that do not meet performance standards..." The evaluation form also stated "30 points earned out of 32 required." Grievant received a final evaluation rating of Does Not Meet Performance Standards.[22]

31. Although eight areas were marked as does not meet performance standards on Grievant's evaluation dated April 15, 2010, his final evaluation rating was calculated subtracting two points for seven performance areas instead of eight. Contrary to the calculation method used for Grievant's May 29, 2009 evaluation form, Principal Halley did not subtract two points for each performance area that was marked N/A on the evaluation on April 15, 2010.

32. At no point did Grievant request the services of an improvement team. Respondent could have referred Grievant to an improvement team, but was not required to do so.

33. By letter[23] dated April 22, 2010, Principal Halley requested that Superintendent John G. Hudson not renew Grievant's contract for the 2010-2011 school year.

34. By letter dated July 26, 2010, Superintendent Hudson notified Grievant that he would recommend that Respondent terminate Grievant's contract of employment. On

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[22] *See* Respondent's Exhibit No. 14, Grievant's April 15, 2010, evaluation form.

[23] Respondent's Exhibit 15, letter dated April 22, 2010, from Principal Halley to Superintendent Hudson.

or about August 24, 2010, Grievant requested a hearing on this proposed recommendation. On September 2, 2010, a hearing was conducted concerning the recommendation to terminate Grievant's contract of employment. At a regular board meeting on October 5, 2010, Respondent voted to terminate Grievant.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. VA. CODE § 18-29-6; *Hoover v. Lewis County Bd. of Educ.,* Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.,* Docket No. 89-41-232 (Dec. 14, 1989). "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sep. 30, 1999). W. VA. CODE § 18A-2-8 identifies the types of action that can result in disciplinary action and provides, in pertinent part:

> 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. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

Former West Virginia Board of Education Policy No. 5300(6)(a), which is now Policy 5310, 126 C.S.R. 142, provided that an employee's dismissal must be based upon an

evaluation of job performance, and that the employee be given an opportunity to improve his performance. This policy was only applicable if the actions of the employee are correctable. An offense or conduct which affects professional competency is correctable, if the conduct or offense does not "directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 274 S.E.2d 435, (1980).

"Failure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." Syl. Pt. 3*, Trimboli v. Bd. of Educ.*, 163 W. Va. 1, 254 S.E.2d 561 (1979); *See also Holland v. Bd. of Educ. of Raleigh County*, 174 W. Va. 393, 327 S.E.2d 155 (1985); *Wren v. McDowell County Bd. of Educ.*, 174 W. Va. 484, 327 S.E.2d 464 (1985).

Respondent asserts that Grievant failed to successfully perform his cleaning duties as a Custodian III and that he abused work hours by socializing during his eight hour work shift. Respondent asserts that Grievant was terminated in compliance with W.VA. CODE § 18A-2-12a and Respondent's Policy AEAAA. Respondent argues that Grievant's evaluations were "open and honest" and that Grievant was given repeated opportunities to improve his work deficiencies. Grievant asserts that he did not spend excessive time chatting at work and stayed on task. Grievant asserts that he helped other employees with their work before and during his shift. Grievant argues that he performed his cleaning duties in an acceptable manner and that he tried to follow the improvement suggestions

of Principal Halley. Grievant argues that the evaluation forms are flawed and that he should have been given the opportunity to work with an improvement team.

Respondent created a staff evaluation policy, Policy AEAAA, in 1985. The Policy was repealed in August 2010. The Policy was in effect during the times of Grievant's evaluations in the present matter, therefore, it should have been followed during Grievant's evaluations. Policy AEAAA states that an employee may request the services of an improvement team or the employee may be referred to an improvement team when the immediate supervisor determines he/she can no longer provide improvement for the employee. Grievant did not request an improvement team. Respondent could have referred Grievant to an improvement team but was not required to do so. Respondent did not violate Policy AEAAA by not referring Grievant to an improvement team.

Respondent conducted yearly evaluations of Grievant, except for the end of the 2007-2008 school year due to Grievant's absence for a work-related injury. There is no indication on the evaluation form as to how an employee earns points. There is no guidance on the evaluation form on what to do about counting areas that are marked N/A to the custodian being evaluated. When asked how N/As count in calculating the score on the evaluation form, Principal Halley testified, "That's a good question. I'm not real sure how they should be counted."[24]

Respondent terminated Grievant for unsatisfactory performance. Respondent based its decision on Grievant's evaluations and its belief that Grievant did not improve

[24] *See* level one hearing transcript page 85, testimony of Principal Halley.

while on improvement plans.[25] Testimony was provided at the level three hearing from cooks, a secretary, and several teachers that Grievant's work performance was satisfactory. Several of the employees testified to seeing Grievant picking up trash or helping the cooks move heavy milk crates before his 2:00 p.m. shift even began. Respondent asserted that the witnesses did not work the same shift as Grievant nor did they supervise him or were responsible for evaluating his work. Such conflicting testimony illustrates the importance of a fair and accurate evaluation system to determine and depict Grievant's work performance.

W.VA. CODE § 18A-2-8 does allow dismissal based upon unsatisfactory performance. However, dismissal for unsatisfactory performance shall only be made as the result of an employee performance evaluation pursuant to W.VA. CODE § 18A-2-12. 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).

W.VA. CODE § 18A-2-12a provides, in pertinent part, the following:

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve [18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the

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[25] *See* Respondent's Exhibit No. 15, letter dated April 22, 2010, from Principal Halley to Superintendent John G. Hudson requesting Grievant's contract not be renewed for the 2010-2011 school year.

> promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion...

Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based upon the just causes listed therein 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.*, 223 W.Va. 431, 675 S.E.2d 907 (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 have been found to be closely related to ones 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)).

An evaluation is properly conducted if it is performed in an "open and honest" manner, and is fair, and professional. W. VA. CODE § 18A-2-12. *See Brown*, *supra*; *Wilt*

v. Flanigan, 170 W. Va. 385, 294 S.E.2d 189 (1982). Respondent's lack of policy guidance or instruction as to how the rating of an employee's performance should be calculated on the evaluation form, does not make for an open and honest evaluation. Such a lack of policy guidance or instruction renders the inconsistent calculations performed by Respondent arbitrary and capricious. Further, Principal Halley's non-uniform action of subtracting two points for each N/A performance area on one of Grievant's evaluations and not subtracting two points for each N/A performance area on two of Grievant's other evaluations, was arbitrary and capricious.

Respondent has failed to meet its burden of proof to establish the charges. Respondent violated W.VA. CODE § 18A-2-8, W.VA. CODE § 18A-2-12, and Policy AEAAA by failing to implement procedures for the staff evaluation policy, failing to conduct evaluations in an open and honest manner, and relying on arbitrary and capricious evaluations to support a decision of dismissal.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. VA. CODE § 18-29-6; *Hoover v. Lewis County Bd. of Educ.,* Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.,* Docket No. 89-41-232 (Dec. 14, 1989).

2. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W.

Va. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sep. 30, 1999).

3. Former West Virginia Board of Education Policy No. 5300(6)(a), which is now Policy 5310, 126 C.S.R. 142, provided that an employee's dismissal must be based upon an evaluation of job performance, and that the employee be given an opportunity to improve his performance. This policy was only applicable if the actions of the employee are correctable. An offense or conduct which affects professional competency is correctable, if the conduct or offense does not "directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 274 S.E.2d 435, (1980).

4. "Failure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." Syl. Pt. 3*, Trimboli v. Bd. of Educ.*, 163 W. Va. 1, 254 S.E.2d 561 (1979); *See also Holland v. Bd. of Educ. of Raleigh County*, 174 W. Va. 393, 327 S.E.2d 155 (1985); *Wren v. McDowell County Bd. of Educ.*, 174 W. Va. 484, 327 S.E.2d 464 (1985).

5. Respondent did not violate Policy AEAAA by not referring Grievant to an improvement team.

6. W.VA. CODE § 18A-2-8 does allow dismissal based upon unsatisfactory performance. However, dismissal for unsatisfactory performance shall only be made as

the result of an employee performance evaluation pursuant to W.VA. CODE § 18A-2-12.

7. 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).

8. Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based upon the just causes listed therein 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.*, 223 W.Va. 431, 675 S.E.2d 907(2009).

9. "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. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

10. An evaluation is properly conducted if it is performed in an "open and honest"

manner, and is fair, and professional. W. VA. CODE § 18A-2-12. *See Brown*, *supra*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982).

11. Respondent's lack of policy guidance or instruction for the evaluation renders the inconsistent calculations performed by Respondent as arbitrary and capricious. Further, Principal Halley's non-uniform action of subtracting two points for each N/A performance area on one of Grievant's evaluations and not subtracting two points for each N/A performance area on two of Grievant's other evaluations, was arbitrary and capricious.

12. Respondent failed to meet its burden of proof. Respondent violated W.VA. CODE § 18A-2-8, W.VA. CODE § 18A-2-12, and Policy AEAAA by failing to implement procedures for the staff evaluation policy, failing to conduct evaluations in an open and honest manner, and relying on arbitrary and capricious evaluations to support a decision of dismissal.

Accordingly, this grievance is **GRANTED**. Respondent is ORDERED to reinstate Grievant as a Custodian III, and to pay him all back pay and benefits to which he is entitled from the date his employment was terminated to the date his employment is reinstated. Documentation of the termination shall be removed from Grievant's personnel file. Grievant shall be placed on an Improvement Plan for three months beginning from the date his employment is reinstated.

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).

DATE: December 12, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge