WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RANDY WHETSTONE,
Grievant,

v. **Docket No. 2009-1817-CONS**

SOUTH BRANCH CAREER AND TECHNICAL CENTER
and WEST VIRGINIA DEPARTMENT OF EDUCATION,
Respondents.

DECISION

Grievant, Randy Whetstone, filed several grievances against the South Branch Career and Technical Center and the West Virginia Department of Education,[1] Respondents. Grievant challenges numerous conditions of his employment and his ultimate dismissal as the Director of the South Branch Career and Technical Center (SBCTC), a multi-county vocational school located in Petersburg, West Virginia. Grievant seeks to be re-instated, back pay, attorney fees and related expenses among other relief.[2]

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[1] The West Virginia Department of Education is the administrative arm of the West Virginia State Board of Education, the governmental agency/personnel, which performs the day-to-day operational activities of the State Board of Education. Throughout the course of relevant events, the nomenclature of the two entities was not used with the specificity most prudent. Regrettably, the distinction of the two entities' labels was not readily acknowledged, or used consistently by all parties involved with the instant grievance(s). It is recognized that the proper Respondent is the employing agency, the West Virginia State Board of Education.

[2] "It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). WEST VIRGINIA CODE § 6C-2-6 is entitled, 'Allocation of expenses and attorney's fees.' It specifically states: '(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.'" *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). *Also see Long v. Kanawha County Bd. of Educ.,* Docket No. 00-20-308(Mar. 29, 2001).

Respondents maintain that their actions were lawful and Grievant's termination was just and proper.

Coupled with the ultimate issue of Grievant's termination by the West Virginia Board of Education (WVBE), Docket No. 2009-1683-SBCTC, Grievant filed an additional 12 separate grievances challenging a myriad of occurrences from September 14, 2008 through November 15, 2008. By mutual agreement, between then legal counsels of the parties, the majority of those grievances had been held in abeyance.[3] It is envisioned and was acknowledged by current legal representatives that these grievances are encompassed within the parameters of the instant grievance proceedings, previously Docket No. 2009-1683-SBCTC, now Docket No. 2009-1817-CONS. See level three hearing transcript and subsequent Consolidation Order of April 4, 2012. The following is an encapsulated summary of the allegations contained in each of Grievant's associated grievances, by date signed:

Sept. 14, 2008	Improvement plan improper because [Grievant] was denied input in improvement plan, not placed on improvement plan in 2007-2008 school year, plan addresses deficiencies for two contractual years. (Docket No: 2009-0356-SBCTC)
Sept. 22, 2008	Comments to improvement plan review of September 19 made by Dr. Kolsun were falsified and misrepresented (female student of Mary Rose treated differently, dispute over purchase order procedures, never told monitor she was showing ignorance). (Docket No: 2009-0385-SBCTC)

[3] Grievant does not and should not prevail on the cited grievances pursuant to current counsel's "Motion for Default Judgment." At the request of Grievant's former legal counsel, and concurrence of West Virginia Department of Education General Counsel, Heather L. Deskins, certain preliminary procedural grievance actions did not occur. Respondents did not hold a level one conference or hearing with Grievant within 15 days of the filing of the above highlighted grievances pursuant to mutual agreement of the parties. Respondents are not in violation of W. VA. CODE § 6C-2-3.

Oct. 2, 2008	Disputes Dr. Kolsun's statement that Grievant didn't share information with county superintendents re: alternative school and complains that Kolsun asked him to sign a document that he had not read. (Docket No: 2009-0559-SBCTC)
Oct. 3, 2008	Has experienced a pattern of violation of school laws [6-2-2(g)(iii), harassment, Policy 5902, §18-2E-6 - falsifying reporting re: evaluation]. (Docket No: 2009-0566-SBCTC)
Oct. 17, 2008	Has been victim of discrimination, favoritism, harassment, interference with job performance, attempt to falsify school records. (Docket No: 2009-0579-SBCTC)
Nov. 11, 2008	Disputes that issues noted in BRIM report have not been addressed. (Docket No: 2009- 0678-SBCTC) [Grievant] disputes that he made an adult student of Ms. Harman's feel intimidated. (Docket No: 2009-0676-SBCTC) Disputes the characterization of the LSIC meeting by Dr. Kolsun. (Docket No: 2009-0677-SBCTC) Disputes Dr. Kolsun's statement that [Grievant] is pleased with uproar at the school. (Docket No: 2009-1815-SBCTC)
Nov. 13, 2008	Disputes Dr. Kolsun's statement that teacher's panic when she is out of the building. (Docket No: 2009-0679-SBCTC)
Nov. 13, 2008	Disputes Dr. Kolsun's termination recommendation. (Docket No: 2009-1816-SBCTC)
Nov. 15, 2008	[Grievant] disputes the assertion that he did not follow through on getting student IEPs to teachers in a timely manner this year. (Docket No: 2009-0680-SBCTC)

(Joint Exhibit 1). (Grievance Board Docket numbers added).

Respondents bear the burden of proof in proving Grievant's termination was lawful. The burden of proof is on Grievant to establish the allegations in the ancillary grievances filed. Level three hearing proceedings were held before the undersigned Administrative Law Judge on April 20, 2010, January 25-28, 2011, and April 26-28, 2011, in the Grievance Board's Charleston office.[4] Grievant was present at all hearings and was represented by

[4] There were also a number of pre- and post-hearing telephone conferences regarding various motions and procedural rulings.

legal counsel Richard Lindroth, Attorney at Law. Respondents were represented by WV Department of Education General Counsel, Heather L. Deskins. Cynthia Kolsun appeared as the representative of West Virginia Department of Education (WVDE). Also present throughout the proceedings was legal counsel Kelly C. Morgan, of Bailey & Wyant, PLLC.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about August 3, 2011. Extensive fact/law proposals were submitted on behalf of Grievant and Respondents.

Synopsis

Grievant was the director of a multi-county career and technical center. Grievant challenges the termination of his employment, alleging the action was wrongful and malicious. The grounds for discharge were identified as insubordination, willful neglect of duty, incompetence, and failure to comply with the plan of improvement/action. Respondents bear the burden of proof in proving Grievant's termination was appropriate. The burden of proof is on Grievant to establish the necessary elements of several ancillary grievances filed challenging numerous conditions of his employment. The terminology used and personnel discussed throughout the eight days of hearing at Level 3 was extensive.

Respondents established facts and deeds of relevance in the circumstances of this matter. Respondents established, by a preponderance of the evidence, that their actions were permissible and lawful. Respondents established that Grievant was insubordinate, willfully neglected to perform tasks assigned to him, and failed to demonstrate improvement in operating the South Branch Career and Technical Center. Grievant did not establish Respondents' disciplinary action was unlawful, arbitrary and/or capricious.

Respondents demonstrated good cause for termination of Grievant's employment. Accordingly, this grievance is DENIED.

Background and Procedural History

South Branch Career and Technical Center (SBCTC) is a multi-county vocational school operating pursuant to W. VA. CODE §18-2B-2. SBCTC serves students from Grant, Pendleton, and Hardy counties. The State Board of Education has the power to establish multi-county vocational schools, and the operational authority for the schools is delegated to an administrative council composed of equal representation from each of the participating county boards of education, the superintendent of schools from each participating county, and the state director of vocational education or his representative.

SBCTC had been operating under the oversight of an administrative council since its creation. In 2007, the Administrative Council of SBCTC requested an educational audit of South Branch Career and Technical Center. The Office of Education Performance Audits (OEPA) found several areas of SBCTC warranted improvement. Subsequent to the audit findings, the West Virginia Board of Education (WVBE) voted to rescind the operating authority of SBCTC's Administrative Council.

Grievant had worked as a teacher at SBCTC beginning in 2001. The Administrative Council hired Grievant as the Director of SBCTC on July 12, 2007. The staff of SBCTC consisted of 14 instructors, the Director and two secretaries. On the first day of school for the 2007-2008 school year, 13 instructors filed a grievance against the Director. Grievant's contract of employment specified that he was a 240-day employee and that he could be terminated at any time for just cause pursuant to W. VA. CODE §18A-2-8. Grievant's

contract remained in place after the Administrative Council's authority was revoked. As explained in the vote of the WVBE, a monitor was appointed to exercise much of the authority that had previously been exercised by the Administrative Council, including oversight of the Director. In essence, the State Board of Education became Grievant's employer when it reclaimed its authority over SBCTC.

After rescinding the authority of the Administrative Council on April 9, 2008, the State Board of Education, via the West Virginia Department of Education, sent a series of Monitors to the school.[5] The State Superintendent first appointed Ron Grimes, who was employed at the West Virginia Department of Education as the Executive Director/General Manager of Cedar Lakes Conference Center, as Interim Monitor at SBCTC. On May 12, 2008, J. Ted Mattern was appointed to the position of SBCTC monitor. Mr. Mattern served as SBCTC monitor beginning May 12, 2008 until August 27, 2008. Ron Grimes remained at the school during this time to assist Ted Mattern.

Grievant's responsibilities and the responsibilities of the Monitor(s) are debated by the parties. A memo dated July 8, 2008 was developed by Monitor Mattern with input from Ron Grimes. This memo contained specific directives to Grievant. It is contended that Grievant failed to complete a significant number of tasks believed to be essential to operating SBCTC. In August 2008, after this first set of written directives, Dr. Stan Hopkins from the State Department of Education and the monitors got together and created an

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[5] In order to manage SBCTC, the State Board of Education delegated certain oversight responsibilities to monitors who were appointed by the State Superintendent; e.g., to identify the cause of the problems at South Branch, to make sure deadlines were met, to make sure the school's finances were in order, to obtain control over the environment, and to generally make sure the school was functional.

improvement plan for Grievant. Dr. Stan Hopkins, the Assistant State Superintendent in charge of career and technical education, met with Grievant on August 27, 2008, to discuss a formal plan of improvement/action for Grievant (and SBCTC). Similar to the memo of July 8, 2008, the plan of improvement/action contained specific directives including deadlines by which identified objectives were to be completed. The improvement plan included certain deficiencies identified in the OEPA audit, coupled with what was specified as shortcomings of Grievant. It is debated, Grievant's continued employment at SBCTC was contingent upon meeting the terms of the plan of improvement/action. The improvement/action plan consisted of at least 25 areas and included specific tasks and deadlines for completion of identified goals.

Ron Ray, former Superintendent for Jackson County Schools, assumed the role of SBCTC monitor on August 27, 2008. He remained as monitor for approximately two weeks. Upon the resignation of Mr. Ray, Dr. Cynthia Kolsun, former County Superintendent of Schools in Tucker and Hampshire counties, became the fourth individual appointed as monitor at SBCTC. Commencing as the monitor in early September 2008, Dr. Kolsun oversaw the plan of improvement/action that had been developed to guide and direct Grievant's performance as the Director of SBCTC. It was Monitor Kolsun's responsibility to administer the improvement plan and evaluate Grievant. Grievant maintains Kolsun created a hostile work environment, engaged in unprofessional conduct, falsified information and did not restore any authority to him. Grievant filed several grievances (listed *infra*, p2, Joint Exhibit 1). After approximately two and a half months, Monitor Kolsun made the recommendation that Grievant's employment as Director of SBCTC be terminated for insubordination, willful neglect of duty, incompetence, and failure

to comply with the plan of improvement/action.

Grievant was suspended with pay pending a pre-deprivation conference with then State Superintendent, Steven Paine, on or about November 14, 2008. (Joint Exhibit 3.) The pre-deprivation conference occurred on November 19, 2008. On November 25, 2008, State Superintendent Paine sent notification to Grievant that his termination would be recommended to the WVBE. After notice was sent to Grievant affording him the opportunity to appear before the WVBE (Joint Exhibit 5 and 6), the WVBE terminated Grievant's employment as Director of SBCTC on May 29, 2009. (Joint Exhibit 7.) Grievant did not appear at the WVBE meeting and oppose his termination.

Preliminary Ruling

The existence of taped conversations between Grievant and various individuals was the subject of speculation and discussion at SBCTC, prior to and during the course of the instant grievance. The propriety or legality of the recordings was not the issue before this Administrative Law Judge. A phone conference was convened to determine the disposition of prospective audio tapes as potential exhibits at the level three hearing of this grievance. After the parties argued their respective positions, it was specifically ruled, by the undersigned ALJ, that if Grievant wanted to introduce, what was believed to be extensive sets of audio tapes, Grievant's counsel was to have them transcribed by a certified stenographer. Adequate time was available prior to the reconvening of level three proceedings. Further, Respondents' counsel volunteered to bear the cost and burden of having Grievant's prospective tapes transcribed. Grievant chose not to avail himself of this offer. At the January 25, 2011 level three hearing, Grievant's counsel attempted to utilize,

portions of an audio tape with written transcriptions being offered as evidence to cross examine or impeach a witness. Upon timely objection by Respondents' counsel, it was determined that the transcriptions offered as exhibits were not transcribed by a certified stenographer. Further, upon listening to segments of the tape and comparing what was heard with what was allegedly a certified transcription, it was readily evident that the written document was not an accurate rendition of the oral utterances. The transcript was inaccurate at numerous cites in a relatively short span of sampling. Respondents' objection to the introduction of the faulty documents was sustained. The written transcripts offered were not reliable. Respondents, months prior, had noted this issue and had sought to eliminate this conflict. Grievant's counsel was aware of Respondent's objection and the Undersigned's ruling, specifying that the audio tapes, if they did exist and were going to be utilized, were to be transcribed by a certified individual prior to the then yet to be determined hearing dates. Notwithstanding Respondent's offer to have the tapes transcribed at their expense, Grievant's strategic decision and subsequent actions lead to the barring of Grievant's recordings from the instant record. Grievant taped several conversations between himself and others over the course of time, this is fact certain, yet the reliability of the tapes are dubious and the written transcripts were found to be truly inaccurate and unreliable.[6] The inaccurate transcripts of tape recordings between Grievant

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[6] See Respondents' Exhibit 26, Report on Forensic Analysis of Audio Recording. The analysis of one of the recordings provided, revealed among other information that the recording was not an original recording, but a poorly-made copy. More than likely made by holding up one tape recorder to another. The tape being examined stops and then resumes, approximately 77 times, often in mid-sentence. The stoppages, whether intentional or not, offer excellent opportunity for surreptitious deletions from, or rearrangement of, the original recording. See also testimony of Howard I. Russell.

and an undetermined number of parties are not of evidence in the instant record.

After a detailed review of the voluminous record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. South Branch Career and Technical Center is a multi-county career and technical school located in Petersburg, West Virginia, encompassing students from Grant, Hardy, and Pendleton counties operating pursuant to WEST VIRGINIA CODE §18-2B-2.

2. South Branch Career and Technical Center ("SBCTC") is one of seven multi-county career and technical schools operating in the State of West Virginia. SBCTC is a public school preparing high school students and adults for the workforce.

3. The governance of a multi-county center, by State statute, is directly tied to the director of vocational and technical education with the West Virginia Department of Education (WVDE). The West Virginia Board of Education (WVBE) has the power to establish multi-county vocational schools, and the operational authority for the schools may be delegated for specified periods of time to an administrative council composed of equal representation from each of the participating county boards of education, the superintendent of schools from each participating county, and the state director of vocational education or his representative. *See* WEST VIRGINIA CODE §§18-2B-1 et seq.

4. Prior to April 2008, SBCTC had been operating under the oversight of an administrative council since its creation.

5. A director of a multi-county center is hired by the administrative council, the director has similar responsibilities and duties of a Superintendent of Schools in that the

director oversees the daily operation and management of the multi-county center and is responsible for staff evaluations, as well as expanded responsibilities, such as financing the operation of the school from both state and local funds, programming (secondary and adult education) for the school, maintaining and continuing relationships with community and technical colleges, and serving on various consortiums. *See* West Virginia Board of Education Policy 3232, Establishment Procedures and Operating Policies for Multi-County Career and Technical Education Centers, Section 5.4.

6. On July 12, 2007, the Administrative Council of South Branch Career and Technical Center hired Grievant as the Director of SBCTC. Grievant's duties were like those of **both** a county superintendent of schools and a high school principal.

7. Grievant's contract of employment specified that he was a 240-day employee and that he could be terminated at any time for just cause pursuant to W. VA. CODE §18A-2-8. (Respondents' Exhibit 3)

8. Internal turmoil was pervasive at SBCTC in 2007 and 2008.

9. The Administrative Council of SBCTC requested an educational audit of SBCTC. The Office of Education Performance Audits (OEPA) performed an audit of SBCTC and issued a report of its findings and recommendations.[7]

10. Numerous issues of concern were identified and specified by the April 2008 OEPA Report (Respondents' Exhibit 5). Several areas of SBCTC operations warranted

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[7] The Office of Educational Performance Audits is an agency that works directly for the WV State Board of Education, independent of the State Superintendent and independent of the WV Department of Education. It is designed to independently assess schools and school systems against the standards, both the performance standards and the process of high quality standards that have been established in terms of definition of a thorough and efficient school. OEPA conducts an assessment and provides a written report to the WV State Board of Education regarding its findings. Respondents' Exhibit 5. *Also See* W. VA. CODE §18-2E.

improvement.

11. The West Virginia Board of Education voted to rescind the operating authority of the SBCTC's Administrative Council on April 9, 2008. The vote to rescind that authority was subsequent to the recommendations and report presented by the Office of Education Performance Audits to the WVBE which found:

> "The South Branch Career and Technical Center has a myriad of problems that need immediate attention. The school climate is tense and volatile. Relationships between teachers and administrative staff have deteriorated to the point of open conflict and confrontation of a hostile nature. Lack of building security, code of conduct violations, and the continued escalation of conflict coupled with other policy and statutory deficiencies at the school call for extraordinary circumstances and an emergency to be declared to restore a safe environment at the school."

Respondents' Exhibit 5, page 19.

12. The April 2008 Report (R. Ex. 5), contains a number of statements about problems at SBCTC. Relevant findings identified under the "Leadership" heading provided:

7.8. Leadership.

7.8.1. Leadership. Leadership at the school district, school, and classroom levels is demonstrated by vision, school culture and instruction, management and environment, community, and professionalism. (Policy 5500.03)

Observations and reported information suggest that the teachers are not in conflict among themselves but do not trust or respect the administration. The director has a low image of many of the teachers. The director believes that the staff has and continues to lead a concerted, planned campaign to remove him from his position. The teachers are very critical of the administration for alleged verbal assaults, intimidation, confrontations, and alleged eavesdropping. Teachers reported they have very little input into management decisions. Collaboration and team building efforts such as faculty luncheons and covered dish occasions had few reported participants and have not achieved harmony at the school. Reprimands of teachers by the director with students present were reported by teachers and students.

The local school improvement council (LSIC) defends the administration at the school and reportedly blames the administrative council for the problems at the school by not backing and supporting the director in his quest to bring

> accountability to the school. The director also reported that the administrative council has suppressed his efforts by asking him to "back-off"; however, nothing of that nature appears in council minutes. Although the administrative council is composed of many highly reputable and capable persons, it has not been able to stabilize and diffuse the situation at the center. In fact, leadership has failed to emerge at the teacher, administrator, or council level to resolve the conflict at the center. Unresolved and lingering issues like police investigations, file deletions, missing records, grievances, and lawsuits that must be settled by others are difficult to overcome but must not stand in the way of providing an effective environment for students.
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> Effective communication among staff, administration, and the administrative council is very much needed. Instead, very little information was shared with teachers or the administrative council of plans to change and eliminate programs. Surveys to determine student interest in next year's course offerings were solicited with programs deleted prior to approval of the administrative council.

Respondents' Exhibit 5, pages 10 and 11.

13. Among other issues and deficiencies, SBCTC suffered from a culture of mistrust and fear.

14. State intervention traditionally involved a county school system. The takeover of SBCTC by the WVBE was a unique and unprecedented event. The West Virginia Board of Education's takeover of SBCTC was the first time that State intervention had been done with regard to a multi-county career and technical school.

15. The West Virginia Department of Education (WVDE), and the State Superintendent are the governmental administrative agents of the West Virginia State Board of Education, Respondent.

16. On April 9, 2008, the West Virginia State Board of Education voted to rescind the operating authority of SBCTC's Administrative Council and delegated that the State Superintendent of Schools shall have the authority to correct deficiencies noted in the OEPA report (and any other deficiencies that may be found at the Center).

17. Grievant's employment contract remained in place after the administrative council's authority was revoked. Per the authorization of the WVBE, the State Superintendent of Schools appointed a monitor to oversee both the operation of the school and the performance of Grievant.

18. Ron Grimes was the first monitor assigned to SBCTC after the WVBE's intervention on April 9, 2008, and was charged with several tasks by the State Superintendent and Stan Hopkins, former Assistant Superintendent for Career Technical and Adult Education. Identified tasks included: 1) to calm the hostile school environment and take steps necessary to assure students' safety; 2) assess the financial status of the school; and 3) to independently assess where the root of the school's problems rested.

19. In his attempt to determine the root of the problems at SBCTC, Monitor Grimes met with and interviewed Grievant, the school secretaries, the custodian, every teacher, groups of students, and selected members of the community during his first week at the school.

20. Monitor Grimes' initial conclusions attributed the state of discord at SBCTC to all parties involved, including its former Administrative Council.

21. On or about Tuesday, April 11, 2008, Monitor Grimes relieved Grievant of the majority of his authority as the Director of SBCTC. Mr. Grimes opined that the only way to bring calm to the school was to assume total administrative control of the facility.

22. Monitor Grimes and Grievant had numerous conversations regarding the operations of SBCTC, its administrative needs, academic standards, the atmosphere among school personnel, and potential corrective actions.

23. Monitor Grimes' and Grievant's interactions were initially harmonious with cooperative dialogs addressing a multitude of issues. Not all of the problems at SBCTC are attributable to misfeasance and/or malfeasant conduct of Grievant.

24. Nevertheless, Mr. Grimes discovered that many essential tasks had not been performed during Grievant's first year (2007-2008) as Director of SBCTC. Some notable omissions included Grievant's failure to complete SBCTC's Local Educational Agency (LEA) Plan, failure to apply for a School Building Authority (SBA) Grant, failure to plan for SBCTC's North Central Accreditation review, and failure to apply for a program modernization grant.

25. Monitor Grimes and Grievant discussed potential corrective actions being considered to resolve issues identified as detrimental, ineffective, and/or inappropriate at SBCTC.[8]

26. Grievant and the faculty members of SBCTC were not working together for the envisioned mutual benefit of the learning center and the students of SBCTC. During the course of one scholastic year, there was a student walk-out, an alleged faculty sickout and various ongoing legal actions. The environment of SBCTC (2007 and 2008) was tense, stress filled and dysfunctional. The relationship between faculty of SBCTC and

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[8] A myriad of issues existed, e.g., citing operational deficiencies highlighted by the OEPA Report, coupled with conflict from outstanding litigation of previous administrative personnel and grievance(s) against the instant Grievant and his management of SBCTC. Yet, notwithstanding the ten areas of non-compliance at SBCTC cited by the OEPA Report, it was perceived that the teachers were doing a pretty good job instructing, in that students were learning and posted exemplary achievements academically. It was also readily apparent that the tumultuous environment at SBCTC would eventually have a negative effect on the academic culture.

Grievant was tumultuous. Neither held the other in high regard.

27. Monitor Grimes discussed with Grievant that other employment options were available. Grievant was hesitant to transfer or apply for alternative employment with Respondent. A variety of optional courses of action were verbalized in regard to SBCTC. The prospect of Grievant being fired was specially expressed as a potential course of action along with other potential employment options being tentatively offered to Grievant. *See* Grievant's Exhibit 2, Transcription of May 21, 2008 meeting between Grievant and Ron Grimes.

28. John "Ted" Mattern assumed the duties of monitor at SBCTC, beginning on or about May 12, 2008. He is an experienced school administrator and has been successful in overseeing school systems in crisis throughout his career.

29. Sometime after Monitor Mattern commenced his duties at SBCTC, but prior to May 22, 2008, Grievant declined a requested formal meeting with Monitor Mattern.

30. Monitor Mattern attempted to meet with Grievant to discuss the operations of a multi-county career and technical school and assess Grievant's capacity to perform as an administrator of SBCTC. (Respondents' Exhibits 8, 9,10 and 11).

31. A number of tasks believed to be essential to the efficient operation of SBCTC were identified and highlighted for Grievant's attention. Respondents' Exhibit 8, memo dated May 22, 2008 from Ted Mattern to Grievant.

32. Monitor Mattern attempted to arrange a formal meeting with Grievant, repeatedly. (Respondents' Exhibits 8, 9,10, and 11).

33. As a result of Grievant's avoidance of a requested formal meeting with Monitor Mattern, a memorandum dated July 8, 2008, was composed outlining specific

tasks and dates for Grievant to accomplish identified goals. (Respondents' Ex. 2 and 12).

34. Grievant failed to perform and/or fully complete a number of the tasks identified by the July 8, 2008 memorandum. For example, Grievant failed to develop a supervisory schedule for staff (item #7), failed to develop a student class schedule for the 2008-2009 school year (item #4), failed to develop an agenda for the first day with teachers by August 1 (item #10), and failed to schedule a group meeting with students on their first day and get approval for the meeting agenda by August 15 (item #11).

35. The efficient and effective operation of SBCTC was the primary and fundamental goal of all Monitors assigned to SBCTC.

36. Grievant failed to complete a significant number of tasks believed to be essential to the efficient operation of SBCTC, including, but not just limited to, the tasks identified by the July 8, 2008 memorandum.

37. Monitor Mattern, a State intervention veteran, opined that the situation at SBCTC was one of, if not the toughest situation he had ever been involved with as a State intervention situation. Mr. Mattern attempted to mentor and monitor Grievant. Monitor Mattern grew frustrated with Grievant.

38. Agents of Respondent met in August 2008 to formulate a strategy to tackle various issues at and relating to the operations of SBCTC.

39. On August 27, 2008, a plan of improvement/action was reviewed and discussed with Grievant. Present at the meeting were Dr. Stan Hopkins, the Assistant State Superintendent in charge of career and technical education; Ron Ray, who was going to replace Ted Mattern as monitor; Ted Mattern and Ron Grimes, former monitors. Respondents' Exhibits 6 and 7. Dr. Hopkins referred to the meeting as an "administrative

assessment."

40. A plan of improvement/action was forged for Grievant as the Director of SBCTC. This plan not only addressed what was perceived as deficiencies of Grievant, but also specified a number of essential operational functions of SBCTC that needed attention.

41. The plan of improvement/action ("improvement plan") included not only correctable items (such as leadership style, interaction skills, etc.), it also contained specific directives for Grievant which included deadlines.[9] (Respondents' Exhibit 7).

42. During the August 27, 2008 meeting, expectations were discussed with Grievant, at length. *See* Respondents' Exhibit 6, Transcript of August 27, 2008 meeting, "Administrative Assessment of Randy Whetstone." Grievant had the opportunity to ask questions and was given the opportunity to provide input into the plan.[10] Grievant was displeased with the improvement plan. The meeting lasted in excess of three hours.

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[9] Generally, an improvement plan is a written plan prepared for an employee whose performance is unsatisfactory, which outlines specific areas of improvement and performance expectations, as well as deadlines in which the employee is required to accomplish the identified expectations. An improvement plan is designed to assist the employee in improving in each identified area and expectation. If the employee fails to improve in the specific areas of improvement and performance expectations within the designated deadlines, the employee may be placed on another improvement plan and/or alternative actions may be warranted, including disciplinary action.

[10] Grievant filed a grievance dated September 14, 2008 alleging that he had been denied input into the plan. The Undersigned is of the opinion that **Grievant was provided opportunity to provide meaningful input into the plan of improvement/action**. However, rather than discuss the plan components constructively, Grievant readily denied deficiencies and reiterated his belief that outstanding grievances and civil litigation concerning the school and former employees would prohibit his compliance with the directives. The meeting of August 27, 2008, was but one of several opportunities Grievant had to make meaningful contribution to the specific directives within the plan of improvement/action, and facilitate the efficient operation of SBCTC. *See* Respondents' Exhibits 6, Transcription of August 27, 2008 meeting.

43. Grievant was explicitly advised, in the meeting of August 27, 2008, that he was responsible for meeting the directives within the plan of improvement/action, and that it was his responsibility to show that he was capable of successfully operating SBCTC.

44. Grievant did not request an improvement team.[11] Respondents' Exhibit 6.

45. During the August 27, 2008 meeting, Grievant was specifically informed it was as if his authority over the vast majority of things was reinstated and Grievant was expected to run the school under the monitoring of Ron Ray.

46. There were known and identified financial and accreditation issues that needed to be addressed at SBCTC to insure the successful operation of the facility.

47. Ron Ray, former Superintendent for Jackson County Schools, assumed the role of SBCTC monitor on or about August 27, 2008. He did not retain the position for an extended period, resigning approximately two weeks later.

48. Upon the resignation of Mr. Ray, Dr. Cynthia Kolsun, former county superintendent of schools in Tucker and Hampshire counties, became the fourth individual appointed as monitor at SBCTC. Dr. Kolsun became the WVDE Monitor who was to supervise Grievant's implementation of the plan of improvement/action.

49. The Improvement Plan consisted of no less than 25 areas and included specified tasks such as completing a student handbook, conducting a student assembly, completing a policy and procedures manual, proper use of support personnel, learning about school finances and obtaining experience in this area, completing an annual LEA

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[11] An improvement team participates in the monitoring of 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. *See* 126 C.S.R. 142 *et seq*., Performance Evaluation of School Personnel (5310).

Plan, becoming an active member of the Potomac Highland Tech Prep Consortium, develop a lesson plan procedure for the staff, evaluation of the need for additional administrative staffing, develop a plan in collaboration with faculty to prepare for a post-secondary accreditation visit, establishing and utilizing school curriculum tech teams, and documenting communications and visitations with local businesses and community groups in the three counties comprising the multi-county school. (Respondents' Exhibit 7).

50. Monitor Kolsun designed a rubric/grid to be used by Grievant to document his progress in completing the tasks set forth in the plan. (Respondents' Exhibit 15). The grid separated each task to be performed by chronological order, set forth dates for formal joint reviews of the plan, and provided space for the Grievant to document his progress. This tool was reviewed with Grievant, as was each performance item listed in the plan.

51. Monitor Kolsun and Grievant would meet on predetermined dates to discuss and review Grievant's progress and performance of the duties and tasks identified by the "improvement plan."

52. Initially, with Monitor Kolsun, Grievant spent a significant amount of energy denying the existence of identified deficiencies or his lack of responsibility for any short comings, e.g., *see* Respondents' Exhibit 18. Monitor Kolsun emphasized the need to address identified deficiencies, essential facility requirements, and documentation of task completion, not debating the issue(s), *ad infinitum*.

53. As Respondent's Monitor at SBCTC, in addition to the formal written plan of improvement/action, Monitor Kolsun identified for Grievant a number of tasks (duties) which were not verbatim directives specified in the improvement plan. Monitor Kolsun attempted to assist Grievant, as well as oversee his actions as the Director of SBCTC.

54. Duties and tasks identified by the improvement plan and Monitor Kolsun for Grievant involved action pertained to the: (1) Student Handbook; (2) Leadership style; (3) Administrative duties; (4) Working Relationship with the Monitor; (5) Student Assemblies; (6) Policy Manual(s); (7) LEA; (8) Faculty meetings; (9) Tech Prep Consortium and; (10) Student Writing Protocol. Monitor Kolsun's rubric/grid of these identified areas provided a systematic manner to review Grievant's activity, Monitor Kolsun added to and/or altered a limited number of directives of the improvement plan.

55. Grievant did not appreciate Dr. Cynthia Kolsun and/or the manner in which she performed her duties as Respondents' Monitor at SBCTC.

56. Grievant's perception of his duties and the priority of tasks were not in sync with that of Monitor Kolsun's understanding of what was in the best interest of SBCTC.

57. Grievant filed several grievances relating to Monitor Kolsun and the conditions of his employment, while he was operating under her direct supervision as Monitor at SBCTC. See list as referred by Joint Exhibit 1, pg. 2.

58. Grievant spent a substantial amount of time and energy on activities he considered to be important, not necessarily the same tasks that were identified by the improvement plan or a goal Monitor Kolsun highlighted as a relevant action. Individually, Grievant's and Monitor Kolsun's perception of priority and timeliness was not in sync with each other.

59. Grievant failed to successfully complete a substantial number of tasks identified on the improvement plan, in a timely fashion. Most, if not all, of the tasks were believed to be important to the efficient operation of SBCTC.

60. Grievant failed to satisfactorily correct the vast majority of the deficiencies identified and reviewed with him by Monitor Kolsun.[12]

61. After a period of approximately two and a half months, Monitor Kolsun recommended that Grievant's employment as the Director of SBCTC be terminated.

62. Grievant was suspended with pay pending a pre-deprivation conference with then State Superintendent, Steven Paine, on November 14, 2008. (Joint Exhibit 3.)

63. Grievant participated in a pre-deprivation conference with State Superintendent Paine. The pre-deprivation conference occurred on November 19, 2008.

64. On November 25, 2008, State Superintendent Paine sent notification to Grievant that his termination would be recommended to the WVBE. (Joint Exhibit 4.) Grievant was provided the opportunity to appear before the WVBE. (Joint Exhibit 5 and 6.) Grievant did not appear at the WVBE meeting and oppose his termination.

65. On May 29, 2009, the West Virginia State Board of Education terminated Grievant's employment as Director of SBCTC. (Joint Exhibit 7.)

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Discussion

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Respondents charge Grievant with insubordination and neglect of duty. Grievant, via counsel, has alleged a number of legal deficiencies with regard to Grievant's

[12] The exact percent is an issue of much debate but the percentage of untimely and/or unsatisfactory resolved deficiencies is substantially larger than the percentage of timely accomplished directives. See Respondents' Exhibit 22.

termination. Grievant's counsel orally set forth several of these contentions at the level three January 25, 2011 hearing.[13] However, Grievant has also put forth several allegations stemming from ancillary events that occurred prior to the WVBE's revocation of the administrative council's authority, and that have no established relevance to the issue(s) legitimately in dispute before this Tribunal.

A substantive issue in the termination grievance (and in each of the 12 underlying grievances) is the actions of Respondents (conduct of its agents) and the performance of Grievant in his role as Director of SBCTC. Grievant was not an "at-will" employee, and has a property interest in his job. Nevertheless, NOT ALL of the topics/issues noted by Grievant's proposed finding of facts and conclusions of law document (in excess of 125 pages) were relevant to determining whether Grievant complied with directives given to him by the monitors, whether the plan of improvement/action was appropriate, or whether the Grievant met the terms of the plan of improvement/action.[14] This decision will address established issues in dispute in the context of the identified grievance(s).

Traditionally, a multi-county center director answers to a governing administrative council. Grievant was indeed hired by the SBCTC Administrative Council to the position

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[13] Grievant's L-3 filing merely states that his termination was wrongful/malicious. Counsel for Grievant elaborated in his opening remarks at the L3 Hearing. Grievant contends among other contentions that Respondents violated WVBE Policy 5310 and WVBE Policy 5899, violation of W. VA. CODE §§18-2E-6, 18-2-7, 18-2-8 and 18-2-12 and improperly credentialed monitors.

[14] Grievant's proposed findings of fact and conclusions of law document contained multiple references to testimony and documents that were either **not** offered or admitted into evidence. There is an exhaustive list. Respondents have objected. The undersigned concurs with Respondents and as requested by Respondents' January 19, 2012 written request, such material shall be excluded from consideration and should be excluded from being included in the record on appeal.

Director of SBCTC on July 12, 2007. The administrative council of a multi-county learning center is made up of the superintendents of each of the participating counties, a county board member from each of the participating counties and a representative from the Department of Education or a designee from the State Superintendent's office. The West Virginia State Board of Education voted to rescind the operating authority of SBCTC's Administrative Council (April 9, 2008), assuming control of the school and directed that a monitor be appointed to oversee both the operation of the school and the performance of Grievant. The WVBE voted to:

> "[R]escind the delegation of operating and maintaining the South Branch Career and Technical Center from the South Branch Career and Technical Center Administrative Council and delegate it instead to the State Superintendent of Schools who shall have the authority to correct the deficiencies noted in the OEPA report (and any other deficiencies that may be found at the Center); that the State Superintendent's authority shall include, but not be limited to, appointing a **monitor** for the Center **who shall: 1) work at the direction of the State Superintendent in overseeing and administering all functions of the Center, 2) make recommendations to the State Superintendent as to how any deficiencies at the Center may best be addressed, 3) be responsible for overseeing the evaluation of personnel and developing improvement plans where necessary, and 4) perform other tasks as assigned**; and that the State Superintendent make regular reports to the WVBE regarding the status and operation of the Center. (Emphasis added.)

(Minutes of the State Board of Education). It is not established that it was illegal for the State Board of Education to send monitor(s) to SBCTC. Essentially, the WVBE became Grievant's employer when it reclaimed its authority over SBCTC. Further, the State Board of Education delegated certain operational authority to the State Superintendent with the direction to appoint a monitor to manage the day-to-day operations of SBCTC.[15] Grievant

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[15] Grievant has alleged that the Respondents confused his employer to be the West Virginia Department of Education (WVDE) rather than the West Virginia Board of Education (WVBE). However, Grievant has not presented any credible evidence to prove that this was true, or that the supervisory structure established by the WVBE was contrary to law. Regrettably, it may be that the WVDE and WVBE titles were not readily acknowledged or used consistently by all participants involved with the instant grievance(s).

is aware of this information but contends that in terminating his employment, Respondents violated several applicable laws in the context of instant events. Grievant does not acknowledge that his own actions significantly facilitated the ultimate determination to terminate his services. Grievant contends bias and prejudice negatively corrupted the progression of events.

Directors of a multi-county center play unique roles, it is a unique position. The duties of a multi-county center director are like those of both a county superintendent of schools and a high school principal. West Virginia Board of Education Policy 3232, Establishment Procedures and Operating Policies for Multi-County Career and Technical Education Centers, sets forth the duties of a Director in Section 5.4:

> 5.4. Administration.
>
> 5.4.1. The Administrative Council shall employ a Director of the Center. The Director shall administer, supervise, and promote, under the policies and regulations established by the Administrative Council, the career, technical and adult programs to be provided at the Center.
>
> 5.4.2. The Director shall prepare and present the annual budget to the Administrative Council for review and approval. Revisions of the budget must be approved by the Administrative Council before presentation to the Fiscal Agent.
>
> 5.4.3. The Director shall be responsible for the recommendation of personnel for appropriate positions. Such recommendation shall be submitted to the Administrative Council for its approval. The Director shall be responsible for recommendation of school personnel actions as prescribed in W. Va. Code §18A-2 et seq. Assignment, transfer, promotion, demotion, reduction in force, suspension, and dismissal will be in accordance

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It is possible that the nomenclatures were used by unidentified individuals interchangeably (indiscriminately) to identify agency conduct. Nevertheless, each agency had distinct roles and defined authority. There was no confusion on the part of Respondents as to their individual agency roles, nor has such been established in the facts of these grievance(s). There is no viable dispute that the West Virginia Department of Education and the State Superintendent are administrative agents of the West Virginia State Board of Education.

> with West Virginia school law governing the employment of professional and service school personnel.
>
> 5.4.4. The Director shall recommend a salary for the personnel of the Center. Such recommendation shall be submitted to the Administrative Council for approval.
>
> 5.4.5. The Director shall prepare and present to the Administrative Council a ten (10) year Comprehensive Educational Facilities Plan, hereinafter CEFP, and any subsequent revisions necessary.

These duties exceed that of a mere principal. The employment of a county superintendent and a high school principal are not administered synonymously thus fueling a debate of which rules, regulations and procedure are applicable to the employment issues in dispute. While contested by Grievant, it is argued by Respondent, that the position formerly occupied by Grievant is more akin to that of a superintendent of a county school system than that of a principal of a school.[16] (Discussed, *infra.*)

In the context of the identified grievances, this decision will address issues in dispute among the various grievances filed. Pivotal aspects of central grievance(s) will be highlighted throughout the decision. The law concerning an employee's refusal to comply with directives (insubordination and willful neglect of duty) is wholly different from the law concerning improvement plans. The two issues must, therefore, be discussed separately.

Credibility

In reaching a decision on many of the issues associated with the parties herein, including a determination as to whether Grievant substantially met the terms of the improvement plan and whether Grievant proved the allegations of his thirteen associated

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[16] Directors have more responsibilities than your typical principal, and in many ways function similarly to county superintendents of schools. L-3 testimony of former Assistant State Superintendent for Career Technical and Adult Education, Stan Hopkins.

grievances, a credibility determination is essential. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/ W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

Grievant's perceptions of events are not necessarily collaborated by definitive facts. Throughout the course of this grievance matter, it was obvious Grievant had a strong tendency to personalize events, and also readily placed his own interpretation on occurrences. Deeds are factual, motives are much more subjective and ripe for renditions. Grievant demonstrated difficulty acknowledging or accepting that any of his actions were less than sufficient, inappropriate or counterproductive. Grievant clearly believed everyone else bears a greater degree of fault, and most, if not all, of the problems that occurred were

created by the actions of others.

It should be noted Grievant's credibility has been called into question with regard to a number of actions.[17] An example readily evident transpired during level three proceedings; Former Monitor Mattern testified, Grievant completed only two of the directives presented in the memorandum dated July 8, 2008 items 8 and 9. (Respondents' Exhibit 2 and 12). Grievant first testified that he had completed "every one" of the directives set forth in the memo "within the time frame listed." He attempted to prove this by attempting to introduce documents that he testified were emails. Interestingly, upon objection, documents alleged to be attached to the emails (which Grievant could not confirm were ever communicated to Monitors Mattern or Grimes), were obviously altered or manufactured. (See Transcript Volume VI, January 25, 2011, page 1363 lines 10 through 1382.) Specifically, the logo was backwards from the logo in the headings of authentic SBCTC documents and the font was different. Grievant later contradicts his earlier testimony by admitting that he had not completed certain items either in their entirety or by the date specified.

Grievant's statements are not consistent and, in some instances, demonstrate untruthfulness. Grievant has a vested interest in the instant subject matter; however, this does not excuse his erratic behavior throughout the course of relevant events. Grievant's

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[17] Examples include, but are not limited to: falsification/alteration of documents which Grievant sought to introduce as evidence (January 2011, L3 Hearing); evasive testimony regarding his clandestine tape recording of meetings (April 2011, L3 Hearing); and evasive and/or inaccurate testimony regarding his prior termination and improvement plan as the principal of Union High School in 1988 (April 2011 Hearing). It is disturbing that Grievant's statements are not consistent and, in some instances, concretely demonstrate untruthfulness.

beliefs, true or not, accelerated Grievant's demise by detrimentally affecting his conduct. Grievant's acknowledged behavior demonstrated his willingness to deceive and manipulate others.

The undersigned finds Grievant's interpretation of events to be profoundly skewed and colored by perceived collusion or nefarious motives. Grievant has repeatedly demonstrated that he is unable to perceive events properly when they involve his own short comings. These inaccurate perceptions do not appear correctable. Grievant's suspicions of others' motives negatively impact his own words and deeds. Grievant's credibility must be discounted. His testimony is not trustworthy.

The overall tone of Grievant's assertions are grandiose, the type and number of unsupported allegations made by Grievant about Monitor Kolsun and others, undermine the overall believability of the conspiracies alleged by Grievant. The amount of sheer effort needed by the diverse personnel acting in concert reduces the plausibility of several of Grievant's explanations for his conduct. Grievant is prone to exaggeration, has demonstrated a willingness to participate in antics or gamesmanship to the point of dishonest behavior. Grievant has shown that his perspectives are skewed and do not align with established facts.

The undersigned Administrative Law Judge finds Grievant's rendition of information is more likely than not to be inaccurate and misleading. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." *Chin v. Dep't of Treasury*, 44 M.S.P.R. 201 (1990). *See Loundman-Clay v. Higher Educ. Policy Comm'n*, Docket No. 02-HEPC-013 (Aug. 29,

2002). Grievant's testimony was consistently biased and not deemed plausible on numerous occasions. Grievant demonstrated forethought and calculated effort to manipulate information and lay blame on anyone, everyone, and the system. Grievant's renditions of events are not credible or reliable.

The undersigned had an opportunity to observe the demeanor of all of the witnesses and to assess their words and actions during their testimony. Credibility assessments were made from direct observations, as well as review of the record. The majority of the statements by the witnesses called to testify were consistent with each other, consistent with their prior statements, internally consistent, and consistent with the documentary evidence. The demeanor of the majority of the witnesses was straightforward, and their testimony was plausible. The same cannot be said for Grievant.

The testimony of Assistant State Superintendent Stan Hopkins, and Monitors Ron Grimes and Ted Mattern was straightforward, reasonable, and consistent. Each testified as to their individual actions and communications with Grievant. The relationship between individual SBCTC monitors and Grievant was not homogeneous, yet Grievant tended to have some type of conflict or miscommunication with each.

The testimony of Monitor Kolsun was extensive. She testified regarding events, conversations and intent that were relevant to issues in discussion. A comparison of Monitor Kolsun's testimony and that of Grievant's is inescapable. Dr. Cynthia Kolsun became the WVDE monitor who supervised Grievant's implementation of the plan of improvement/action. Credibility assessment of Monitor Kolsun (testimony & conduct) is imperative to numerous facts and conclusions contended by Respondents.

The demeanor of Dr. Kolsun demonstrated appropriate respect and cooperation with the instant grievance process. Her interaction with Grievant during the course of pertinent events established an opportunity or capacity to perceive and communicate vital facts. It was apparent that she knew honest and accurate explanations of events were important. In her role as Respondent's representative and as a critical witness, it was readily evident she understood the existence or nonexistence of fact(s) as testified to by her and others was of issue. During the course of pertinent events, Monitor Kolsun witnessed Grievant's attitude and documented his conduct. Dr. Kolsun's prior work assignment(s) were successful endeavors and she has a positive reputation for dedication to duty and honesty.

Dr. Kolsun replaced Ron Ray as the SBCTC Monitor in early September 2008 and implemented Grievant's Improvement Plan. The testimony of Monitor Kolsun is supported by contemporaneous notes that she kept during her tenure at SBCTC,[18] by other witnesses, and on some points of interest by Grievant himself. Monitor Kolsun's actions and testimony indicated constructive professional behavior.

Monitor Kolsun testified as to her objectives and motivation during the course of events. She provided details and example after example of her actions and reactions to the conduct and demeanor of Grievant. Grievant's opinion regarding the motivations of others is more speculation and conjecture than established fact. There is no doubt that Monitor Kolsun became frustrated with some of Grievant's antics from time to time. However, it is not established that such frustration manifested an undue bias or motive to

[18] This is in addition to the rubric/grid designed to document Grievant's progress in completing tasks set forth in the plan. (Respondents' Exhibit 15.)

sabotage Grievants actions as the Director of SBCTC. *Monitor Kolsun testified her objective was not to engineer the dismissal of Grievant but to aid and assist in the administering of SBCTC operations* which included, but was not necessarily limited to, identifying and instructing Grievant regarding perceived deficiencies in the essential operations of the facility. This testimony is consistent with the testimony of other monitors, who attempted to mentor and monitor Grievant. This information is deemed credible and reliable. The efficient and effective operation of SBCTC was the fundamental goal of all monitors assigned to SBCTC.

In assessing the trustworthiness of the information provided by Monitor Kolsun, the undersigned was mindful of the potential for bias, and the possibility of agency interest while considering the consistency of statements and the plausibility of the witness's information. The demeanor of Dr. Kolsun throughout the level three proceedings, as witnessed by this presiding ALJ was professional, organized and deemed trustworthy. Her testimony was extensive, due care was taken to explain rationale and circumstances of prescribed objectives and her efforts to fulfill her duties as a monitor assigned to SBCTC. While minor points of perception and interpretation could be endlessly debated , Monitor Kolsun's testimony was reasonable and plausible. The undersigned finds the facts provided by Monitor Kolsun's testimony to be credible.

Burden of Proof

Respondents have the burden to prove that the termination based on insubordination, willful neglect of duty, incompetence, and failure to comply with the plan of improvement/action was justified. Grievant bears the burden of proof as to all other

claims, including those set forth in the 12 underlying grievances. Grievant's claims include that the improvement plan was flawed; that he has been a victim of discrimination, favoritism, and harassment; that WVBE Policies 5310 and 5899 were violated; that West Virginia Code §§18-2E-6, 18-2-7, 18-2-8 and 18-2-12 were violated; and that confusion as to the identity of Grievant's employer led to improper use of monitors.

1. Burden of Proof re: Termination

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *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); *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988).

"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. 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[; this] determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). *See Black's Law Dictionary*, 5th ed. at 1064. The 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party with the burden has not met its burden. *Id*.

2. Burden of Proof re: Improvement Plan

"Evaluations and subsequent improvement plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving his claims regarding the improvement plan by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10-427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and improvement plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v.Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W.Va. 205, 400 S.E.2d 213 (1990)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

"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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

Merits

Before examining the element of the much discussed plan of improvement/action, it is important and prudent to note the roles of the parties in this grievance matter are unique. Prior to the instant case, the State Board of Education had never intervened in the operation of a multiple-county vocational-technical center operating in this State. The WVBE has established applicable rules, procedures and history with regard to taking over a county school system (state intervention); however, there are few, if any, direct statutes applicable to the scenario of this case. Useful concepts and practical guidelines exist but few established procedures directly address the instant scenario.

It is imperative to determine the regulations that apply to the instant set of facts. Multi-county centers are unique educational facilities. Directors of a multi-county vocational school are more than mere principals, and in many ways function similarly to county superintendents of schools.[19] Respondent was mindful of this fact and utilized

[19] Principals do not prepare annual budgets; perform the personnel functions set forth in Article 2 of Chapter 18 (§18A-2-1, *et seq.*) for the hiring of a staff including positing, selecting, reduction in force, suspension, and dismissal; nor do principals set salaries for staff or prepare a Comprehensive Educational Facilities Plan (CEFP). These are all functions more specifically reserved unto a county superintendent of schools or a RESA (Regional Education Service Agency) director.

some of the overall concept/structure of Policy 5310 but not the policy, *per se*, to construct and/or formulate a plan of improvement/action for Grievant (and SBCTC) in the circumstances of this matter. The undersigned is persuaded that there is no statutory intent, or intent within the policy itself, that would require the strict application of Policy 5310 to a director of a multi-county vocational school under State intervention.

WVBE Policy 5310, Performance Evaluation of School Personnel, specifically states, in Sections 3.1 and 3.2, that it applies to employees of county boards of education. Although the term "administrator," as defined in Section 4.11 of Policy 5310, does contain the term "director," this does not encompass directors of multi-county vocational schools. Rather, this term refers to directors employed by county boards of education such as directors of curriculum, school nutrition or personnel.

In describing the evaluation and improvement plan procedures for administrators, Policy 5310 states, in Section 15.3, that the "administrator's immediate supervisor is responsible for monitoring performance and for preparing the written evaluation." Immediate supervisor is defined in Section 4.13 as "a professional educator/administrator identified by the county superintendent to conduct observations, complete evaluations, and write and monitor improvement plans." This scenario cannot apply to the director of a multi-county vocational school where the director is analogous to a county superintendent and is the highest level of authority under the managing body - the administrative council.

The enabling statute for Policy 5310 is W. VA. CODE §18A-2-12. It states, in paragraph (a):

> "The state board shall adopt a written system for the evaluation of the employment performance of personnel, which system shall be applied uniformly **by county boards of education** in the evaluation of the employment performance of personnel employed by the board." (Emphasis added.)

It further states, in paragraph (c):

> "For purposes of this section, 'professional personnel', 'professional' or 'professionals,' means professional personnel as defined in section one, article one of this chapter.

W. VA. CODE §18A-1-1, in pertinent part, defines professional personnel in the following manner:

> (a) **"School personnel"** means all personnel employed by a **county board** whether employed on a regular full-time basis, an hourly basis or otherwise. **"School personnel" is comprised of two categories: Professional personnel and service personnel;**
>
> (b) "Professional person" or "professional personnel" means those persons or employees who meet the certification requirements of the state, licensing requirements of the state, or both, and includes a professional educator and other professional employee . . . (Emphasis added.)

Grievant cites and relies on *Spears v. The Administrative Council of the James Rumsey Technical Institute*, 93-MCVTC-461 (June 1, 1994) to establish that Policy 5310 does indeed control the evaluation of and implementation of improvement plans for directors of multi-county vocational schools. However, this reliance is misplaced. *Spears* deals exclusively with the salary of a director. Salary and benefits (such as vacation, retirement, insurance, etc.) are not equivalent to issues of hiring or evaluation. *Spears* cites little substantive law relevant to the instant issue.

There is no provision of law that permits the WVBE to void employment contracts when revoking the operating power of an administrative council pursuant to W. VA. CODE § 18-2B-2. It is important to understand that the revocation of an administrative council's authority to operate a multi-county vocational school is authorized by W. VA. CODE §18-2B-1. This is not an action controlled in any way by W. VA. CODE § 18-2E-5(n)(6)(B). WEST

VIRGINIA CODE §18-2E-5 provides a process to be followed when an emergency is declared in a school under the control of a local board of education. South Branch Career and Technical Center was not under the control of a traditional county board of education, nor was it a low performing school as defined in §18-2E-5.[20]

Respondents assert that the controlling legal constraints in its termination of the Grievant are found within his contract of employment. (Respondents' Exhibit 3). Paragraph 5 and 6 of the contract state as follows:

> 5. This contract is not a continuing contract of employment but the Employee shall not be removed from this position without shown reasons pursuant to the West Virginia Code §18A-2-7.
>
> 6. This contract may be terminated by the Council at any time for just cause pursuant to the West Virginia Code 18A-2-8 or by the mutual consent of the parties.

Respondents assert that the inapplicability of WVBE Policy 5310 is an important point to defend. This is understandable. The hardship of such constraints would severely hamper, if not fatally inhibit, WVBE's ability to rectify a situation upon intervention. Yet, Grievant's desire to be given a fair chance to succeed must be preserved. Thus, the undersigned is in agreement that there are indirect applications but there is no wording in W. VA. CODE § 18A-2-12, WVBE Policy 5310, or WVBE Policy 3232 that evidences an intent to tie these very specific and detailed procedures to a director of a multi-county vocational school. Grievant, in the facts of this case, was provided a fair opportunity to succeed.

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[20] It may be of interest to note, if the State Board intervenes in the operation of a school system [W. VA. CODE § 18-2E-5], part of the authority given the State Board is the authority to void an existing employment contract between the county board and the county superintendent and declare that the office of the county superintendent be vacant. Principals may be transferred to alternative positions. See W. VA. CODE §§ 18-2E-5 and 18-2E-5a.

Improvement Plan

Grievant has argued that his improvement plan was improper because he was not formally evaluated prior to its implementation, that the plan contained data that fell outside of the timelines established by WVBE Policy 5310, and that he was not afforded the opportunity to provide input into the plan.

Performance improvement plans are part of the evaluation process and are management tools to increase production and correct unsatisfactory performance. "Evaluations and improvement plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving his claims regarding the improvement plan by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10-427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v.Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W.Va. 205, 400 S.E.2d 213 (1990)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999). The arbitrary and capricious standard is used in assessing whether an evaluation should be set aside. See standard generally defined pg. 35, *supra.*

The undersigned is not persuaded that Grievant was denied opportunity for input

into his plan of improvement. Citing August 27, 2008 meeting, Respondents Exhibit 6. Grievant's assertion that he was not given the opportunity for input into his plan of improvement is not factually accurate. "As long as an employee has the opportunity for discussion of an Improvement Plan, and has the opportunity for input if desired, an Improvement Plan will not be later invalidated by a claim that the plan was previously prepared. *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999)." The administrative assessment/improvement plan meeting of August 27, 2008 lasted in excess of three hours. During the meeting, the expectations contained in the plan were discussed with Grievant at length. Grievant had the opportunity to ask questions and was given the opportunity to provide input into the plan and to request an improvement team. Grievant denied the vast majority, if not all, of the identified deficiencies and stated his belief that the grievances and civil litigation concerning the school and former employees would prevent him from complying with the directives he had been given. Grievant's input into the final elements of the improvement action/plan was limited by his own actions. Grievant neglected to effectively avail himself of the opportunity to provide meaningful input into the plan. The fact that Grievant disagrees with his superiors' evaluation of his performance as an effective Director does not establish that the appraisal was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator(s). *See Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988).

Grievant's opportunities to provide meaningful input were not limited to one August meeting, citing the numerous meetings with Monitor Kolsun and other agents of Respondents. Respondents argue it is disingenuous for Grievant to claim that the

improvement plan was contrary to law when it was his own insubordination, poor performance, and defiance of authority that necessitated its implementation. Respondents highlight that Grievant was repeatedly notified that there were expectations of him, those expectations were put in writing, and Grievant failed to comply and at times elected not to even enter into discussion with monitors regarding issues at SBCTC. A highlighted example is Monitor Mattern's repeated attempts to meet with Grievant. Subsequent to Grievant's avoidance of requested meetings with Monitor Mattern, and other events of note, a correspondence signed by State Superintendent Paine was transmitted to then Grievant's legal counsel, which in part provided:

> [T]he West Virginia Board of Education [Board], Mr. Whetstone's employer, specifically directed that monitors be placed at South Branch to oversee and direct the totality of its operations, including the work and performance of Mr. Whetstone.
>
> * * *
>
> As previously communicated [Grievant] is directed to meet with the monitors at their request, either formally or informally. There is no requirement that these meetings be scheduled in advance. Mr. Whetstone does not have the right to refuse to meet with and/or talk to monitors about any aspect of the operations of South Branch Career and Technical Center, including his own performance, nor does he have the right of legal representation at any meetings that do not concern discipline or a pending grievance in which he is the grievant. Discussions and meetings between employers and employees do not constitute harassment. . . . [T]hese interactions are a normal aspect of the employer/employee relationship. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback. The fact that an employee does not like the information he receives from an employer does not mean it is inappropriate or constitutes harassment. *Rider v. Bd. of Trustees/Marshall Univ.,* Docket No. 99-BOT-348 (Apr. 7, 2000).

Grievant's Exhibit 1 (August 20, 2008 correspondence).

Grievant had several opportunities to communicate with responsible agents of Respondents. As the trier of fact, the undersigned administrative law judge specifically finds that Grievant had ample opportunity to add meaningful input into the much discussed

plan of improvement/action referenced as his improvement plan. Further, Grievant's contention that he was unaware of the monitors' role is disingenuous. If Grievant didn't understand the objectives of the various monitors, all Grievant needed to do was ask and listen to the prompt and direct (oral and written) response(s) that were repeatedly being delivered to him.

Upon addressing the plan itself, it is recognized that there are indirect applications of Policy 5310 which do lend themselves to this situation. However, it is not ruled that the strict application of the policy is required in the facts of this matter. The April 2008 OEPA Report (Respondents' Exhibit 5) identified very real concerns regarding the operations of SBCTC. The efficient operations of SBCTC was the foremost objective of Respondents. State intervention is not a process cavalierly entered into by the State Board of Education. Respondents acknowledge that the plan of improvement/action presented to Grievant was more than an improvement plan in the traditional sense.[21]

Some contractual employees, like Grievant, have the right to correct performance problems prior to being terminated. However, the improvement plan was designed to aid Grievant and SBCTC with what had been identified as deficiencies, and essential tasks, not punishment. This Grievance Board has acknowledged that placing form over substance is not required and has specifically held that there is "no requirement for a formal evaluation" before an improvement plan is instituted. When a supervisor sees a deficiency in an employee's performance, places him on notice of the problem, and the

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[21]*Arguendo*, Respondents stress that even if WVBE Policy 5310 would apply, Respondents have substantially complied with all legal requirements therein in determining that Grievant failed to meet the terms of the improvement plan which were developed for him.

behavior is then repeated; there is no need for the supervisor to perform a formal evaluation. *Beckley v. Lincoln County Board of Education*, Docket No. 99-22-168 (Aug. 31, 1999); *Meade v. Mingo County Board of Education*, Docket No. 90-29- 103 (Jan. 30, 1991); *Cohenour v. Greenbrier County Bd. of Educ.*, Docket No. 13-87-058-4 (June 22, 1987). Respondents notified Grievant that there were expectations of him, those expectations were put in writing, and Grievant still failed to recognize and adequately adjust his conduct. Respondents suggest the Administrative Assessment held on August 27, 2008, in essence, served as an evaluation of Grievant's performance and was performed in an open and honest manner, *e.g.,* Respondents' Exhibits 6, 7, and 8.

In review of the facts leading up to the implementation of the plan of improvement, it is readily evident why Respondent reasoned a written action plan was prudent. Grievant was not complying with the State's efforts to assess and improve the educational services at SBCTC.[22] Respondents' Exhibits 8-13. Similar to the memo of July 8, 2008, the plan of improvement contained specific directives for Grievant. Credible level three hearing testimony established intent, explanation of directives, essential facility functions, setbacks, timeliness, and repercussions of incomplete tasks. *See* testimony of Hopkins, Grimes, Mattern and Kolsun.

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[22] A memorandum dated July 8, 2008, outlining very specific tasks and deadlines to be met. (Respondents' Exhibit 2.) The list contained items that were essential to the operation of SBCTC and were necessary for the opening of the 2008-2009 school year. Mr. Mattern testified that the list was developed, in part, because Grievant had not previously taken the initiative to either begin or complete the items on it. Mr. Mattern further testified that the tasks required of Grievant were not superfluous requests. Rather, they were "nuts and bolts" items essential to the successful operation of the school. (Transcript Volume I, January 25, 2011, page 133 lines 8-19). Grievant failed to perform and/or fully complete a majority of the tasks identified.

Respondents' actions addressed tasks believed to be essential to operating SBCTC. The improvement/action plan included not only correctable items (such as leadership style, interaction skills, etc.), it also contained deadlines. No less than 25 topics were identified and included specified tasks such as completing a student handbook, completing a policy and procedures manual, proper use of support personnel, learning about school finances and obtaining experience in this area, completing an annual LEA plan, becoming an active member of the Potomac Highland Tech Prep Consortium, develop a lesson plan procedure for the staff, evaluation of the need for additional administrative staffing, develop a plan in collaboration with faculty to prepare for a post-secondary accreditation visit, establishing and utilizing school curriculum tech teams, and documenting communications and visitations with local businesses and community groups in the three counties comprising the multi-county school. (Respondents' Exhibit 7). These activities were reasonable duties for a Director to perform.

Grievant has not provided sufficient evidence to establish the existence of procedural errors sufficient to cause the plan to be set aside. There was no lack of notice to Grievant, the plan was discussed with him in an open and honest manner, and it was developed based on criteria that was well documented and considered. The Grievant has presented no evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the policy [e.g., WVBE Policy 5310] has been confounded.' *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County

Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W.Va. 205, 400 S.E.2d 213 (1990)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

Grievant's agreement or disagreement with Respondents' identified objectives is not at issue. Credible evidence of record indicates that Monitor Kolsun attempted to assist Grievant as well as oversee his actions as the Director of SBCTC.[23] Grievant spent a substantial amount of time and energy on activities he considered to be significant/important, not necessarily the same tasks that were identified by the improvement plan or a goal Monitor Kolsun highlighted as a relevant action. Grievant, for his own reasons and rationale, found it difficult to satisfactorily direct his actions to achieving the identified goals. Grievant failed to timely and/or adequately perform what has arguably been represented to be 85% of the tasks identified for him by the plan and Monitor Kolsun.[24] See Monitor Kolsun's Testimony and final Improvement Plan review (Respondents' Exhibit 22).

Lastly, it is not determined that the improvement plan, discussed with Grievant in August 2008, implemented by Monitor Kolsun September - November 2008, and in effect during the 2008-2009 school year, impermissibly encompassed two school years. It was

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[23] Monitor Kolsun and Grievant discussed and reviewed Grievant's progress and performance of duties and tasks on a regular basis. Monitor Kolsun emphasized the need to address identified deficiencies, essential facility requirements, and documentation of task completion. See Respondents' Exhibits 14 through 22 .

[24] The percentage cited is believed to be mathematically correct; however, given that the exact number of directives and what constitutes full compliance is much disputed, it is factually accurate to state Grievant failed to successfully complete a substantial number (the majority) of tasks identified on the improvement plan, in a timely fashion.

discovered that a number of important tasks had not been performed during the Grievant's first year (2007-2008) as Director of SBCTC; some notable omissions included Grievant's failure to complete SBCTC's Local Educational Agency (LEA) plan, failure to apply for a School Building Authority (SBA) grant, failure to plan for SBCTC's North Central Accreditation review, and failure to apply for a program modernization grant. This information became known to Monitor Grimes, who was appointed as an interim or temporary monitor at SBCTC beginning on April 11, 2008. When Ted Mattern became monitor beginning May 12, 2008, he attempted to meet with the Grievant to discuss Grievant's role as the director of SBCTC. It appeared that no goals had been mutually established by Grievant and the administrative council, and it was evident that effective leadership was needed at SBCTC. However, as detailed herein, Grievant refused to meet with Monitor Mattern. Because of Grievant's refusal to meet with Mr. Mattern, a written memo was issued to him setting forth various directives to be completed. The memo was clearly a directive. Grievant neglected to complete numerous tasks, identified as necessary for effective management of the school. Because of Grievant's own defiance, poor performance, and willful refusal to meet with the monitors, Respondents were left with almost no alternative other than implementation of an improvement plan.[25] It is disingenuous for Grievant to now claim that the improvement plan was contrary to law when it was his own conduct and defiance of authority which made it necessary. Respondents contend they simply did the best that could be done - and suggest even more than they were required to do - considering the extreme circumstances at SBCTC.

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[25] Attempts at a mutually agreed voluntary transfer were unsuccessful.

Grievant's continued employment at SBCTC was *defacto* contingent upon meeting the terms of the plan of improvement/action but it is not established that the improvement plan clearly covered two school years and thus violated this board's holding in the case of *Puskarich v. Hancock County Board of Educaton,* Docket No. 91-15-094 (May 29, 1992). Numerous tasks were required to be completed yearly by a Director, the fact that completion of a particular task was also essential in the previous school year does not make it any less ripe for discussion during the current academic year.

Insubordination

Insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) *citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980). Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994).

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health*

Dep't, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). "An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College,* Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997)." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

"Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act.[26] *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*,

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[26]"It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

Docket No.93-21-427 (Feb. 24, 1994).

Grievant's refusals to cooperate with the Respondents' endeavors to identify and resolve perceived deficiencies at SBCTC were persistent, intentional and knowing. An early example of Grievant's acts of insubordination (Respondents' Exhibits 9-11) is Grievant's refusal to meet with Monitor Mattern to discuss issues relevant to the operation of SBCTC. The list grows exponentially as time passes. Grievant argues it was illegal for the State Board and the State Superintendent to send a monitor to SBCTC. Grievant contends that WEST VIRGINIA CODE §18-2E-5 was not followed thus rendering void the entire process undertaken by the so-called monitors. This argument, like a number of others presented by Grievant, does not withstand scrutiny or justify Grievant's failure to diligently attempt to assist in the resolution of deficiencies at SBCTC.[27] The State Board's endeavors to identify and resolve perceived deficiencies at SBCTC were rational.

Grievant presented little, if any, credible evidence to show that he had complied with the majority of the directives presented to him or that he was prevented from doing so. His failure to comply with the directives was willful and intentional, not negligent actions. Grievant, in deed, refused to recognize the authority of his employer to direct his conduct. Grievant failed to satisfactorily correct the vast majority of the deficiencies identified and reviewed with him by Monitor Kolsun. Grievant gave little more than cursory obedience to Respondents' identified objectives. Grievant willfully neglected his duty.

This Grievance Board recognizes that insubordination "encompasses more than an

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[27] (Respondents' Exhibit 2 and 12). The July 8, 2008 memorandum was clearly a directive. The first paragraph under the subject line of the memorandum stated "The following is a partial list of duties that ***must*** be completed by the dates noted." (Emphasis added.)

explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)). Grievant demonstrated this conduct. The record is littered with examples, some more blatant than others but the number of confrontations, disagreements coupled with under or unperformed duties is disturbing. Grievant neglected his fiduciary duty to the institution and to his employer.

The pattern of willful neglect of duty and insubordination after the arrival of Dr. Cynthia Kolsun at SBCTC is documented. Monitor Kolsun kept contemporaneous notes detailing her experiences with Grievant (Respondents' Exhibit 14). Within those notes she sets forth multiple instances of insubordination which include, but are not limited to:

> Failure to obtain monitor's approval before distributing legal documents to students and parents;
>
> Refusal to inform monitor regarding SBCTC community activities;
>
> Failure to receive prior approval from monitor for scheduling faculty meeting;
>
> Refusal to provide adequate contact information to monitor after multiple requests;
>
> Failure to receive monitor approval before submitting strategic plan to WVDE.

Grievant was aware that he was not to send correspondence that had not been approved by the monitor, in advance; that he was to provide contact information to the monitor so that he could be reached when he was out of the building; that all reports and grants had to be approved by the monitor prior to submission; that all faculty meetings and student assemblies were to be approved 24 hours in advance by the monitor; and that he was to arrange for a facilitator for the video history class. Further, Monitor Kolsun specifically

directed Grievant to complete the Leadership Inventory directive documented in the Improvement plan.[28] Yet, in spite of having been unequivocally notified about expectations, Grievant chose not to comply with Respondents' agents and priority of goals.[29] Grievant was explicitly advised, in the meeting of August 27, 2008, that he was responsible for meeting the specific directives within the plan of improvement/action, and that it was his burden to show that he was capable of successfully operating SBCTC.

Dr. Kolsun, in her testimony at the Level 3 hearing, summarized her reasons for recommending termination as follows:

> **Q. So one last question for you, Dr. Kolsun. We have talked a lot about very specific instances, both in your testimony and in Mr. Whetstone's testimony. Is there any one instance that caused you to recommend Mr. Whetstone's termination?**
>
> A. No, no.
>
> **Q. Could you describe for us what did cause you to make that recommendation, the big picture?**
>
> A. When you look at the overall improvement plan you'll notice that it's not the little picky things that we're looking at, it's the fact that there needs to be a leadership style, there needs to be someone in charge, there needs to be consistency, there needs to be someone who can run the school that the teachers feel comfortable with, they know that the principal has the expertise. And you know, we have an obligation to students to provide leadership in that school. And when you look at that overall improvement plan that's what you see is missing.

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[28] See Monitor Kolsun's final Improvement Plan review for additional acts of defiance, Respondents' Exhibit 22.

[29] An argument could be made that Grievant's insubordination includes his willful defiance regarding Monitor Kolsun's directive not to surreptitiously record conversations with students and staff at SBCTC. As noted in the OEPA report (Respondents' Exhibit 5) and in the testimony of nearly all the witnesses for Respondents, SBCTC suffered from a culture of mistrust and fear. Grievant's actions did not assist in eradicating this cancerous condition at SBCTC. Even Grievant felt this mistrust, and had his office professionally swept for monitoring devices.

Q. That's what you see is missing from what?

A. That's what you see is missing from [Grievant's] leadership. The leadership was not – the expertise to run a school was not there. There were lots of excuses and it was always somebody else who should have had this responsibility or somebody who should have told me or somebody who should have trained me, but basically when you're in leadership positions nobody tells you how to do your job, you have to learn how to do your job . . .

Q. One final question. What was [Grievant's] attitude toward the improvement plan in your opinion?

A. Well, if you recall in earlier testimony during the very first time that we met, instead of even making an attempt to say that he had met any of those items, he simply said that he didn't feel that he should have to fill out this improvement plan. And when you're talking to somebody about communication -- communication is a critical issue in a school. And when you're talking to someone about you need to work on communicating with your staff, your students, your parents, you know, a one page copy of a Dale Carnegie book does not – it just goes to show that he really was not even taking this seriously. He did not take it seriously . . .

April 28, 2011 Transcript page 1174 line 17 through page 1177 line 7.

Grievant spent a substantial amount of time and energy on activity he considered to be significant/important, not necessarily the same tasks that were identified by the improvement plan or a goal Monitor Kolsun deem important. Grievant's perception of priority and timeliness was not in sync with Respondents. Grievant was obsessed with SBCTC's involvement with various ongoing litigation. Grievant's managerial style was not demonstrating the positive gains in SBCTC operations envisioned by Respondents. Grievant's conduct did not foster an atmosphere conducive for an educational setting. Grievant was disrespectful, disruptive, and fell short of efficiently stewarding SCBTC during a critical period of its operation. Respondents are of the opinion that an efficient Director needs to facilitate resolutions, Grievant demonstrated he posed more conflict and uncertainty than solutions to the situation at SBCTC.

Grievant was aware of the State's intervention at SBCTC. His argument that the monitors assigned to SBCTC were not lawful, even if true, does not excuse his behavior. Others, who were at SBCTC to do their respective jobs, with a reasonable degree of efficiency, were negatively impacted by Grievant's conduct. Grievant was and is unwilling to acknowledge shortcomings in his conduct. The events of this matter are regrettable, however, a significant number of corrosive situations were avoidable. Grievant did not adhere to implied and expressed directives. An employer and/or supervisor has a right to issue lawful directives to an employee. Respondents presented persuasive testimony and evidence to demonstrate that Grievant did not comply with specific directives given to him by monitors (verbal and written) and failed to improve his leadership capacity to a level recognized to be efficient for successful operation of SBCTC.

Grievant's behavior constituted a willful neglect of duty which rose to a level of insubordination. Grievant knowingly failed to conform his actions to the expressed wishes of individuals empowered to direct his conduct. Grievant failed to perform work-related responsibility. Grievant failed to adequately perform in spirit and deed.

Alleged Harassment, Discrimination, and Favoritism

Grievant alleges that he has been the victim of discrimination, favoritism, and harassment. Grievant bears the burden of proof in each of these assertions.

"Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by

preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. *See* W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96- BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Id.*; *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

Grievant essentially argues that monitors instigated or condoned conflict against him. Grievant maintains this was by design to engineer his termination, "[I]t was easier to

get rid of one administrator" as opposed to disciplining the entire faculty at SBCTC. The contention is not established as fact. While the concept may have been verbalized in a conversation, by or with Grievant, such information does not demonstrate that this was Respondents' designed course of action.[30]

Grievant has not presented credible or persuasive evidence to support his allegations that he was subjected to harassment, favoritism, or discrimination. Grievant found something inappropriate with all the monitors assigned by the State Superintendent to SBCTC. However, the fact that Grievant did not like the information he received from the monitors, does not mean it was inappropriate or constituted harassment. *Rider v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-348 (Apr. 7, 2000). Rather, the evidence shows that the actions of monitors toward and with Grievant were reasonable.

Grievant found fault with all the monitors assigned by the State Superintendent. Grievant questions the credentials of Monitor Ron Grimes, the authority of monitors, and the professionalism of Monitor Kolsun. Grievant does not establish unlawful conduct by any agent of Respondents. The role of the assigned monitors did vary to some degree. But the authority and mandated duties of the monitor(s) at SBCTC was not information unknown to Grievant. The WV State Board of Education, upon intervention, mandated that the State Superintendent appoint a monitor to SBCTC who would:

> 1) work at the direction of the State Superintendent in overseeing and administering all functions of the Center, 2) make recommendations to the State Superintendent as to how any deficiencies at the Center may best be addressed, 3) be responsible for overseeing the evaluation of personnel and developing improvement plans where necessary, and 4) perform other tasks as assigned

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[30] May 2008 conversation between Monitor Grimes and Grievant. Discussion of several different issues and potential resolutions. No definitive course of action was established pursuant to this conversation, many options were available to all parties.

(Minutes of the State Board of Education). *See* Grievant's Exhibit 1. This mandate was explained to Grievant, repeatedly. Grievant didn't truly appreciate the role of a monitor at SBCTC. Grievant was figuratively and verbally combative with monitors. His actions went beyond not understanding what was being asked of him. It is not found that the State Board illegally sent monitors to SBCTC.

Grievant contends Monitor Kolsun engaged in a systematic pattern of harassment and intimidation. Seen from another perspective, Monitor Kolsun attempted to do her job. She met with Grievant on a regular basis, identified and discussed what she perceived to be viable solutions to deficiencies to the essential operations of SBCTC. See Kolsun testimony and Respondents' Exhibits 14-22. She implemented checks and balances to measure and chart Grievant's accomplishments. Monitor Kolsun even adjusted directives when she determined it appropriate. All of these actions were within her mandate as Monitor, established via the state superintendent and by the State Board of Education. The undersigned was not convinced that Monitor Kolsun harassed Grievant. Grievant disapproved of Monitor Kolsun's methods of operation and her opinions of his conduct; this is readily evident. However, his disdain does not constitute validation of his repeated allegations of unlawful actions by Monitor Kolsun.

Nearly all of Grievant's underlying grievances are prefaced, in the attachments to them, with references to harassment and discrimination. However, Grievant, more times than not, merely listed in each, a series of statements with which he disagrees. In attempting to refute the statements, Grievant offers his contrary statements, or points to a series of actions that occurred prior to the WVBE's revocation of power from the SBCTC

administrative council. This is not persuasive evidence. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998). *See Bryant v. Dep't of Motor Vehicles*, Docket No. 05-DMV-403 (Sept. 29, 2006). This trier of fact does not find that Monitor Kolsun's various actions in attempting to facilitate the efficient and effective operation of SBCTC constituted unlawful acts of harassment and intimidation toward Grievant.

Grievant may truly believe that others are out to get him, but this belief is not enough to validate the accusation of reprisal and conspiracy levied against Respondents and their agents. Frustration can be a legitimate reaction. More than one Monitor acknowledged some form of it while interacting with Grievant. However, Grievant did not demonstrate through any measurable means that the actions of Respondents were tainted by nefarious motive. The record does not include evidence which establishes or significantly tends to indicate tainted action on the part of agents of Respondent. The evidence of record indicates that administrative personnel attempted to assist Grievant. An unflattering observation can be a valid reflection. It is not necessarily harassment. The fact that an employee does not like the information he receives from an employer does not mean it is inappropriate or constitutes harassment. *Rider v. Bd. of Trustees/Marshall Univ.,* Docket No. 99-BOT-348 (Apr. 7, 2000). Others who were at SBCTC to do their jobs, within a reasonable degree of efficiency, were negatively impacted by Grievant's conduct. There is no evidence that a dispute between Grievant and any administrator, faculty or mentor unduly facilitated or unreasonably contributed to the instant disciplinary measure.

As to the severity of the penalty imposed, this is an affirmative defense. Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Mitigation of a penalty is considered on a case-by-case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Under the circumstances presented, it has not been demonstrated that the disciplinary measure levied was so clearly disproportionate to the employee's offense that it constitutes an abuse of discretion. Grievant is and was unwilling to acknowledge shortcomings in his conduct. This is problematic, shortcomings were evident.

The State Board of Education assumed control of SBCTC and directed that monitors be appointed to oversee both the operation of the school and the performance of Grievant. Monitors presented Grievant with a memorandum and then a detailed plan which directed him to complete specific tasks believed to be essential to the operation of SBCTC. Grievant was provided opportunity to become a more effective leader. Grievant did not comply with specific directives given to him by monitors and failed to improve his

leadership capacity to a level deemed proficient (required) for successful operation of SBCTC. Respondent presented persuasive testimony and evidence to demonstrate that Grievant failed to effectively and efficiently administer the operation of SBCTC as instructed. This behavior constituted insubordination and a willful neglect of duty. Grievant did not establish by a preponderance of the evidence that Respondents' actions through the monitors at SBCTC were unreasonable or unlawful.

The events of this matter are regrettable, but the undersigned cannot find that termination was too severe a penalty. Clearly, Grievant was disrespectful, disruptive, and fell short of efficiently stewarding SCBTC during a critical period of its operation. Respondent had discretionary options in the circumstances of this case. Nevertheless, Respondent elected to terminate Grievant. Given the considerable deference afforded to employers in disciplinary situations, the undersigned is without sufficient justification to rule that the discipline imposed was excessive. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgment for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

The following conclusions of law are appropriate and support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

3. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

4. Performance improvement plans are part of the evaluation process and are management tools to increase productivity and correct unsatisfactory performance. Evaluations and performance improvement plans are not disciplinary actions. Consequently, Grievant has the burden of proving by a preponderance of the evidence that the performance improvement plan given to him was improper. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *Hedrick v. Dep't of Health & Human Res.*, Docket No. 2009-0496-CONS (Aug. 18, 2009); *Bailey v. Kanawha*

County Bd. of Educ. 2009-1594-KANED (January 19, 2010).

5. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

6. Grievant did not prove that the Performance Improvement Plan given to him was arbitrary and capricious.

7. Grievant did not establish that the Performance Improvement/action Plan created for him as the Director of a multi-county educational institution under state intervention was unlawful.

8. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). Insubordination " encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) *citing Weber v. Buncombe County Bd. of Educ.*, 266

S.E.2d 42 (N.C. 1980).

9. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994).

10. Respondent demonstrated its disciplinary actions, in the facts of this case, were not arbitrary, capricious or clearly excessive. Respondent met its burden of proof by a preponderance of the evidence, and established just cause for disciplinary actions against Grievant.

11. Respondent established by a preponderance of the evidence that Grievant's actions were deliberate and intentional to the degree that the conduct constituted insubordination and willful neglect of duty.

12. Respondent established by a preponderance of the evidence that, in the circumstances of this case, Grievant’s conduct constituted a terminable offense.

13. The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

14. The State Board of Education, Respondent, had discretionary options in the

circumstances of this case. Considerable deference is afforded to employers in disciplinary situations. An Administrative Law Judge will not substitute his judgment for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

15. Grievant failed to meet his burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the personnel action.

16. In order to establish a favoritism or discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

17. Grievant failed to demonstrate that he was the victim of discrimination or favoritism.

18. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997).

19. Grievant failed to establish that Respondents engaged in harassment and/or discriminatory activity.

Accordingly, this grievance is **DENIED**. Further it is recognized that this **ORDER** is issued to address the associated grievances of *Randy Whetstone v. South Banch Career and Technical Center and West Virginia Department of Education,* formerly Docket Number 2009-1683-SBCT, coupled with the grievances previously identified as;

Docket No. 2009-0356-SBCTC	Docket No. 2009-0676-SBCTC
Docket No. 2009-0385-SBCTC	Docket No. 2009-0677-SBCTC
Docket No. 2009-0559-SBCTC	Docket No. 2009-1815-SBCTC
Docket No. 2009-0566-SBCTC	Docket No. 2009-0679-SBCTC
Docket No. 2009-0579-SBCTC	Docket No. 2009-1816-SBCTC
Docket No. 2009-0678-SBCTC	Docket No. 2009-0680-SBCTC

(see list *infra*, p2, Joint Exhibit 1) Also see Consolidation Order of April 4, 2012.

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: May 14, 2012

_____
Landon R. Brown
Administrative Law Judge