

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**HENRY NEARMAN,
Grievant,**

v.

Docket No. 2023-0569-KanED

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

DECISION

Grievant, Henry Nearman, is employed by Respondent, Kanawha County Board of Education, as a Principal at Ruffner Elementary School. On January 18, 2023, Grievant filed a level one grievance due to being placed on a Corrective Action Plan ("CAP"). Grievant's Statement of Grievance stated the following:

On November 16, 2022, Mr. Nearman was suspended with pay pending an investigation and on December 16, 2022, Mr. Nearman was authorized to return to work. On January 6, 2023, Mr. Nearman was placed on a corrective action plan. The evidence does not show misconduct that would support Mr. Nearman being suspended for a month and ultimately being placed on a Corrective Action Plan on January 6, 2023. Mr. Nearman does not have a history of misconduct and did not receive any type of verbal or written warning, performance evaluation or attempt to rectify the situation prior to a suspension, furthermore, a Corrective Action Plan excessive [sic].

For relief, Grievant requested that the Corrective Action Plan be terminated.

Following the level one conference held on January 31, 2023, a level one decision was rendered on March 27, 2023, denying the grievance. Grievant appealed to level two on April 5, 2023. Grievant appealed to level three of the grievance process on September 18, 2023. A level three hearing was held on January 9, 2024, and March 8, 2024, before Administrative Law Judge Wes White in Charleston, West Virginia at the offices of the Public Employees Grievance Board. Grievant appeared in person and was represented

by counsel, Alan Pritt, Esq., of Pritt and Spano PLLC. Respondent appeared by Assistant Superintendent Amanda Mays and was represented by Lindsey McIntosh, Esq., General Counsel for the Kanawha County Board of Education. This matter became mature for decision on April 29, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Principal at Ruffner Elementary School. Grievant grieved being placed on a Corrective Action Plan ("CAP") for mishandling funds and giving inappropriate direction for addressing a student with special needs. Grievant failed to meet his burden to show Respondent arbitrarily and capriciously placed him on a CAP when an investigation revealed 17 findings of noncompliance with Respondent's manual of financial records for Kanawha County Schools. Grievant also simplified a behavioral plan for a special needs child known to have behavior issues. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as the Principal of Ruffner Elementary School.
2. Former Ruffner Elementary School Secretary Kim Robinson primarily handled all financial accounting duties before she retired before the 2022 school year. Grievant would sign off on her financial accounting documentation. While Ms. Robinson was employed, there were no financial reporting concerns at the school.

3. Ms. Robinson did not train her replacement before she retired, and her position was not replaced right away with a full-time Secretary. Instead, Ruffner Elementary School would have a Substitute Secretary fill in for the position. The Substitute Secretary would perform all the prior duties of Ms. Robinson, including the financial accounting. Grievant continued to sign off the financial accounting reporting that was performed by the Substitute Secretary.

4. At the level three hearing, Daniel Rose, Accountant for Kanawha County Schools, explained how Kanawha County Schools performs an annual financial audit each year. The audit is performed by taking a sample from the financial reporting documentation to determine whether any financial irregularities have occurred. Mr. Rose explained that the audit is in accordance with Kanawha County School policies and any violation is a cause for concern.

5. In August of 2022, Ruffner Elementary School conducted its annual financial audit. The sample taken for the August 2022 audit did not show any irregularities. The August 2022 financial audit occurred after Ms. Robinson retired.

6. Grievant's prior audits did not raise any cause for concern and Grievant had never been disciplined.

7. On October 27, 2022, Megan McCorkle, the Assistant Superintendent of Special Education, reported to Dr. Mellow Lee, the Assistant Superintendent of Elementary Schools and Grievant's supervisor, that on October 25, 2022, an incident occurred where Grievant and one of his teachers questioned the Autism eligibility of a child in an IEP¹ team meeting. *See Respondent's Exhibit No. 6.*

¹ Both parties used the term "IEP" but failed to explain the meaning of the acronym.

8. On October 27, 2022, Assistant Superintendent Lee emailed Grievant informing him that there were concerns regarding Grievant's behavior at an IEP meeting and that there would be an investigation into the matter.

9. On November 2, 2022, there was an incident at Ruffner involving a special needs student in the self-contained classroom. The incident involved the student becoming upset, attempting to leave the classroom, and throwing objects and paint. One teacher had to seek medical attention due to getting paint in their eyes.

10. The student involved in the November 2, 2022, incident had a history of past behavior issues. Due to the student's history of behavior issues, Vicki Brown, a Board-Certified Behavior Analyst, developed a behavior plan to address his behavioral incidents. The behavior plan stated, "If [the student] continues to be a danger to himself or others, staff must use their judgement as outlined in CPI's nonviolent crisis intervention training to determine if physical safety interventions must be used in order to maintain safety." *See Respondent's Exhibit No. 2.*

11. The November 2, 2022, incident was investigated by Investigator Katheryne Smith, for the Respondent.

12. On November 7, 2022, Investigator Smith submitted a written memo to Respondent regarding the November 2, 2022, incident that outlined the actions of the student and how school staff responded to the student's behavior. *See Respondent's Exhibit No.*

13. On November 3, 2022, a letter of reprimand was issued to Grievant for the October 25, 2022, incident. *See Respondent's Exhibit No. 5.* Grievant did not grieve the letter of reprimand.

14. On November 9, 2022, another incident occurred with the same special needs student where the student bit a staff member and threw an object that hit another staff member in the head.

15. The incident on November 9, 2022, was investigated and it was revealed that when Grievant was made aware of the incident, he instructed staff to call the student's mother to come and get the student.

16. On November 15, 2022, a Substitute Secretary called the Lead Secretary for the Respondent, Leslie Michaelson, and reported concerns regarding financial irregularities at the school.

17. On November 15, 2022, Ms. Michaelson went to Ruffner Elementary School to investigate the alleged financial irregularities. Ms. Michaelson found several financial issues that did not follow the county's financial manual regarding the collection and receipt of cash, staff not paying for lunches, and a memo that had been sent home to parents regarding the price of adult lunch for Thanksgiving.

18. On November 15, 2022, Ms. Michaelson reported the financial irregularities at the school to Respondent.

19. On November 16, 2022, Grievant was suspended, with pay and pending investigation, by letter, alleging that he "mishandled funds and gave inappropriate direction for addressing a student with special needs." *See Respondent's Exhibit No. 1.*

20. As part of the investigation into financial irregularities, a second financial audit was conducted for Ruffner Elementary School that took a larger sample than the first audit.

21. During the financial investigation, the incidents with the special needs student were also reviewed by Respondent. The review revealed that Grievant created a simplified plan for his staff of Ms. Brown's behavior plan. *See Respondent's Exhibit No. 3.*

22. Grievant's simplified version of Ms. Brown's behavior plan omitted certain parts of Ms. Brown's plan involving non-violent intervention and de-escalation. Grievant's simplified version of the behavior plan for the special needs student was in effect at the time of the incident on November 2, 2022.

23. On December 13, 2022, Respondent received the results from the second financial audit that revealed 17 findings of noncompliance with Respondent's manual of financial records for Kanawha County Schools. *See Respondent's Exhibit No. 3.*

24. On December 16, 2022, Grievant received a letter from Respondent permitting him to return to work. *See Respondent's Exhibit No. 2.* The December 16, 2022, letter noted what was found in Grievant's investigation and informed Grievant he would be placed on a Corrective Action Plan ("CAP").

25. Dr. Thomas E. Williams, Jr., Superintendent for Kanawha County Schools explained the investigation process of determining whether a CAP is considered. Superintendent Williams explained that the more findings discovered from an investigation the more reason for a CAP unless one of the findings is serious, I.E. theft, etc.

26. Shortly after Grievant returned to work, the mother of the special needs child who was involved in the two incidents emailed the Superintendent and several members

of the Kanawha County School Board expressing her displeasure with Grievant's return to work and the safety of her child. *See Respondent's Exhibit No. 12.*

27. On January 6, 2023, Grievant was placed on a CAP. The CAP stated that the investigation did not reveal any findings of theft but there was concern over money deposited in the bank that was incorrect from the invoice. The areas for improvement outlined in the CAP was, 11.3 "Professional Conduct – Adhering to Policies and Procedures. The policies mentioned were "the collection of money and its distribution... WVBE Policy 2419, WVBE Policy 4373, KCS policy J25, and federal law under the IDEA." *See Respondent Exhibit No. 9.*

28. Grievant successfully completed the CAP on May 26, 2023.

Discussion

The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013). "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." *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10- 427 (Jan. 24, 1995). Therefore, this grievance does not involve a disciplinary matter and Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

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).

An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-

DOE081 (Oct. 16, 1996);” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

Grievant argues that being suspended with pay for a month pending an investigation and then being put on a CAP was excessive. Grievant asserts he does not have a history of misconduct, did not receive any type of verbal or written warning, nor was he offered any attempt to rectify the situation prior to a suspension. Grievant also asserts that Respondent failed to provide adequate evidence or justification for suspending Grievant and placing him on a CAP. Grievant asserted he was unfairly placed on the CAP due to the Respondent’s fear of a lawsuit from the special needs child’s mother. Respondent argues Grievant engaged in multiple incidents of misconduct that caused concern including having 17 findings of noncompliance with the School Board’s financial policies that constitute Grievant rightfully being put on a CAP.

Respondent chose to suspend Grievant pending investigation after receiving a report of multiple alleged financial irregularities and an allegation he gave inappropriate direction for addressing a student with special needs. An allegation of financial impropriety is a very serious allegation. It is reasonable for Respondent to suspend Grievant to protect the Board’s interests given the seriousness of an allegation of financial impropriety. Further, as Grievant was suspended with pay, he suffered no harm from the suspension pending investigation.

There is no dispute between the parties that CAPs are treated similarly as improvement plans. Thus, the issue here is to determine whether Respondent arbitrarily and capriciously placed Grievant on a CAP after suspending him with pay pending an

investigation into multiple incidents. The record reveals that Respondent did not unreasonably, without consideration, and in disregard of facts and circumstances of the case place Grievant on a CAP.

Prior to being placed on the CAP, Respondent gave notice to Grievant that he was being suspended with pay for the purpose of an investigation. Grievant was informed the investigation was due to concerns of Grievant mishandling funds and giving inappropriate direction for addressing a student with special needs. The record reveals that a second financial audit revealed 17 findings of noncompliance with Respondent's manual of financial records for Kanawha County Schools. *See Respondent's Exhibit No. 3.*

At the level three hearing, Grievant attempted to downplay the noncompliance by saying the 17 violations were merely an error in bookkeeping made by an untrained Substitute Secretary. However, Dr. Thomas E. Williams, Jr., Superintendent of Kanawha County Schools, made it clear that it was Grievant's duty to ensure compliance with the financial recordkeeping and not the Secretary's responsibility. Further, Daniel Rose, Accountant for the Kanawha County Schools, explained that any financial violation is a cause for concern and the second audit revealed 17 separate violations. Clearly, 17 violations demonstrate Respondent did not arbitrarily and capriciously place Grievant on a CAP when the record shows a single violation would create a cause for concern. Moreover, Grievant admitted that without the knowledge he gained from participating in the CAP that he would still be susceptible to continue to make mistakes.

Superintendent Williams stated that the more findings there are from an investigation, the more reason for a CAP. The 17 findings of noncompliance with Respondent's financial recordings policy were not the only issues that caused concern

for Respondent. The record revealed that Grievant also simplified a behavioral plan for a special needs child with known behavioral issues and two incidents occurred that involved the child. Grievant argued he felt he was being unfairly punished for fear of the special needs child's mother suing the school. However, the incidents with the child were merely a supplemental factor that was not ignored by Respondent. A behavior plan was created for the special needs child and by simplifying that plan, Grievant created an unsafe place for the teachers. One teacher had to seek medical attention due to the student's actions. While Grievant's simplified version of the plan was not argued to directly cause the teacher's injury, the action of simplifying the plan was a contributing factor to be included in Grievant's investigation. The record revealed the CAP itself primarily focused on issues dealing with the collection of money and its distribution. *See Respondent Exhibit No. 9.*

Thus, the complete record clearly revealed Respondent did not arbitrarily or capriciously place Grievant on a CAP due to the investigation revealing 17 findings of noncompliance with financial policy and simplifying a behavior plan that contributed to a teacher needing to seek medical attention. Accordingly, the grievance should be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-

HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “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] case by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10- 427 (Jan. 24, 1995).

3. 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).

4. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

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. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE081 (Oct. 16, 1996);” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

6. Grievant failed to meet his burden to show Respondent arbitrarily and capriciously placed him on a Corrective Action Plan when an investigation revealed 17 findings of noncompliance with Respondent’s manual of financial records for Kanawha County Schools. Grievant also simplified a behavioral plan for a special needs child with known behavior issues in addition to the 17 findings of noncompliance with Respondent’s manual.

Accordingly, the grievance is **DENIED**.

“The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed.” W. VA. CODE § 6C-2-5(a) (2024). “An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure.” W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: June 12, 2024

Wes White
Administrative Law Judge