

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**VIRGINIA D. MORRIS,  
Grievant,**

**v.**

**Docket No. 2017-2189-JefED**

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

**DECISION**

Grievant, Virginia Morris, filed this action against her employer, Jefferson County Board of Education, on May 11, 2017, directly to Level Three. Grievant challenges observations and evaluations of her from January 2017 through the time of the filing of the grievance indicating that they were “procedurally flawed, not open and honest, arbitrary and capricious.” Grievant also alleges reprisal. She seeks rescission and expungement of the unsatisfactory evaluations; for the Plan of Improvement to be rescinded, and to be re-employed in the same position and same school without reprisal and to be made whole. The controlling issue in this matter is Respondent’s decision not to renew the Grievant’s probationary contract.

A Level Three evidentiary hearing was conducted before the undersigned on July 10, 2017. Grievant appeared in person and by her counsel, Steven Brett Offutt, Esquire. Respondent appeared by its counsel, Tracy B. Eberling, Steptoe and Johnson, PLLC. This matter became mature for consideration upon receipt of the Respondent’s fact/law proposals on August 11, 2017. Grievant’s attorney failed to provide fact/law proposals on the initial deadline or after being given an extension of the time period to file proposals.

## **Synopsis**

Grievant, a probationary employee, challenged the non-renewal of her probationary contract. Grievant failed to prove that Respondent's decision was arbitrary and capricious. The record supported a finding that the decision not to renew Grievant's contract came after three years of efforts to help the Grievant meet standards. Respondent took all appropriate steps to advise the Grievant of its concerns about her performance and to give her the tools to improve. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievant was hired by the Respondent to teach math at Harpers Ferry Middle School for the 2014-15 school year. She worked on a probationary contract for that year.
2. Eric Vandell, Harpers Ferry Middle School Principal, assumed the responsibility for observing and evaluating all new teachers for the 2014-15 school years and served as the Grievant's supervisor.
3. At the end of the 2014-15 school year, Grievant completed a self-assessment in which she rated herself as Distinguished in one area, Accomplished in 12 areas and Emerging in one area.<sup>1</sup>
4. At the end of the 2014-15 school year, Principal Vandell rated the Grievant as Accomplished on 7 of the 14 standards and as Emerging on the other 7. On Student

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<sup>1</sup>At the end of each school year, all West Virginia teachers complete a self-assessment rating form and rate themselves on a four level scale on five of the West Virginia Professional Teaching Standards. A total of 14 areas within the five standards are rated. The ratings available are Distinguished, Accomplished, Emerging and Unsatisfactory.

Learning Goals, he marked her as Accomplished on one and Emerging on the other. In all of the four areas of Professional Conduct, he rated the Grievant as Meets Standards. The Grievant's overall rating as calculated by the West Virginia Department of Education was Emerging.

5. After the 2014-15 school year, Grievant was offered additional support to assist her with professional development and to improve her teaching abilities. This consisted of her attending the APL teacher academy over the summer.

6. Because of concerns about Grievant's abilities voiced by parents of her students, Principal Vandell adjusted Grievant's course load and removed the Math Honors from her course load and assigned her remedial computer-based classes.

7. Grievant received a probationary contract for the 2015-16 school year.

8. During the 2015-16 school year, Grievant was again observed by Principal Vandell.

9. At the end of the 2015-16 school year, Grievant completed a self-assessment in which she rated herself as Accomplished in 5 areas and Emerging in 9 areas. This represented a decline for the prior year's self-assessment.

10. Principal Vandell's evaluation of Grievant also showed a decline in his ratings of her. Her ratings in the individual categories largely declined, resulting in only four areas noted as Accomplished and was ranked as Emerging in the other ten. She improved on one Student Learning Goal and had two Accomplished ratings in the sub parts of that standard. Grievant was noted Meet Standards again in all 4 areas of the Professional Conduct Standard.

11. Grievant was provided with additional assistance for improvement in the following school year, consisting of the support of an educational coach.

12. Grievant was issued a third year probationary contract for the 2016-17 school year.

13. For the 2016-17 school year, Assistant Principal Jennifer Moss assumed the responsibility for observing and evaluating Grievant, as well as a number of other teachers. The 2016-17 school year was Ms. Moss's sixth year as an Assistant Principal.

14. Ms. Moss observed Grievant on August 26, 2016, and found her work to be adequate, but noted that she did not have an evident lesson plan, no agenda, or objectives for the activities that students would be completing. Ms. Moss also noted that she was not certain that Grievant was following the prescribed program for one of her courses.

15. In January of 2017, during the course of meetings with students failing or having borderline failing grades, a student reported concerns to school administration about Grievant and her teaching skills.

16. Ms. Moss observed Grievant on January 23, 2017, and noted significant concerns in the five standards areas observed.

17. Ms. Moss held a post-observation conference with Grievant on January 24, 2017, and placed her on a Focused Support Plan. The plan provided that Grievant would receive support from an instructional coach, frequent visits by Ms. Moss and that Grievant was required to attend new teacher meetings.

18. Ms. Moss observed Grievant on February 24, 2017, and while she noted some improvement, Grievant was still struggling in other areas.

19. A progress assessment meeting was held on March 3, 2017, the midpoint of the Focus Support Plan, and Grievant was advised that she had not made adequate progress and that the plan would be continued.

20. During Ms. Moss's observation of Grievant on March 9, 2017, Grievant provided incorrect information to her students during the class period. Grievant was unable to complete the math problem that she attempted to demonstrate for the class and could not reach the correct answer by the end of the class period.

21. Ms. Moss offered support to Grievant and also documented a number of areas of new and continued concerns about Grievant's teaching ability. Ms. Moss offered to model a lesson for Grievant; however, Grievant did not follow up and failed to provide Ms. Moss with the information requested to prepare a lesson. In addition, Grievant did not keep all scheduled meetings with her instructional coach.

22. Grievant and her representative met with the Chief Human Resources Officer for Jefferson County Schools, Joseph Pettiford. Grievant expressed that she did not feel that she was being treated fairly by Ms. Moss and asked for another supervisor. Mr. Pettiford denied this request.

23. Another observation was conducted by Ms. Moss on March 20, 2017, and continued deficiencies were noted in a number of standards areas. A final observation was conducted on March 27, 2017. Deficiencies were noted in three of the standards areas.

24. Ms. Moss met with Grievant and her representative on March 30, 2017, at the conclusion of the Focus Support Plan. Ms. Moss advised Grievant that she had not made adequate progress in the standards areas. Ms. Moss explained that it was her intention to place Grievant on a Corrective Action Plan.

25. Ms. Moss prepared a draft Corrective Action Plan and scheduled a meeting with Grievant for April 4, 2017, to finalize the plan. Grievant took April 4, 5, 6, and 7 as sick days. Grievant thereafter did not agree to attempts to reschedule the meeting through April 24, 2017.

26. On April 6, 2017, the Jefferson County Human Resources Department provided all of the county's Principals with a list of the staff members on probationary contracts in their respective schools and asked for their input as to whether or not the contracts should be renewed or become continuing contracts.

27. The list provided to Principal Vandell included Grievant's name. He consulted with Ms. Moss, who shared her concerns about Grievant's failure to make adequate progress on the Focus Support Plan. Principal Vandell recommended that Grievant's probationary contract not be renewed.

28. The Jefferson County Board of Education met on April 24, 2017, and accepted the list proposed by the Superintendent of contracts to be renewed. Grievant's name was not included on that list.

29. Superintendent Bondy Shay Gibson sent a certified letter to Grievant dated April 27, 2017, advising her of the Board of Education's decision at its April 24, 2017, meeting.

30. On April 27, 2017, Grievant met with the Benefits Coordinator for Jefferson County Schools. Grievant expressed that she felt she needed a break and asked about leave options. Grievant was given paperwork to complete to be considered for leave under the Family Medical Leave Act. Upon receipt of the paperwork, the Benefits Coordinator advised that the health care provider had not sent all of the necessary information and

wrote to Grievant and requested additional details. The request was provided and Grievant's leave was approved effective May 1, 2017, through the end of the 2016-17 school year.

### **Discussion**

The non-renewal of a probationary contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof by a preponderance of the evidence. *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005). 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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

The undersigned acknowledges that WEST VIRGINIA CODE § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove her case, Grievant must establish the board's decision to not renew her contract was arbitrary and capricious. *Mellow v. Jefferson County Bd. of Educ.*, Docket No. 2010-1397-JefED (Oct. 8, 2010).<sup>2</sup>

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<sup>2</sup>WEST VIRGINIA CODE § 18A-2-8a provides:

The superintendent at a meeting of the board on or before May 1 of each year shall provide in writing to the board a list of all probationary teachers that he or she recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections two and five of this article. Any such probationary teacher or other probationary employee who is not rehired by

Respondent's non-renewal of Grievant's contract clearly complied with the requirements of WEST VIRGINIA CODE § 18A-2-8a, which is the governing code section in this case. There being no procedural deficiency, Grievant must prove by a preponderance of the evidence that Respondent's decision was arbitrary and capricious. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

As previously noted, the record established that Respondent afforded Grievant with the statutory protections provided by WEST VIRGINIA CODE § 18A-2-8a. In addition, the

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the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.

Any probationary teacher who receives notice that he or she has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. The hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.



record further established that Respondent's decision not to renew Grievant's contract of employment was justified and not arbitrary and capricious.

Beginning with her first year of teaching at Harpers Ferry Middle School, Grievant's performance was somewhat marginal. Grievant was provided with support to help her improve after her first year. Despite those efforts, her evaluation for the 2015-16 school year did not show improvement, to the contrary, the quality of her work declined both in her own self-assessment, as well as that of her supervisor.

Grievant was observed and evaluated by another administrator for the 2016-17 school year. Ms. Moss, the new supervisor, was experienced and had undergone training in evaluating personnel. Ms. Moss's initial observation of Grievant showed adequate skills, with some deficiencies. In the observation conducted on January 23, 2017, a different scenario was revealed. Respondent made further efforts to assist Grievant with her professional development by placing her on a Focus Support Plan and providing other support.

Despite the assistance and support provided to her over the nine weeks of the Focus Support Plan, Grievant failed to improve. The record is undisputed that Ms. Moss observed Grievant's inability to complete a math problem for her class and that she exhibited confusion in attempting to do the same during the course of the class. The decision not to renew Grievant's contract came after three years of efforts to help Grievant meet standards. Math is a foundational subject and effective instruction is critical at all academic levels. Grievant was provided with three years to demonstrate her ability to meet applicable standards for Respondent and failed to meet them.

Finally, reprisal could not have occurred in this case as the decision to not renew the Grievant's contract came before Grievant filed this action. Grievant offered no evidence that any action was taken because of her support for any other person in the grievance process. Grievant did not meet her burden of proof and offered no evidence at Level Three to establish that Respondent acted in an arbitrary and capricious manner in declining to renew Grievant's probationary contract.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. The non-renewal of a probationary contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof by a preponderance of the evidence. *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005).

2. WEST VIRGINIA CODE § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove her case, Grievant must establish the board's decision to not renew her contract was arbitrary and capricious. *Mellow v. Jefferson County Bd. of Educ.*, Docket No. 2010-1397-JefED (Oct. 8, 2010).

3. Respondent properly followed the requirements of WEST VIRGINIA CODE § 18A-2-8a in the non-renewal of Grievant's contract. Grievant failed to prove that Respondent's decision was arbitrary and capricious given the record of this case.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by 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: August 29, 2017**

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**Ronald L. Reece**  
**Administrative Law Judge**