THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES DAVIS,

Grievant,

v. **Docket No. 2018-1418-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Charles Davis, filed this expedited level three grievance against his employer, Kanawha County Board of Education, dated June 22, 2018, stating as follows: "I was wrongfully terminated from my position at Kanawha County Schools." As relief sought, Grievant asks "[t]o be put back into my position and to receive back pay and seniority lost."

A level three hearing was conducted on September 25, 2018, before the undersigned administrative law judge at the Grievance Board's office in Charleston, West Virginia. Grievant appeared in person and by his representative, Rodman Stapler, West Virginia School Service Personnel Association. Respondent, Kanawha County Board of Education, appeared by counsel, James W. Withrow, Esquire. At the commencement of the level three hearing, the parties informed the ALJ that they wished to submit this matter for decision on the record created at the lower level proceeding. Given the agreement of the parties and their request, the ALJ granted the same. Accordingly, no evidence was presented by either party at the level three hearing. Thereafter, the mailing date for the parties' proposed Findings of Fact and Conclusions of Law was set as October 31, 2018.

This matter became mature for consideration on November 2, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as an Electrician II. Respondent terminated Grievant's employment asserting the charge of unsatisfactory performance. Grievant denies Respondent's claims and argues that he was wrongfully terminated. Respondent proved by a preponderance of the evidence the charge of unsatisfactory work performance, thereby justifying Grievant's termination. 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. At the times relevant herein, Grievant was employed by Respondent as an Electrician II. It is unclear from the record how long Grievant was employed by Respondent, and how long he held the Electrician II position.

2. Donnie Bowe is Grievant's director supervisor. Prior to Mr. Bowe becoming Grievant's supervisor, Charlie Rucker had served as his supervisor.[1] Terry Hollandsworth is the Executive Director of Maintenance. Grievant's supervisor reports to Mr. Hollandsworth.

3. Grievant was assigned to work primarily in the preventative maintenance program. Grievant is the only electrician assigned to work in this program. This

[1]Mr. Rucker has since retired from his position with Respondent.

assignment required Grievant to travel to Respondent's various buildings and facilities to perform various electrical work as directed by work orders.

4. Work orders for the preventative maintenance program are generated through the maintenance department's computerized maintenance management system. These work orders would go directly to Grievant. Other work orders would come in from schools, bus garages, and other facilities owned by Respondent. Once they came in, Mr. Hollandsworth directed them to Mr. Bowe, who then directed them to the appropriate employee.

5. Grievant had trouble timely completing his work orders. Grievant was expected to work independently to complete the work orders. He was not given regular instructions as to where to go and what to do. He was given his work orders and expected to group them by location, travel to the identified sites, and complete the work required by the orders.

6. On March 22, 2016, Terry Hollandsworth conducted an evaluation of Grievant's work performance. Mr. Hollandsworth evaluated Grievant's performance as unsatisfactory in a number of areas, including "work judgments," planning and organizing," "follows instructions," "acceptance of responsibility," and "work coordination," and evaluated Grievant's performance as unsatisfactory overall. Mr. Hollandsworth noted as a specific goal or improvement program "completion of PM work orders & report on progress." Mr. Hollandsworth further noted "get the PM program up & running" as the "specific work performance areas for improvement or job behavior requiring improvement or correction."[2]

[2]*See*, KCS Exhibit 1, lower level, Evaluation dated March 22, 2016.

7. On September 26, 2016, Mr. Hollandsworth placed Grievant on a six-month Performance Plan of Improvement. The Performance Plan of Improvement was written, and stated the following as to its purpose: "The purpose of this plan of improvement is to define serious areas of concern, gaps in your work performance, reiterate Kanawha County Schools expectations, and allow you the opportunity to demonstrate improvement and commitment." Further, this plan of improvement lists "areas of concern," "observations, previous discussions or counseling," "goals," "resources," "expectations," "progress checkpoints," and "timeline for improvement, consequences & expectations." This plan of improvement is signed by Grievant, Mr. Hollandsworth, and Charlie Rucker, then Grievant's supervisor.[3]

8. The areas of concern identified by the Performance Plan of Improvement were "completion of work orders," "attendance, tardiness, and leaving early," and "electrical preventative maintenance program."

9. In the "Progress Checkpoints" section of the improvement plan, Mr. Hollandsworth set forth a monthly schedule for meeting with Grievant to evaluate him and to provide him feedback on his progress.

10. The "timeline for improvement, consequences & expectations" section of the improvement plan states as follows:

> Effective immediately, you are placed on a six month plan of improvement. During this time you will be expected to make regular progress on the plan outlined above. Failure to meet or exceed these expectations, or any display of gross misconduct will result in further disciplinary action, up to and including termination. In addition, if there is no significant improvement to indicate that the expectations and goals will be met within the timeline indicated in the Plan of

[3]*See*, KCS Exhibit 2, lower level, "Performance Plan of Improvement."

> Improvement, your employment may be terminated prior to the six months. Furthermore, failure to maintain performance expectations after the completion of the Plan of Improvement may result in additional disciplinary action up to and including termination.[4]

11. By letter dated March 6, 2017, Mr. Hollandsworth informed Grievant that he had successfully completed his Plan of Improvement "for the Preventative Maintenance program, attendance and personal hygiene." Mr. Hollandsworth further stated, "I applaud you on your efforts. This last month it appeared that you were finally getting the idea. Now it is of the utmost importance that you continue to improve as a professional employee of Kanawha County Schools."[5]

12. On June 23, 2017, Mr. Hollandsworth performed another performance evaluation on Grievant. Mr. Hollandsworth noted a number of areas of unsatisfactory performance, including "observation of work hours," "attendance," "planning and organizing," "follows instructions," and "meeting schedules," and evaluated Grievant's performance as overall unsatisfactory. Mr. Hollandsworth noted on the evaluation that the preventative maintenance program still needed improvement, and that Grievant had 43% of his work orders completed in 81 days, and that Grievant only completed 19% of his work orders on time. Mr. Hollandsworth listed as Grievant's goals as improving his work order completion by 5-10% and "fleet safety." Grievant signed this evaluation on June 27, 2017.[6]

13. Following the June 2017 evaluation, both Mr. Hollandsworth and Mr. Bowe met with Grievant to discuss his work performance, attendance, and personal hygiene.

---

[4]*See*, KCS Exhibit 2, lower level, "Performance Plan of Improvement."
[5]*See*, KCS Exhibit 3, lower level, letter dated March 6, 2017.
[6]*See*, KCS Exhibit 4, lower level, "Evaluation Form" dated June 23, 2017.

14. On May 2, 2018, Mr. Bowe evaluated Grievant's performance as unsatisfactory in a number of areas, many of which were identified as unsatisfactory in prior evaluations. Such areas of unsatisfactory performance included "observance of work hours," "attendance," "meeting schedules," "work judgments," "planning and organizing," "acceptance of responsibility," "follows instructions," and "work coordination," among others. Mr. Bowe noted as "goals or improvement programs to be undertaken" as personal hygiene, preventative maintenance program excessively overdue, attendance, observance of work hours. As "areas of improvement or job behavior requiring improvement or correction," Mr. Bowe listed "Meeting in Jan. about hygiene. Also meeting on April 2, 2018 about his PM work orders. Informed Mr. Davis that the amount of completed order for the past 12 months was unsatisfactory. He agreed that 1 order every couple of days was not too much to ask, and agreed to do better."[7]

15. In his May 2, 2018, evaluation of Grievant's performance, Mr. Bowe noted that the evaluation was overall unsatisfactory, and that he would not recommend Grievant's continued employment.[8]

16. By letter dated May 15, 2018, Superintendent Duerring informed Grievant that he was suspended with pay, stating, in part, as follows:

> [o]n March 22, 2016, you were given an evaluation that was marked as unsatisfactory in several areas and unsatisfactory overall. On September 22, 2016, you were placed on an Improvement Plan designed to remedy the deficiencies noted in the evaluation. You completed the plan successfully on March 6, 2017. On June 23, 2017, you were given an evaluation that was marked as unsatisfactory in several areas and unsatisfactory overall. Despite your supervisor and Mr.

[7]*See*, *See*, KCS Exhibit 10, lower level, "Evaluation Form" dated May 2, 2018.
[8]*See*, *See*, KCS Exhibit 10, lower level, "Evaluation Form" dated May 2, 2018.

> Hollandsworth working with you to assist you in improving, your job performance has not improved. On May 2, 2018, you were given an additional evaluation in which several areas were noted as being unsatisfactory and unsatisfactory overall. The evaluation also did not recommend that your employment be continued.
>
> Based on the foregoing you are hereby suspended, with pay, pending hearing and recommendation to the Board of Education. . . Please be advised that a hearing will be held on May 24, 2018, beginning at 10:00 a.m., in Room 219, at 200 Elizabeth Street, Charleston, West Virginia, to determine if any additional disciplinary action, up to and including dismissal should be imposed. . . .[9]

17. An employee disciplinary hearing was held for Grievant before Hearing Examiner Anne B. Charnock on May 24, 2018. Grievant was then represented by counsel, Joe Spradling, WVSSPA. By decision dated June 8, 2018, Hearing Examiner Charnock ruled that "[Grievant's] failure to perform his job in a satisfactory manner can be sanctioned by Employer up to and including termination." The Hearing Examiner did not recommend any particular sanction, or discipline. Instead, she only recited Respondent's options in discipling Grievant.[10]

18. By letter dated June 12, 2018, Superintendent Duerring informed Grievant that as follows:

> I am in receipt of the recommended decision by the independent hearing examiner, issued on June 8, 2018, wherein she determined that you were guilty of misconduct and recommended that you be subject to disciplinary action up to and including termination from your employment with Kanawha County Schools. A copy of the decision is included herein.
>
> I concur with the findings, conclusions and recommendations of the hearing examiner and intend to recommend to the

[9]*See*, Exhibit "HE No1," lower level, letter dated April 30, 2018.
[10]*See*, "Decision of the Hearing Examiner" dated June 8, 2018.

> Board of Education that you be dismissed from your employment. Once the Board of Education acts on my recommendations, you will be advised of the Board's decision. In the interim, you will be suspended without pay, pending the recommendation to the Board.[11]

19. By letter dated June 22, 2018, Superintendent Duerring informed Grievant of the following:

> Please be advised that at its meeting on June 21, 2018, the Kanawha County Board of Education adopted the following motion:
>
> I move the Board adopt the findings and conclusions of the hearing examiner, approve the Superintendent's prior suspension of Charles M. Davis and further approve the Superintendent's recommendation for dismissal of Charles M. Davis, and Charles M. Davis shall be, and he is hereby, terminated from his employment with the Kanawha County Board of Education, effective immediately. . . .

20. Respondent had not charged Grievant with any specific offense at the time he was suspended. In his letter, Superintendent Duerring's describes the incident, but does not charge Grievant with any violation of WEST VIRGINIA CODE § 18A-2-8(a). Further, Dr. Duerring only refers to the allegations against Grievant and the cause for his termination as "misconduct." The hearing examiner from the school disciplinary hearing labeled Grievant's conduct as "unsatisfactory work performance," and that was not stated until she issued her recommended decision.

21. Grievant did not testify at the employee discipline hearing before the hearing examiner on May 24, 2018. Further, Grievant presented one exhibit, but no other evidence at that hearing. His counsel cross-examined the two witnesses Respondent called during that hearing, but did not call any witnesses in his case-in-chief.

[11]*See*, letter dated June 12, 2018, lower level record.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. 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 employer has not met its burden. *Id*.

Grievant argues that he was wrongfully terminated from his position at Kanawha County Schools. He asserts that he had received no prior discipline and that termination of his employment was the wrong sanction. Grievant also disagrees as to what should be considered a reasonable time to complete his work orders. Respondent asserts that it properly terminated Grievant for unsatisfactory performance as Grievant had notice of his performance issues, how to improve, and that continued unsatisfactory performance could result in termination of his employment.

The authority of a county board of education to suspend or terminate an employee's contract must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 91-AA-110 (June 4, 1992).

WEST VIRGINIA CODE §18A-2-8 states, in part that,

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

W. VA. CODE § 18A-2-8(a). "A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. . . ." W. VA. CODE § 18A-2-8(b). However, "[i]t 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), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, ***aff'd, Duruttya v. Bd. of Educ.,*** 181 W. Va. 203, 382 S.E.2d 203 (1989).

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-DOE-

081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

While Respondent failed to charge Grievant with any particular ground in its letter dated April 30, 2018, Superintendent Duerring detailed Grievant's history of unsatisfactory performance, evaluations, prior improvement plan, and his then-current performance issues.[12] The lower level hearing examiner found that Grievant's conduct constituted unsatisfactory performance. Superintendent Duerring adopted the hearing examiner's recommended decision and recommended Grievant's dismissal based upon the same. The Board then dismissed Grievant.

[12]*See*, Exhibit "HE No1," lower level, letter dated April 30, 2018.

"The factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [he] does not know the standard to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002)." *Waggoner v. Cabell County Bd. of Educ.,* Docket No. 2008-1570-CabED (Oct. 31, 2008).

The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[13] conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ.,* 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in WEST VIRGINIA CODE § 18A-2-12a and state the following:

> (6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to termination or transfer of their services. Decisions concerning the promotion, demotion, transfer, or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in

[13] Although the Court's discussion in *Maxey* referred to a teacher, the statutes in the case apply with equal force to all public school employees. *See* W. Va. Code §§ 18A-2-8 and 18A-2-12a.

> matters affecting their employment, transfer, demotion or promotion . . . .

Id.

The Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732, 274 S.E.2d 435 (1980) where it wrote:

> Our holding in *Trimboli, supra,*[14] requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable." The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli, supra,* and in *Rogers, supra,*[15] be understood to mean an offense of conduct which affects professional competency.

Id at 739. Concerning what constitutes "correctable" conduct, the Court noted that "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Id.* "A board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are 'correctable.'" *Mason County Bd. of Educ., supra.*

Further, "[a] review of past improvement plans and disciplinary action 'can establish an employee was on notice of his inappropriate behavior, and that a continuing

[14] *Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W. Va. 1, 254 S.E.2d 561 (1979).
[15] *Rogers v. Bd. of Educ.,* 125 W. Va. 579, 588, 25 S.E.2d 537 (1943).

pattern of behavior is present which has proven not correctable.' *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002). *Byers v. Wood County Bd. of Educ.*, Docket No. 2013-2075-WooED (Oct. 31, 2013). To rule otherwise, 'would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement.' *Dalton v. Monongalia County Bd. of Educ.*, Docket No. 2010-1607-MonED (Nov. 23, 2010), *aff'd*, Kanawha County Cir. Ct., Civil Action No. 11-AA-2 (May 12, 2011)." *Yoders v. Harrison County Bd. of Educ*., Docket No. 2016-0129-HarED (Jan. 15, 2016).

In this case, Grievant's unsatisfactory performance in the various areas of his job duties and responsibilities are not correctable. Grievant has been evaluated a number of times thereby bringing his work performance deficiencies to his attention. There has been no evidence to suggest that Grievant grieved any of these poor evaluations. Grievant was placed on an improvement plan in late 2016 and he successfully completed the same in 2017. However, at no time thereafter did he maintain his improved performance long enough to make it until his next evaluation. After successfully completing his improvement plan, Grievant immediately began exhibiting his old behaviors and his performance declined. Grievant appears to dispute how long it should take him to complete a work order, but he does not dispute that he had a large number of work orders not completed or his percentage of work orders completed in thirty days. The precise amount of time to complete a work order really does not matter. The fact that Grievant had 111 open and incomplete work orders dating back to 2015 as of the end of May 2018, demonstrates that he had not been completing his work in a timely fashion. Grievant has also not challenged Respondent's claims regarding his attendance. Grievant was given

notice of his deficiencies and multiple chances to improve. Grievant improved during his six-moth improvement plan. Such indicates that Grievant understands what he needs to do in order to perform his work in a satisfactory manner, but has not continued to do so. Therefore, Grievant's conduct is no longer correctable, and Respondent has proved that Grievant's performance was unsatisfactory. Accordingly, Grievant's termination was justified, and was not arbitrary and capricious.

For the reasons set forth herein, the grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. 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 employer has not met its burden. *Id*.

2. The authority of a county board of education to suspend or terminate an employee's contract must be based on one or more of the causes listed in West Virginia Code § 18A-2-8and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 91-AA-110 (June 4, 1992).

3. “Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.” W. VA. CODE §18A-2-8(a).

4. “A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.” W. VA. CODE § 18A-2-8(b).

5. 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-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), ***aff’d*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

6. The West Virginia Supreme Court of Appeals has held that “where the underlying complaints regarding a teacher’s conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into

whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ.,* 212 W. Va. 668, 575 S.E.2d 278 (2002).

7. "A review of past improvement plans and disciplinary action 'can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable.' *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002). *Byers v. Wood County Bd. of Educ.*, Docket No. 2013-2075-WooED (Oct. 31, 2013). To rule otherwise, 'would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement.' *Dalton v. Monongalia County Bd. of Educ.*, Docket No. 2010-1607-MonED (Nov. 23, 2010), ***aff'd***, Kanawha County Cir. Ct., Civil Action No. 11-AA-2 (May 12, 2011)." *Yoders v. Harrison County Bd. of Educ*., Docket No. 2016-0129-HarED (Jan. 15, 2016).

8. Respondent proved by a preponderance of the evidence that Grievant's work performance was unsatisfactory and not correctable thereby justifying the termination of his employment pursuant to WEST VIRGINIA CODE §18A-2-8.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: December 21, 2018.

_____

Carrie H. LeFevre
Administrative Law Judge