

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CONNIE MIZE,**

**Grievant,**

**v.**

**Docket No. 2017-2232-CONS**

**CABELL COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Grievant, Connie Mize, filed two level one grievances against her employer, Cabell County Board of Education, which were later consolidated into this action. The first, Docket No. 2017-1973-CabED, was dated March 17, 2017,<sup>1</sup> stated as follows: “[t]here was a meeting Mr. Hardesty and Mr. Alexander wanted to set up with Ms. Mize and Kitty Dooley, Attorney[,] to discuss the 1<sup>st</sup> Bullying Investigation Ms. Mize completed at the school level. Then, Ms. Mize (sic) informed it would be an Evaluation Meeting for March 9, 2017. I was marked Unsatisfactory in Standard 1&4.” As relief sought, Grievant requested “[a]ny and all letters of reprimand, discipline letters, and (Evaluation Form/Letter of March 9, 2017) be removed from my file. My overall evaluation from March 9, 2017 needs to be revisited and reflected that Standard 1 and Standard 4 need changed affirmatively from Unsatisfactory to ‘Accomplished’.” Grievant’s second grievance, Docket No. 2017-2095-CabED, was dated April 21, 2017, and stated as follows:

I am grieving the rating of unsatisfactory for Standards 1 and 4 of my 2016-2017 Administrator Evaluation given to me by

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<sup>1</sup> This grievance form was received by the Grievance Board on March 20, 2017. The signature date is March 17, 2017. The postmark on the envelope was also dated March 17, 2017. As the postmark is March 17, 2017, that is the date this grievance is considered filed.

my supervisor. The ratings are not supported by the objective evidence, are arbitrary and capricious and are in retaliation for my assertion of my rights under the public employee grievance system. The evaluation was given to the grievant without notice at a meeting previously scheduled for an unrelated matter on March 9, 2017. Her evaluator directed other Cabell County Elementary School principals on April 7, 2017 to begin submitting their supporting information for the completion of their evaluations (nearly a month after giving me my evaluation).

As relief sought, Grievant requested the following: "Change the 'Unsatisfactory' ratings on Standards 1 and 4 on my 2016-2017 Administrator Evaluation to 'Emerging' or 'Accomplished. An order directing my supervisors cease and desist from their efforts to undermine my administrative authority and interfere with the exercise of my right to the public employees grievance mechanism."<sup>2</sup>

A level one conference was held on April 17, 2017 in Grievance Docket No. 2017-1973-CabED, and denied by decision issued April 21, 2017. Grievant appealed to level two on April 25, 2017. A level one conference was held on May 9, 2017, on Grievance Docket No. 2017-2095-CabED, and denied by decision issued May 15, 2017. Grievant appealed to level two on May 16, 2017. Grievant, by counsel, moved to consolidate these two grievances on May 16, 2017. By Order entered May 31, 2017, the two grievances were consolidated and given the consolidated Docket No. 2017-2232-CONS. A level two mediation was conducted in this consolidated grievance on July 18, 2017. Grievant

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<sup>2</sup> Grievant did not address this claim of retaliation in her proposed Findings of Fact and Conclusions of Law. Therefore, Grievant's retaliation claim is deemed abandoned, and it will not be addressed herein. While discrimination is not mentioned in Grievant's statement of grievance, she appeared to claim such during the level three hearing. However, discrimination was also not addressed in her proposed Findings of Fact and Conclusions of Law. Accordingly, any discrimination claim Grievant may have had is hereby deemed abandoned, and will not be addressed further herein.

perfected her level three appeal on July 24, 2017. A level three hearing was conducted on November 3, 2017, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by counsel, Katherine L. Dooley, Esquire, The Dooley Law Firm, P.L.L.C. Respondent appeared by its counsel, Rebecca M. Tinder, Esquire, Bowles Rice LLP. This matter became mature for decision on December 20, 2017, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant is employed by Respondent as a principal. Grievant's supervisor conducted her evaluation and rated her "Unsatisfactory" in two standards. Grievant argues that her supervisor treated her unfairly and that these two "Unsatisfactory" ratings are arbitrary and capricious. Respondent denies Grievant's claims. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, 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 has been employed by Respondent for approximately seventeen years. At all times relevant herein, Grievant was regularly employed by Respondent as the principal at Meadows Elementary School. She previously served as principal at Culloden Elementary School and Geneva Kent Elementary School. Grievant has been employed by Respondent as a principal in the county for over sixteen years.
2. Grievant is certified as a principal and a superintendent. Grievant holds two

Master's Degrees in Special Education and Education Leadership. She has worked as a classroom teacher, assistant principal, and elementary school principal for more than 27 years.

3. Tim Hardesty is the Elementary Administrative Assistant for the Cabell County Board of Education. Mr. Hardesty is Grievant's supervisor, and as such, he is responsible for evaluating her performance. Mr. Hardesty has been Grievant's supervisor since she was the principal at Geneva Kent Elementary School.

4. During Grievant's last year at Geneva Kent, she had some performance issues. To address these issues, Grievant was provided informal support which included working with Mary Campbell, a retired administrator. Grievant refers to Ms. Campbell as her mentor.

5. During the 2015-2016 school year, which was Grievant's second year at Meadows, Mr. Hardesty again identified some performance issues. As a result, in 2016, Grievant was placed on Focused Support Plan for the second semester of the 2015-2016 school year. Under this Focus Support Plan, the Respondent provided Grievant with additional support, and Mary Campbell began working with Grievant again.

6. Grievant successfully completed her Focused Support Plan by the end of the 2015-2016 school year.

7. During the next school year, 2016-2017, staff informed Mr. Hardesty that they were having communication issues with Grievant. Also, Mr. Hardesty received complaints from parents about actions Grievant had taken. One such complaint pertained to Grievant's response and investigation into a bullying allegation involving a five-year-old student. Mr. Hardesty also received several written complaints from teachers

pertaining to decisions Grievant had made and leadership abilities. Mr. Hardesty received these complaints between August 26, 2016, and February 27, 2017.

8. Given the complaints he had received as of February 2017, Mr. Hardesty decided to accelerate Grievant's evaluation, which is normally conducted later in the school year. Mr. Hardesty contacted Grievant by email to schedule a meeting with her and her counsel. By email dated February 24, 2017, Grievant informed Mr. Hardesty that she and her counsel could meet with him on March 9, 2017, at 10:00 a.m. Mr. Hardesty replied that same date stating as follows: "Connie, [t]hat day and time will be fine. We will meet in the conference room in the elementary and secondary department offices. This will be an evaluation meeting. Thank you, Tim."<sup>3</sup>

9. Mr. Hardesty did not ask Grievant to prepare anything pertaining to her evaluation prior to the meeting.

10. The meeting was held as scheduled on March 9, 2017. In attendance were Mr. Hardesty, Grievant, and her counsel. At the meeting, at least one of the complaints Mr. Hardesty received concerning Grievant was discussed. Also, Mr. Hardesty provided Grievant with a copy of her evaluation that he had prepared. Mr. Hardesty refers to this as a draft copy.

11. The draft evaluation Mr. Hardesty provided to Grievant at the March 9, 2017, meeting rated Grievant as "Unsatisfactory" on performance Standard 1, Interpersonal and Collaborative Skills, "Unsatisfactory" on Standard 4, Positive Learning Climate and Cohesive Culture, "Emerging" on Standard 2, Clear and Focused Learning Mission, and "Emerging" on Standard 9, Continuous Improvement. In assigning

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<sup>3</sup> See, Respondent's Exhibit 1, email thread from February 24, 2017.

Grievant's ratings in the different standards, Mr. Hardesty considered the complaints he had received about Grievant from teachers in her school and parents during that school year.

12. Following the March 9, 2017, meeting, Grievant was allowed to submit additional information to Mr. Hardesty for his consideration in her performance evaluation for the 2016-2017 school year. Thereafter, Grievant submitted additional information to Mr. Hardesty to be considered.<sup>4</sup> As a result of submitting this additional information, Mr. Hardesty changed Grievant's ratings of "Emerging" on Standards 2 and 9 to "Accomplished."<sup>5</sup> Mr. Hardesty did not change the other ratings. On her final evaluation, Grievant received the ratings of "Unsatisfactory" on Standard 1, Interpersonal and Collaborative Skills, and Standard 4, Positive Learning Climate and Cohesive Culture.<sup>6</sup>

13. Mr. Hardesty noted the following concerns on Grievant's evaluation under Standard 1, Interpersonal and Collaborative Skills: "[r]efusing to tell Alternative Education teacher information when she called with questions about the students in her class due to confidentiality; [f]ailure of self-awareness, does not respond proactive to concerns about performance; [f]ailure to complete an open and honest investigative report; [f]ailure to provide accurate information when seeking advice; [l]ack of trust and/or follow through; [p]rincipal needs to have well thought-out decisions that are not reactionary; and, [p]rincipal fails to create clear expectations for staff."<sup>7</sup>

15. Mr. Hardesty noted the following concerns on Grievant's evaluation under

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<sup>4</sup> See, Respondent's Exhibit 5, written statement drafted by Grievant.

<sup>5</sup> See, testimony of Grievant; testimony of Tim Hardesty; Grievant's Exhibit 3, evaluation.

<sup>6</sup> See, testimony of Grievant; testimony of Tim Hardesty; Grievant's Exhibit 3, evaluation.

<sup>7</sup> See, Grievant's Exhibit 3, evaluation.

Standard 4, Positive Learning Climate and Cohesive Culture: “[p]rincipal fails to maintain a positive and cohesive culture; [m]ultiple occurrences of failure to resolve problems brought forth by teachers and parents; [l]ack of effective response to behaviors; and, [d]emonstrates difficulty handling difficult situations.”<sup>8</sup>

16. As a result of receiving “Unsatisfactory” ratings on Standard 1 and Standard 4, Grievant received an overall unsatisfactory evaluation.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *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.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, “[t]he 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).

Grievant asserts that Mr. Hardesty’s decision to rate her as “Unsatisfactory” on Standards 1 and 4 on her March 9, 2017, performance evaluation was arbitrary and capricious, and “without consideration and in disregard of the relevant facts and

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<sup>8</sup> See, Grievant’s Exhibit 3, evaluation.

circumstances.”<sup>9</sup> Grievant is asking these ratings be changed to “Emerging” or “Accomplished.” Respondent disputes Grievant’s claims, asserting that the evaluation was conducted properly, and that Grievant’s ratings were reasonable and supported by the evidence.

“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 had the burden of proving [her] case 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 County Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier [County] 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).” *Bailey v. Kanawha County Bd. of Educ.*, Docket No. 2009-1594-KanED (Jan. 19, 2010).

“The standard for assessing an evaluation or improvement plan grievance is the arbitrary and capricious standard.” *Turner v. Boone County Bd. of Educ.*, Docket No. 05-03-278 (Oct. 31, 2005). Arbitrary and capricious actions have been found to be closely

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<sup>9</sup> See, Grievant’s proposed Findings of Fact and Conclusions of Law, p. 12.



related to ones that are unreasonable. See *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *Id.* (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 (4<sup>th</sup> 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).

An evaluation is properly conducted if it is performed in an “open and honest” manner, and is fair, and professional. See *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); *Wilt v. Flannigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). “The mere fact that a Grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator.” *Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988). The immediate supervisor is responsible for the employee’s evaluation, and he or she must share the evaluation with the employee. The employee has a right to attach a written addendum to the evaluation. *Jones v. Braxton County Bd. of Educ.*, Docket No. 97-04-

311 (Apr. 28, 1998).” *Bailey v. Kanawha County Bd. of Educ.*, Docket No. 2009-1594-KanED (Jan. 19, 2010).

Largely, Grievant argues that her two “Unsatisfactory” ratings on the March 9, 2017, evaluation were unfair. She asserts that “Mr. Hardesty based his evaluation on narrow, isolated events . . . as opposed to her body of work at Meadows.”<sup>10</sup> Grievant also asserts that Mr. Hardesty, as her supervisor, has treated her unfairly, subjected her to constant criticism, and circumvented her authority in the building by allowing faculty and staff to contact him directly without advising her of the contact. Grievant has generally offered only her testimony in support of these claims. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)). With respect to the complaints about Grievant that Mr. Hardesty considered in Grievant’s evaluation, Grievant appears to argue that those complaints were designed to place her in a poor or unfavorable light. Grievant does not appear to dispute many of the factual situations described in these complaints. Instead, Grievant appears to argue that she was not told about the complaints, that the teachers and parents complaining about her actions were wrong, and that the teachers and parents were working together to undermine her.

Grievant bears the burden of proving that the two evaluation ratings she disputes were arbitrary and capricious. The evidence presented demonstrates that Mr. Hardesty considered the complaints he received about Grievant in rating her on the evaluation.

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<sup>10</sup> See, Grievant’s proposed Findings of Fact and Conclusions of Law, pg. 8.

Grievant has offered no authority to suggest that such is impermissible. The ALJ cannot conclude that it was unreasonable for Mr. Hardesty to consider these complaints when evaluating Grievant. Grievant has only demonstrated that she disagrees with the complaints, arguing that they were designed to place her in an unfavorable light. Further, Mr. Hardesty reviewed the evaluation with Grievant on March 9, 2017, and allowed her to submit supplemental information for his consideration. As a result, Mr. Hardesty improved Grievant's ratings on two of the standards, but not the ratings for Standards 1 and 4, at issue herein. Grievant has failed to prove by a preponderance of the evidence that these "Unsatisfactory" ratings were arbitrary and capricious. Grievant has only proved that she disagrees with these unfavorable ratings. Accordingly, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

### **Conclusions of Law**

1. "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 had the burden of proving [her] case 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 County Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier [County] 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).” *Bailey v. Kanawha County Bd. of Educ.*, Docket No. 2009-1594-KanED (Jan. 19, 2010).

2. “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.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, “[t]he 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).

3. “The standard for assessing an evaluation or improvement plan grievance is the arbitrary and capricious standard.” *Turner v. Boone County Bd. of Educ.*, Docket No. 05-03-278 (Oct. 31, 2005).

4. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *Id.* (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 (4<sup>th</sup> 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).

6. “The mere fact that a Grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator.” *Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988).

7. Grievant has failed to prove by a preponderance of the evidence that the two “Unsatisfactory” ratings on her evaluation were arbitrary and capricious.

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 (eff. July 7, 2008).

**DATE: February 7, 2018.**

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**Carrie H. LeFevre**  
**Administrative Law Judge**