THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BONITA REDD,

Grievant,

v. **Docket No. 2019-1849-McDED**

MCDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Bonita Redd, is employed by Respondent, McDowell County Board of Education, as a classroom teacher at Welch Elementary School. On June 24, 2019, she filed this grievance, stating:

> Event – Demerits on Teacher Evaluations – on 6/3/19.
> Violations of the following laws, statutes, policies, including, but not limited to:
> 1) Violations of Civil Rights / Employment Rights
> 2) Title VII
> 3) Title IX
> 4) WV Whistle Blower Act (6c-1-1) (6c-1-3)
> 5) Favoritism
> 6) Discrimination / same race discrimination
> 7) Retaliation against Whistle Blower
> 8) FERPA
> 9) Teacher Evaluation Policy
> 10) Employment Laws – Harassment – Intimidation
> Hostile Workplace
> Hostile PLC
> Hostile Community School
> 11) Disparate Treatment
> 12) Continued discrimination
> 13) Continued Race discrimination
> 14) Policy 6-011
> 15) Fundraiser certificate
> 16) Policy 8-001

As relief, Grievant requests, “Removal of demerits from teacher evaluation with no further actions; cease workplace harassment/intimidation, compensation for slander and defamation in PLC and community school.”

A level one hearing was held on July 11, 2019, and a decision denying the grievance was issued on August 22, 2019. Grievant appealed to level two of the grievance process on September 3, 2019. A mediation session was held on November 1, 2019. Grievant appealed to level three on November 13, 2019. A level three hearing was held on November 5, 2020, before the undersigned via an online platform. Grievant was self-represented. Respondent appeared via Superintendent Carolyn Falin and was represented by attorney Howard Seufer, Jr. of Bowles Rice LLP. The parties submitted Proposed Findings of Fact and Conclusions of Law (PFFCL). This matter became mature for decision on December 10, 2020.

Synopsis

Grievant has been employed as a teacher by Respondent, McDowell County Board of Education, for 35 years. After a parent complained that Grievant publicly criticized students during an awards assembly, Respondent did not discipline Grievant but addressed the incident through her year-end evaluation. Grievant challenges the negative reviews on her evaluation and claims a lack of due process, discrimination, harassment, retaliation, and violations of various laws and policies. Grievant failed to prove any of her claims. Accordingly, this 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 as a teacher for Respondent, McDowell County Board of Education, for 35 years.

2. On May 30, 2019, Grievant participated in an awards assembly with her third and fourth grade students in the presence of other students, parents, and faculty. While presenting them with awards, Grievant addressed four of her highest achieving students concerning their difficult and talkative behavior throughout the school year. Grievant told the students they always had to get the last word but that she would get the last word that day. Grievant then asked the mother of one of the students if the student was always this difficult at home.

3. Grievant's remarks embarrassed students and offended at least one parent. The parent filed a complaint with the school about Grievant's conduct and discussed the incident on social media.

4. Respondent perceived Grievant's remarks at the assembly to be disparaging and a public rebuke of the students.

5. During her year-end Summative Evaluation (evaluation) on June 3, 2019, three days after the awards assembly, Principal Kristy East informed Grievant that a parent had filed a complaint against her.

6. The parent complaint was dealt with separately from the evaluation through a Title IX investigation. There is no evidence that the Title IX investigation made any findings against Grievant or resulted in any discipline.

7. During the evaluation session, Principal East provided Grievant with her evaluation and an Incident Report. The Incident Report explained the poor ratings given

Grievant on one of the seven standards covered in the evaluation. The allegations and ratings were already filled in on the forms when Grievant entered the meeting.

8. Principal East used the evaluation to rate Grievant on seven performance standards and the elements under each of the seven standards. Principal East also provided an overall rating (aka a "Summative Performance Rating").

9. Principal East used the Incident Report to simply explain the ratings assigned to two of the four elements under Standard 7 of the evaluation. These comments related to Grievant's conduct during the awards assembly. The Incident Report was not related to the complaint filed by a parent to initiate the Title IX investigation.

10. Grievant signed the Incident Report and added at the bottom that she wanted to respond to the complaint against her.

11. Principal East allowed Grievant to communicate her disagreement with the evaluation in the addendum under Standard 7.

12. Principal East completed Grievant's year-end evaluation as required by State Board of Education Policy 5310, "Performance Evaluation of Professional Personnel." (Respondent's Exhibit 1 and Grievant's Exhibit 8)

13. Under section 13.1 of Policy 5310, every teacher's Summative Evaluation conference must be held on or before the teacher's final day of the school year in the classroom or on or before June 15, whichever occurs first. (Grievant's Exhibit 8)

14. Policy 5310 mandates that teachers are to be rated on seven performance standards and the elements under each standard. These standards and their elements include "Curriculum and Planning" (comprised of three performance elements), "The

Learner and the Learning Environment" (comprised of three performance elements), "Teaching" (comprised of three performance elements), "Professional Responsibilities for Self-Renewal" (comprised of two performance elements), "Professional Responsibilities for School and Community" (comprised of three performance elements), "Student Learning" (comprised of one performance element), and "Professional Conduct" (comprised of four performance elements). (Grievant's Exhibit 8 & Respondent's Exhibit 2)

15. The ratings for the first six performance standards, in ascending order, are "Unsatisfactory," "Emerging," "Accomplished," and "Distinguished." (Respondent's Exhibit 2)

16. The ratings for the seventh performance standard, in ascending order, are "Unsatisfactory," "Below Standard," and "Meets Standard." (Respondent's Exhibit 2)

17. Under the first six performance standards, Principal East initially rated Grievant as "Emerging" on each element. "Emerging" is defined under Section 8 of the Policy 5310 rating structure to mean "[p]erformance which meets the basic standard and has an opportunity for professional growth."

18. However, after receiving input from Grievant during the evaluation conference, Principal East changed the rating on an element under "Curriculum and Planning" to "Accomplished." "Accomplished" is defined in the Policy 5310 rating structure as "[p]erformance which demonstrates mastery of the standard." (Grievant's Exhibit 8)

19. Under the seventh performance standard, "Professional Conduct", Principal East rated Grievant as "Meets Standard" on two elements and "Below Standard" on two elements. The "Below Standard" elements were "Policy and Procedure" and "Respect."

20. The West Virginia Department of Education's "Evaluation Rubrics for Teachers" explains Standard 7 or "Professional Conduct" as follows:

> **Professional Conduct** reflects the understanding that teaching is both a demanding and rewarding profession and involves a serious commitment to the highest standards of public service. This performance standard sets clear criteria for those competencies and habits-of-mind without which professional teaching simply cannot occur. The Professional Conduct standard allows educators to address areas of concern without necessitating an improvement plan. The Professional Conduct performance standard does not, however, supplant code and policy to which educators remain fully accountable and is not determinative of whether behavior is correctable. Certain violations may be cured by implementation of an improvement plan; others will require immediate action.

(Respondent's Exhibit 2)

21. "Policy and Procedure" is one of the two elements under Standard 7 ("Professional Conduct") on which Principal East rated Grievant as "Below Standard." For purposes of evaluation under Policy 5310, "Policy and Procedure" means that "[t]he teacher demonstrates professional conduct as defined in law, policy and procedure at the state, district and school board level." A "Below Standard" rating on this element means that the teacher "[a]dheres to state, district and school policy and procedure with few exceptions." The definition under "Policy and Procedure" for "Meets Standard," the highest rating, is the same as "Below Standard" minus the phrase "with few exceptions." Conversely, the definition under this element for "Unsatisfactory," the lowest rating, is "[d]emonstrates a pattern of violating state, district or school policy and procedure." (Respondent's Exhibit 2)

22. In explaining the "Below Standard" rating on the "Policy and Procedure" element of "Professional Conduct," Principal East wrote in the Incident Report as follows:

> During the 3rd & 4th grade awards ceremony on May 30, Mrs. Redd publicly discussed the behavior of four individual students. This specific identification of students is a violation of FERPA. Additionally, this is also a violation of State Policy 5902, the Employee Code of Conduct, sections 4.2.3 and 4.2.7. By making comments of demeaning and discriminatory nature, Mrs. Redd failed to demonstrate professional conduct as defined in the aforementioned policies and laws.

(Respondent's Exhibits 1 and 3)

23. Respondent's training material on FERPA (Family Educational Rights and Privacy Act of 1974) describes it as "Federal regulations that govern access to and release of personally identifiable information about students found in education records." (Grievant's Exhibit 4)

24. The referenced Employee Code of Conduct (State Policy 5902) states in relevant part:

> 4.2. All West Virginia school employees shall:
>
> > 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
> >
> > 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

W. VA. CODE ST. R. § 126-162-4.2 (2002).

25. "Respect" is the second of the two elements of "Professional Conduct" on which Principal East rated Grievant as "Below Standard." For purposes of evaluation under Policy 5310, "Respect" means that the teacher "[i]nteracts professionally with students, parents/guardians, colleagues and community." A "Below Standard" rating on this element means that the teacher "[i]nteracts professionally with students, parents/guardians, colleagues and community with few exceptions." The definition under

"Respect" for "Meets Standard," the highest rating, is the same as "Below Standard" minus the phrase "with few exceptions." Conversely, the definition under this element of "Unsatisfactory," the lowest rating, is "[d]emonstrates a pattern of behavior with students, parents/guardians, colleagues and/or community which is unprofessional." (Respondent's Exhibit 2)

26. In explaining her "Below Standard" rating on the "Respect" element of "Professional Conduct," Principal East wrote in the Incident Report as follows:

> Mrs. Redd did not maintain professionalism and show respect to students as individuals by failing to discuss student behavior in a confidential manner. The teacher's comments about students embarrassed not only students but also their parents, which resulted in harassment complaints filed against her by the parents of the students Mrs. Redd singled out during the awards ceremony.

(Grievant's Exhibit 5)

27. At her June 3, 2019 evaluation meeting, Grievant was allowed to respond in writing to Principal East's assessment of her "Professional Conduct" as provided by section 13.10 of Policy 5310. She included the following as an addendum:

> It appears that under the professional conduct descriptor, I have been found guilty just because a complaint was filed against me by a parent. There is no proof that I violated the policy, only the opinion of a possibly disgruntled parent and her friends on Facebook. Therefore, I disagree with being marked below standard, when I know that teachers have described student behavior in the Awards ceremony without a complaint being filed against them.

(Respondent's Exhibit 1 & Grievant's Exhibit 8 - Policy 5310)

28. Grievant received an overall "Summative Performance Rating" of "Emerging" on her evaluation. This rating reflected the same rating given to the first six performance standards and was unaffected by the "Below Standard" rating for the

"Respect" and "Policy and Procedure" elements of "Professional Conduct" related to the awards assembly incident. (Respondent's Exhibit 1)

29. Grievant acknowledged at the level one hearing that the situation could have been avoided if she had instead addressed student's classroom behavior in private conferences with their parents instead of at an awards assembly. (Level one hearing transcript, page 26)

30. Grievant has not been disciplined or put on an improvement plan based on the comments she made at the awards assembly. No action has been taken against Grievant based on the separate Title IX investigation initiated through a parent complaint.

31. Grievant compares her conduct to that of Goldie Freeman, another teacher at Welch Elementary School. Ms. Freeman referred to a student as a "little wild child" during the awards ceremony.

32. Grievant also compares her conduct to that of Bonita Miano, Director of Student Services. Ms. Miano gave a presentation at the Board of Education meeting on November 4, 2019, that was covered by the Welch Daily News. The newspaper wrote that "Miano said the younger kids usually want to come to school, even if its mainly about eating breakfast and lunch. 'But they don't have anyone to get them up in the morning and get them ready,' …."

33. Neither the evaluation of Ms. Miano nor Ms. Freeman reflected that they inappropriately or to the dissatisfaction of the evaluator commented in public about a student, disclosed information about a student, or referred to a student by name. (Respondent's stipulation)

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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 burden has not been met. *Id*.

Grievant asserts that Principal East acted arbitrarily and capriciously in rating her "Below Standard" on two elements of Standard 7 of her Summative Evaluation and then commenting in the Incident Report about her award assembly conduct without conducting a proper investigation. Grievant also claims discrimination, harassment, slander, defamation, and retaliation, and the violation of various laws and policies, including Title VII, Title IX, WV Whistle Blower Act, FERPA, the teacher evaluation policy, employment rights, Policy 7-012, Policy 6011, and Policy 8-011. Grievant requests that the two "Below Standard" ratings on her evaluation be removed along with the negative comments under the elements of "Policy and Procedure" and "Respect" on the Incident Report. Respondent disputes Grievant's claims, asserting the evaluation was properly conducted and the ratings reasonable and supported by the evidence. Grievant contends the evaluation and Incident Report were disciplinary and that Respondent has the burden of

proving the comments and ratings thereon were justified. Respondent counters that evaluations and the related Incident Report are not disciplinary and that Grievant therefore has the burden of proof. As for the remaining claims, Respondent asserts they are untimely.

"[When an] employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ*., Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv*., Docket No. 90-DHS-524 (May 14, 1991)." *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

While the burden is on Respondent to prove the grievance was filed untimely, the code requires that "[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two." W. VA. CODE § 6C-2-3(c)(1). There is no evidence, that Respondent raised timeliness at or before level two and then renewed this argument at level three. Regardless, Grievant's discrimination and harassment claims emanate from and are the fruition of the evaluation and Incident Report. Thus, Respondent's claim of untimeliness must be rejected.

As for Grievant's argument that her evaluation is disciplinary, "'[e]valuations 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). 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 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 (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).

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). Grievant has not shown that Respondent failed to provide her an open and honest evaluation. Further, there is no doubt that Respondent shared the evaluation with Grievant and allowed her to attach an addendum.

Grievant argues that her "Below Standard" ratings on the two elements of Standard 7 relating to the awards assembly incident were not reasonable because she was only teasing the students, not reprimanding them. She further asserts that Principal East did

not follow proper protocol in evaluating her and did not allow her to show that her comments were made in jest. Principal East prepared an Incident Report along with Grievant's evaluation. This report explained the "Below Standard" ratings for two of four elements under Standard 7. These two elements are "Policy and Procedures" and "Respect." Principal East commented under "Policy and Procedures" that by publicly discussing the behavior of four students at the awards assembly in a demeaning and discriminatory nature, Grievant violated FERPA and the Employee Code of Conduct (State Policy 5902) section 4.2.3 and 4.2.7. State Board of Education Policy 5902, "Employee Code of Conduct," 126 CSR 162, sections 4.2.3 and 4.2.7, requires teachers to "maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination," and to "comply with all Federal and West Virginia laws, policies, regulations and procedures." Respondent's interpretation thereof through the Incident Report will be given deference unless clearly wrong.

Grievant does not deny that she made the personally identifiable comments about students at the award assembly in the presence of students, faculty, and parents. Rather, she contends that this did not violate FERPA. Respondent's training material on FERPA describes it as "Federal regulations that govern access to and release of personally identifiable information about students found in education records." Section 17 of West Virginia Board of Education Policy 4350, "Procedures for the Collection, Maintenance and Disclosure of Student Data," 126 CSR 94, was enacted under the authority of the Federal Family Educational Rights and Privacy Act (FERPA). It prohibits teachers from disclosing personally identifiable education information about students except in certain

circumstances. Grievant has not shown that these exceptions existed at the awards assembly. Grievant asserts she did not violate FERPA because the comments she made about the four students at the awards assembly were not found in their education records. She asserts that FERPA does not cover information obtained by an employee through personal knowledge or observation in working with the students or derived from others. The undersigned cannot reject the merits of either party's interpretation of FERPA. While Grievant may have created ambiguity as to whether her conduct was covered by FERPA, she did not show that Respondent acted in an arbitrary and capricious manner in deeming Grievant's behavior to be harassment, intimidation, bullying, or a violation of FERPA. The burden of proof in this matter is on Grievant. The undersigned cannot nullify an employer's interpretation of laws and policies made during the course of employee evaluations when Grievant has not shown these to be unreasonable.

Principal East's Incident Report comments under "Respect" do not cite to any law or policy, but simply explain that Grievant did not maintain professionalism or respect of students when she failed to discuss their behavior in a confidential manner, resulting in the parents of the students filing harassment complaints against her. Grievant does not provide any authority for the implied proposition that Respondent must cite to some law or policy violation for every less than perfect rating issued on an employee's evaluation. Grievant has not shown that Respondent acted unreasonable in asking Grievant to correct students in private instead of during a public assembly. Parent dissatisfaction is a legitimate concern on the part of Respondent and its role cannot be overlooked in the evaluation comments Grievant now grieves. It is apparent that the students and parents would have seen Grievant as being more caring and supportive if she had not called

students out publicly. Grievant even appears to admit during her level one testimony that she should have addressed the behavior of these four students in a parent conference. In retrospect, Grievant acknowledges that the best practice would have been to address her concerns in a private setting rather than doing so even in jest at an awards ceremony. The undersigned does not take this as an admission of any wrongdoing by Grievant. However, if Grievant believes it would have been reasonable to express her concerns to parents in private, then she should understand that Principal East did not act arbitrarily in stating the same in the evaluation and Incident Report.

Grievant did not prove that Principal East abused her discretion through the evaluation in a manner that violated State Board of Education Policy 5310. As Policy 5310 mandates, Grievant was given the opportunity to attach her own addendum to the evaluation. Grievant did not prove that this policy was violated. Principal East did not confound the purpose of the evaluation process by elaborating in the Incident Report under Standard 7 regarding her concerns about Grievant's performance. This feedback was consistent with the very purpose of evaluations, which is to correct performance and improve the education provided to students. It is important to note that the West Virginia Department of Education's "Evaluation Rubrics for Teachers" explains that "[t]he Professional Conduct standard allows educators to address areas of concern without necessitating an improvement plan."

Ultimately, the "Below Standard" ratings which Grievant challenges did not impact the overall rating on her evaluation. Grievant received an overall rating of "Emerging." She was also rated as "Emerging" under the first six standards of her evaluation. Grievant does not contend that the ratings on these six standards were related to the awards

assembly incident. The only ratings that were related to the assembly incident were the "Below Standard" ratings for two of the four elements under Standard 7. A "Below Standard" rating accounts for no more than an occasional failure by a teacher to fully adhere to the requisite standard and can be distinguished from a rating of "Unsatisfactory," which refers to a pattern of conduct. That Grievant received a rating of "Below Standard" rather than "Unsatisfactory" on the elements of "Policy and Procedure" and "Respect" reasonably accounts for her involvement in the incident at the awards assembly. In other words, the "Unsatisfactory" rating on these two elements accounted for the fact that Grievant adhered to the standard except for an isolated incident at the awards assembly.

Grievant bears the burden of proving her evaluation was arbitrary and capricious. The evidence presented demonstrates that Principal East considered the complaints she received about Grievant along with Grievant's response. While Grievant contends that Principal East had the evaluation and Incident Report forms prefilled going into their meeting, Grievant offered no authority to suggest that this is impermissible. Respondent showed that Principal East was willing to change her preliminary assessment after hearing from Grievant and that Principal East allowed Grievant to give input on all the standards rated in the evaluation. That Principal East maintained an open mind was apparent when, after hearing from the Grievant, she upgraded the rating on one element of the first standard of the evaluation. Grievant did not show that Principal East acted unreasonably in considering a parent complaint when evaluating Grievant. Principal East acted appropriately in considering Grievant's input and allowing her to submit supplemental information. Principal East considered this feedback and was willing to

modify the comments and ratings she had prefilled on the forms. Grievant has failed to prove by a preponderance of the evidence that these "Below Standard" ratings under Standard 7 were arbitrary and capricious.

Grievant also asserts that Respondent violated Policy 7-012 and placed demerits on her evaluation based on hearsay and without a proper investigation. Grievant conflates the Title IX investigation with her evaluation in arguing that she was not provided due process in the Title IX investigation. Grievant failed to show that Respondent acted improperly in the manner it conducted her evaluation or that the procedures set forth in Policy 7-012 apply to evaluations. Further, Grievant does not have any basis to challenge the Title IX investigation since she has not shown this investigation has concluded or resulted in her being discipline. The 2019 Summative Evaluation and the Title IX investigation are separate processes, with different purposes, procedures, and possible outcomes. As such, the undersigned will only consider Grievant's qualm with the Title IX investigation in the context of Grievant's harassment claim.

Grievant claims harassment and hostile work environment. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-

1705-MAPS (Feb. 22, 2012), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, 'considering all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75 (1998) (citing Harris, 510 U.S. at 23). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" but "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

Grievant fails to put forth any incident in support of her claims of harassment and hostile work environment. The undersigned is therefore left guessing at Grievant's intended argument. The only facts raised that could possibly qualify are those involving comments by fellow teachers on a parent's Facebook post involving the awards

assembly. However, even if true, this is one incident and is not sufficiently severe or pervasive to qualify as harassment or hostile work environment. Further, Grievant did not present any evidence that Respondent was made aware of this or any other allegation of harassment and that it then failed to address the allegations. Grievant has not proven she was subjected to harassment or hostile work environment.

As for discrimination and favoritism, these have an identifiable definition for the grievance process. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination claim asserted under the grievance statute, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr*., Docket No. 04-CORR-278 (Feb. 14, 2005).

Grievant compares herself to two named employees, Goldie Freeman and Bonita Miano, and some unnamed employees. Grievant failed to show that the unnamed employees were similarly situated to her. As for Ms. Miano, Grievant argues that

Respondent failed to act after the local newspaper reported the following about Ms. Miano's presentation at a McDowell County Board of Education meeting:

> … Miano said the younger kids usually want to come to school, even if its [sic] mainly about eating breakfast and lunch.
>
> "But they don't have anyone to get them up in the morning and get them ready," ...

Grievant failed to show that she was similarly situated to or treated differently than Ms. Miano. While Grievant was a teacher, Ms. Miano was the Director of Student Services. Further, attendees at the award assembly could connect Grievant's comments with individual students, whereas Ms. Miano's comments could not be connected to individual students.

As for Ms. Freeman, it is undisputed that she referred to one of her special needs students as a "little wild child" at the awards assembly. During the same assembly, Grievant addressed four of students concerning their difficult and talkative behavior throughout the school year. Grievant told the students they always had to get the last word, but she would get the last word now. Grievant asked the mother of one of the students if the student was always that difficult at home. On paper, Ms. Freeman's comment appears to be similar to those made by Grievant in that it can be seen as derogatory. Further, each is likely based on confidential information about the student's behavior that Ms. Freeman and Grievant learned in their role as teacher. The attendees could also connect Ms. Freeman's comments with a particular student just as they could with Grievant's comments. The initial difference between the two is that a parent complained about Grievant whereas no one complained about Ms. Freeman.

Grievant and Ms. Freeman were similarly situated in that each was a teacher making similarly styled comments about identifiable students at the same awards assembly. Whether they were treated differently is at the root of this matter. Respondent stipulates that Ms. Freeman's evaluation did not reflect that she inappropriately or to the dissatisfaction of her evaluator commented in public about a student, disclosed information about a student, or referred to a student by name. While Principal East expressed dissatisfaction with Grievant for her comments at the awards assembly, the undersigned cannot glean from Respondent's stipulation that Respondent treated Grievant differently from Ms. Freeman. Respondent's stipulation leaves unaddressed many details that are necessary for a proper comparison as to how each was treated. The burden of proof is on Grievant. Grievant did not show whether she and Ms. Freeman had the same evaluator. Different evaluators are bound to at least slight variations in their interpretation of policies and behavior. The undersigned also cannot determine whether Ms. Freeman's evaluator was even aware that Ms. Freeman referred to her student as a "little wild child" at the awards assembly. After all, the only reason Principal East knew about Grievant's comments is that a parent complained. There is no evidence that a parent complained about Ms. Freeman and therefore no indication that Ms. Freeman's evaluator would have necessarily been aware of her comments. Thus, as Grievant failed to prove that Respondent treated her and Ms. Freeman differently, she failed to prove discrimination by a preponderance of evidence.

Grievant's remaining claims include retaliation and violation of civil rights, employment rights, Title VII, the WV Whistle Blower Act, Policy 6-011, Policy 8-001, defamation, and slander. Grievant has abandoned these claims in not providing any

evidence thereof or even mentioning them during the level three hearing or in her PFFCL. "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)). These claims must therefore be rejected.

In summary, Respondent never disciplined Grievant for criticizing students at an awards assembly but simply addressed its concern over the incident through a year-end evaluation. Respondent has broad leeway to correct conduct it deems problematic through employee evaluations unless it does so in an arbitrary and capricious manner. Grievant did not show that Respondent acted unreasonably in giving her a "Below Standard" rating on two of the elements under Standard 7 related to the awards assembly incident or through the corrective comments related to those elements on the Incident Report. Grievant received a rating of "Emerging" on her evaluation under the first six elements. These were unrelated to the awards assembly incident. Grievant also received an overall rating of "Emerging" on her evaluation. Thus, her overall rating of was unaffected by the ratings under Standard 7 that are at issue in this grievance. Respondent allowed Grievant to give feedback and took this feedback into account in assessing her ratings. Grievant also failed to show the persist pattern of disturbance from her coworkers that is necessary for harassment or that she was treated differently from any similarly situated employee as is necessary for discrimination.

Accordingly, this grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. 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 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 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).

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 (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).

5. Grievant did not prove by a preponderance of the evidence that the ratings on her 2019 Summative Evaluation and the comments to Standard 7 of the evaluation on the Incident Report were arbitrary and capricious or violative of any law or policy.

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

7. Grievant did not prove by a preponderance of the evidence that Respondent subjected her to harassment or a hostile work environment.

8. Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statute, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr*., Docket No. 04-CORR-278 (Feb. 14, 2005).

9. Grievant did not prove discrimination by a preponderance of evidence.

10. Grievant did not prove by a preponderance of evidence that the Title IX Investigation resulted in any discipline and did not prove any of her remaining claims, including, but not limited to, retaliation and violation of civil rights, employment rights, Title VII, the WV Whistle Blower Act, Policy 6-011, and Policy 8-001.

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

DATE: January 19, 2021

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Joshua S. Fraenkel
Administrative Law Judge