

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

MARVIN J. WOMBLE,
Grievant,

v.

Docket No. 2021-2517-MrnED

MARION COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Marvin J. Womble, is employed by the Marion County Board of Education as an assistant principal, filed a level one grievance form on or about June 18, 2021, alleging that:

Upon further review of my evaluation Mrs. Finamore marked me as emerging on three different standards during my evaluations. Those standards were Element 1.1, 4.1 and 7.1. In her wording on All three of these standards I feel as if I am being labeled as an administrator that doesn't help run the school and one who doesn't communicate with staff or sustain a positive culture. I communicate with staff, and administration via email, text message, school phone or in-person consistently. For Element 1.1: The school leader demonstrates effective and professional interpersonal and collaborative skills. Mrs. Finamore wrote that "While Mr. Womble communicates via text messages and occasionally e-mails, more verbal in-person communication with his co-administrators would enhance the effectiveness of the team".

My response: We only had one meeting as an administrative team since I returned from leave and I communicated with her and the other administrator during that meeting validating her suggestions and ideas. Majority of the meeting was her speaking and asking us if we were ok with her plan of action for things that needed to be done at the end of the school year which I concurred. I also conversed back and forth consistently with school administration about my availability to cover school or sporting events. Majority of this communication was initiated by Mrs. Finamore via email so that is how I communicated with her and the other

administrator. I also communicated with the other assistant principal about a situation where another student made a threat to fight a student at school which we communicated with each to make sure both students were safe and a fight did not happen. I also sought to communicate with Mrs. Finamore via office phone about a situation where a teacher reported a student made a racial comment which she then told me to contact the other assistant principal to handle the issue since the student was a 10th grader which I complied and called the other assistant principal to handle the issue.

Element 4.1: The school leader builds and sustains a safe and positive climate and cohesive culture. Mrs. Finamore wrote: "Mr. Womble is a member of the PBIS Team that works to maintain a positive school culture. While he is present at most meetings, he rarely contributes to the discussions'.

My response: I communicate with staff members every day throughout the school whether it's about a school issue or just being nice and cordial with staff. During the morning when I walk by a staff member's classroom and see them I always speak and say good morning. I even went above and beyond to reach out to staff to try and gather feedback from them about students who were not participating remotely by emailing them to send me a list of those students so I could contact their parents/guardians to try and get them to participate in class. I stayed late after school multiples [sic] days to reach out to parents of those students to gather feedback for teachers which the staff was receptive to. I also communicated with staff members regularly about students who were skipping class consistently so that I could make sure the student(s) were going to class and catching up on their missing work. There was a technical issue with my computer where I could receive sound but I could not talk. However, I communicated with Mrs. Finamore multiple times before and after my leave about reaching out to businesses to become Partners in Education with our schools as this was the role I was assigned to do on our PBIS team. I also speak to students when I am doing hall and lunch duty every day to try and create a positive school environment for them.

For Element 7.1: The school leader demonstrates a proactive approach in effectively managing the resources and operations of the school. Mrs. Finamore wrote: "Mr. Womble was minimally involved in the process of managing and monitoring resources and operations this year".

My response: I was not involved or consulted about majority of the decisions that were made this school year before and after my leave of absence. It was not a situation of me not wanting to be involved but for reasons unknown to me I was not involved in much of the decision-making process daily throughout this school year. For example, I was not consulted or included in the organizing of the School Strategic Plan this year or last year. I also successfully managed the school's Ink Cartridge Budget for staff and teachers as Mrs. Finamore mentioned last year for this standard in my evaluation. Therefore, I should not be penalized on my evaluation for not being included in school planning or decisions that I did not know about or have the opportunity to participate in.

For relief, the grievant seeks the following: I feel that Mrs. Finamore's wording in her evaluation of me on these three standards seeks to create a picture that I am not a positive administrator, involved in managing the school and or a capable leader. I also feel her wording presents me as an administrator that does not communicate with staff or sustain a positive culture. I am seeking a change in my evaluation on these three standards from emerging to accomplished along with changing her wording for her evaluation of me on these standards as I feel her statements are not an accurate depiction of my character or leadership ability and can affect my pursuit of future leadership opportunities.

This case was denied at level one on or about July 19, 2021, by Superintendent DeLorenzo. A level two mediation was conducted on December 21, 2021. A level three evidentiary hearing was conducted before the undersigned on March 22, 2022, via Zoom. Grievant appeared in person and by his counsel, Katherine Dooley, The Dooley Law Firm, PLLC. Respondent appeared by Superintendent DeLorenzo and by its counsel, Richard S. Boothby, Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties' findings of fact and conclusions of law on April 25, 2022.

Synopsis

Grievant has been an employee of Marion County Board of Education for eleven years. Grievant has been an assistant principal at Fairmont Senior High School for over four years. Grievant filed this action challenging his evaluation for the 2020-2021 school year in areas in which he received a rating of “emerging.” Under the totality of the circumstances of this case, Grievant was able to demonstrate that the rating of “emerging” and the rationale presented by the evaluator in support of the rating is lacking in merit or proper foundation and can reasonably be viewed as arbitrary. This grievance is granted, and Respondent is ordered to change the ratings of “emerging” to “accomplished” in the appropriate areas of the 2020-2021 evaluation.

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

Findings of Fact

1. Grievant has been an employee of the Marion County Board of Education for eleven years as a teacher and administrator at the time of the filing of this grievance. Grievant has been an assistant principal at Fairmont Senior High School for five years.
2. Grievant holds professional certifications from the West Virginia Department of Education Office of Professional Preparation. Grievant is certified to be a principal and superintendent.
3. Grievant holds a bachelor's degree in Physical Education and Health from Fairmont State University, and two master's degrees in education leadership and higher education leadership from Salem University.

4. In the fall of 2020, former Superintendent, Randall Farley, and Administrative Assistant for Human Resources, Rockie DeLorenzo, asked Grievant to provide a letter from his therapist.

5. Grievant's therapist provided a letter documenting his condition and set forth the accommodations for him as providing five-to-ten minute breaks and time off work, as needed, in accordance with the County Board policy.

6. Grievant used these accommodations, as needed, without issue, until his supervisor, Karen Finamore, went on sick leave.

7. After Principal Finamore's absence, Superintendent Farley directed Grievant to attend a meeting in his office on November 5, 2020. Superintendent Farley placed Grievant on administrative leave pending a "fitness for duty" examination by a doctor of their choosing.

8. Grievant objected to the administrative leave and appealed the decision to the full Marion County Board of Education. The Board refused to reverse the decision of the Superintendent, leading to Grievant's forced absence from the school for over four months.

9. After his return to work, Grievant was once again supervised by Principal Finamore.

10. The job performance of professional school employees in West Virginia is evaluated pursuant to West Virginia Board of Education Policy 5310. There are eleven standards on which the job performance of school leaders are evaluated under Policy 5310. Under the first ten standards, a school leader's job performance may be rated, highest to lowest, as distinguished, accomplished, emerging, or unsatisfactory.

11. The emerging rating means that the employee met the basic standard being evaluated. In addition, the emerging rating means that the evaluator believes the employee has an opportunity for professional growth in this area.

12. Accomplished means performance which demonstrates mastery of the standard.

13. When Grievant received his performance evaluation for the 2020-2021 school year, Principal Finamore evaluated him as “emerging” in three areas: Elements 1.1, 4.1, and 7.1.

14. Element 1.1 provides as follows: “The school leader demonstrates effective and professional interpersonal and collaborative skills.” In support of her rating, Principal Finamore indicated that, “While Mr. Womble communicates via text messages and occasionally e-mail, more verbal in-person communication with his co-administrators would enhance the effectiveness of the team.”

15. Prior to Grievant’s return to work, a meeting was held to set forth the parameters for effective communication. Principal Finamore attended the meeting.

16. Grievant was directed to contact Principal Finamore via text message if he was using any of the accommodations provided for in the document facilitating his return. Grievant complied with this request.

17. Additionally, due to her medical condition, Principal Finamore advised her administrators that her doctor was concerned about her physical contact with others at the school, so she limited her contact with everyone following her return to work. Principal Finamore communicated using email. Grievant responded in kind.

18. When Grievant returned to Fairmont Senior, Marion County was adhering to COVID-19 protocols. While Grievant communicated with students, faculty and staff in the normal course of business and continued to conduct school business, he did so adhering to the COVID-19 protocols.

19. Element 4.1 provides, “The school leader builds and sustains a safe and positive climate and cohesive culture.” Principal Finamore’s only comment was regarding Grievant’s participation as a member of the school’s PBIS Team. She indicated that “Mr. Womble is a member of the PBIS Team that works to maintain a positive school culture. While he is present at most meetings, he rarely contributes to the discussion.”

20. Element 7.1 provides, “The school leader demonstrates a proactive approach in effectively managing resources and operations of the school.” Principal Finamore commented that “Mr. Womble was minimally involved in the process of managing and monitoring resources and operations this year.”

21. It is undisputed that Grievant was placed on administrative leave for over four months, due to the actions of the Superintendent during the pandemic. Grievant returned to work on or about March 19, 2021.

22. The record supports a finding that Grievant was, in essence, penalized for matters that he could not accomplish because of the administrative leave that he was forced to take by the Superintendent and Board of Education.

23. Grievant seeks to have the evaluations for Elements 1.1, 4.1 and 7.1 changed from emerging to accomplished.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

“Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10- 427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). See *Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), *aff'd* Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), *aff'd*, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990).” *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

Grievant asserts that Principal Finamore acted arbitrarily and capriciously in rating him “Emerging” on three elements of his evaluation. The record supports a finding that the rationale presented by the evaluator in this case was lacking in merit or proper foundation and can reasonably be viewed as arbitrary.

In the instant case, the evaluation was performed without consideration of facts and circumstances impacting the actions of Grievant. Through no fault of his own, Grievant was forced to take over four months away from his duties and responsibilities at Fairmont Senior High School. It is also undisputed that the level of disruption in the school year was also significant based on the principal’s absence due to medical issues. In addition, a global pandemic saw students attending school virtually or on alternative days

in person and the holding of meetings via a virtual platform, which resulted in anything but normal.

In any event, Principal Finamore criticized Grievant for communicating by text message for which he was required to do as a result of his return to work agreement. Principal Finamore criticized Grievant for using email when she often used that mode of communication, due to her ongoing health issues which required limited exposure to students and staff. The record lacks any evidence that Principal Finamore witnessed Grievant's interaction with students, faculty and staff during the 2020-21 school year due to her absence. Principal Finamore's criticism does not take into account the totality of the circumstances, including her own limitations.

The record also supports a finding that Principal Finamore's criticism of Grievant's limited participation in PBIS meetings is arbitrary. When Grievant returned to work, he did the prudent thing listening to better understand what had taken place in his absence and to confer with Principal Finamore who had contacted businesses. Grievant responded to questions and updated the group as necessary. The record established that there were fifteen to twenty people on the virtual meetings held via Teams. For everyone to have something to say during every thirty minutes to one hour meeting, would have been counterproductive. In addition, there is no evidence that there was a requirement for everyone to add to the discussion at every meeting or that anyone else was being evaluated by Principal Finamore according to their level of participation.

Principal Finamore references nothing else in Grievant's performance which ignores his efforts to improve school climate, including greeting students and parents, showing concern for the well-being of students, dealing with disciplinary matters, and

doing so in a COVID-19 pandemic. The fact that the principal evaluated Grievant as having performed differently than previously is not validated through actual observation, nor other direct communication other than one instance in a group meeting. The record is void of data that supports the conclusion that Grievant is now emerging, yet employed for over five years of tenure in the position with acceptable previous performance. Principal Finamore was on leave for four months and provided no meaningful support for her rating of “Emerging.”

Finally, regarding his management of school resources, Grievant managed the resources for which he was responsible for the school year while at Fairmont Senior Highschool. Grievant’s labeled minimum involvement is related to being out of the building for over four months and the exclusion of him from decision-making for the school. The record is absent any rebuttal that Grievant did handle management issues including the attendance, performance evaluations of service and other personnel, discipline of students and ink cartridge orders. Grievant was an integral part of the administration of the school in the 2020-2021 school year, despite his administrative leave.

The limited record of this case demonstrates by a preponderance that Principal Finamore focused on singular items to rate Grievant emerging versus accomplished. She principal ignored other work Grievant completed and failed to consider his involuntary removal from the school, and efforts Grievant undertook to reacclimate himself to committee work. The principal also ignored the entirety of Grievant’s responsibilities and body of work including interactions with faculty, and staff, as well as students and parents during the time of a worldwide pandemic. It is more likely than not that Grievant’s

evaluation score relating to the three contested elements merited a score of accomplished rather than emerging due to an arbitrary conclusion reached in a manner contrary to the evidence,

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10- 427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). See *Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No.

54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990).” *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

3. 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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

4. Grievant was able to demonstrate by a preponderance of the evidence that the rating of “Emerging” and the rationale presented by the evaluator in support of the rating was lacking in merit or proper foundation and can reasonably be viewed as arbitrary.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to change Grievant’s evaluation for the 2020-2021 school year in areas 1.1, 4.1 and 7.1 from “emerging” to “accomplished”, any negative comments for each of the areas of evaluations be removed, that the updated evaluation

be made a part of his personnel file, and that the previous evaluation be removed from his personnel file.

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 (2018).

Date: June 3, 2022

Ronald L. Reece
Administrative Law Judge