JAY BAKER,

Grievant,

v. **DOCKET NO. 94-10-427**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Jay Baker (hereinafter "Grievant") was employed by the Fayette County Board of Education (hereinafter "Respondent") as a classroom teacher for approximately five and one-half (5-1/2) years. Grievant was assigned during his entire employment to Falls View Elementary School ("Falls View") under Principal Edgar Friedrichs. At the end of the 1993-1994 school year, Principal Friedrichs and John Cavalier, Director of Elementary Schools, made a recommendation to Superintendent Rick Powell that Grievant's employment be terminated for the following reasons:

1. Failure to successfully and fully complete his current Plan of Improvement;

2. repeated violations of written and verbal directives;

3. failure to maintain consistent levels of improvement in many areas even after having passed two previous Improvement Plans;

4.

> failure to maintain and/or establish adequate levels of trust and confidence between himself and many students and parents at Falls View School which, over the years,has resulted in those parents transferring their children to other schools.

Admin. Ex. 3.

Superintendent Powell notified Grievant by certified mail on July 8, 1994, that he was recommending his termination to the Board of Education effective the end of the 1993-1994 school year "for unsatisfactory performance and insubordination based upon the recommendation of Principal E. M. Friedrichs (copy attached) and the matters therein set forth or referenced." Grievant was informed by this letter that the Board would meet on August 8, 1994, and that he could "appear in person and/or by counsel or representative, present evidence, cross-examine witnesses and otherwise participate in the hearing." Admin. Ex. 24.

Grievant appeared in person and by counsel at the August 8, 1994 meeting and an extensive hearing was held before the Board. (See footnote 1) At the conclusion of the hearing, the Board voted to adopt the Superintendent's recommendation and terminated the Grievant's employment. Grievant was notified by Superintendent Powell of the action taken by the Board by letter dated August 9, 1994.

Grievant thereafter timely filed this grievance on August 15, 1994, citing violations of W. Va. Code §§ 18-29-2(n), 18-29-3, 18A-2-8 and 18A-2-12, as well as Title 126 Series 142 Policy 5310 for "improper dismissal due to improper improvement plan, evaluation, and notice. Factual basis relied upon by board insufficient tojustify dismissal or an improvement plan of the type prquired [sic] in this case." (See footnote 2) A Level IV hearing was held on October 18 and 21, 1994. The parties submitted proposed findings of fact and conclusions of law on or about November 10, 1994, at which time this case became mature for decision.

The following facts are deduced from the pleadings and record developed in this matter.

1. Grievant had been employed as a classroom teacher at Respondent's Falls View Elementary School for approximately 5-1/2 years under Principal Edgar Friedrichs.

2. Prior to school year 1993-1994, Grievant had been placed on two previous improvement plans.

3. Both during the 1993-1994 school year, and during previous years, numerous verbal and

written directives were given to Grievant by Principal Friedrichs touching on various issues, including, but not limited to, tardiness, favoritism in the treatment given Grievant's son in school, inconsistent or uneven discipline in the classroom, leaving students unattended and unsupervised, inadequate or incorrect grading methods, unprofessional conduct, violating confidentiality of students andparents with regard to disciplinary matters, and non-compliance with directives. Admin. Ex. 1.

4. During the 1993-1994 school year and during previous years, Principal Friedrichs had received and advised Grievant of numerous verbal and written complaints from parents of students in Grievant's classroom about lack of discipline, unevenness of discipline, failure to return papers, inadequate or incorrect grades and other areas of complaint. Admin. Exs. 20, 25-27.

5. Principal Friedrichs conducted three observations of Grievant on December 12, 1993, February 15, 1994, and March 8, 1994. A post-observation conference was conducted in each instance in a timely manner, with the data set forth in the observation reviewed by the Grievant. Grievant acknowledged the opportunity to confer with Principal Friedrichs in each instance. Admin. Ex. 22.

6. Thereafter, Principal Friedrichs conducted a formal teacher performance evaluation of Grievant on March 15, 1994.

7. West Virginia State Board of Education Policy 5310 (Policy 5310) requires a minimum of one written evaluation per year for employees with three to six years of experience. Policy 5310 also requires that teachers with three to six years of experience be observed a minimum of two times for each written evaluation, and that a post-observation conference be conducted within five working days of the observation. The performance evaluation form (Admin. Ex. 22) is the state-approved performance tool provided to all Principals in Fayette County in accordance with the directives of Policy 5310.

8. Grievant's performance evaluation of March 15, 1994 reflected the problems being encountered by Grievant as indicated by the directives issued by Principal Friedrichs and the parent complaints. The evaluation indicated unsatisfactory scores in five of the six areas being evaluated, specifically: Classroom Climate; Instructional Management System; Student Progress; Communication; and Professional Work Habits.

9. The teachers' performance criteria set forth in Policy 5310 includes the above five categories, as well as Programs of Study, making up the six categories listed on the state-approved

evaluation form utilized by Principal Friedrichs in evaluating Grievant.

10. At the completion of the evaluation on March 15, 1994, a post-evaluation conference was held and Grievant was advised that a Plan of Improvement would be developed. Grievant was invited to and did meet with Principal Friedrichs on March 29, 1994, to provide suggestions and ideas for incorporation into the Plan. Admin. Ex. 10.

11. Grievant received the Plan of Improvement on or about April 1, 1994, and was advised that if he failed to successfully complete the Plan, Principal Friedrichs would recommend his termination to the Superintendent. Admin. Ex. 13.

12. Part of the Plan of Improvement involved the formation of an Improvement Team to monitor and assist Grievant with his Plan of Improvement. The Team was comprised of Principal Friedrichs, Ralph Winter, Principal, Ansted Elementary, and Jackie Ward, a teacher atGauley Bridge Elementary. Ms. Ward was selected by Grievant as the teacher representative on the Team. In addition, Doris Shockey, Fayette County Elementary Specialist, agreed to be available to assist Grievant in any way necessary. Admin. Ex. 11.

13. Policy 5310 provides that an improvement team shall be comprised of the employee's immediate supervisor, one additional administrator, and one professional educator who shall be selected by the teacher from a list approved by the county. An improvement team shall monitor the improvement plan and may conduct observations and conferences, provide training to assist the employee, and identify additional resources to aid the employee in meeting the performance criteria outlined in the Plan.

14. The Plan of Improvement dated March 31, 1994 (Admin. Ex. 12) was submitted to Director of Elementary Education John Cavalier and approved by him on or about April 7, 1994 (Admin. Ex. 4).

15. The Plan of Improvement was devised on a state-approved form supplied to all principals in Fayette County. The areas of improvement denoted on the Plan were taken directly from the Grievant's teacher evaluation form and Policy 5310.

16. Principal Friedrichs also devised monitoring reports for the Improvement Team which corresponded with the areas of needed improvement denoted on the Plan of Improvement and teacher evaluation form. Principal Friedrichs utilized suggestions received in the training session for evaluators conducted by the Center for Professional Development in Spring, 1992 in developing the

monitoring report forms.

17. All Improvement Team members were supplied a copy of the Improvement Plan, a list of materials which had been provided to Grievant by Principal Friedrichs, a copy of a letter of approval of the Team Member, a copy of Grievant's schedule and monitoring report forms. Each team member was reminded that the purpose of the improvement team was to help Grievant improve and that they were to have no discussion or sharing of information between or among team members until the end of the improvement period. Each team member was required to deliver his or her reports before June 10, 1994, the end of the improvement period, along with a final report. Admin. Exs. 6-1, 7-1, 8-1.

18. Team member Ward had previously served on a school-wide improvement team concerning Grievant and Grievant had selected her again to serve in that capacity. Ms. Ward subsequently withdrew from the team for personal reasons. However, she did have the opportunity to observe Grievance once, on April 12, 1994, completed observation monitoring report forms and conferred with Grievant following her observation. Admin. Ex. 8-2.

19. Principal Friedrichs informed Grievant on April 29, 1994, that Julia Brown was willing to serve on the Improvement Team in place of Ms. Ward. Admin. Ex. 6-4. Grievant asked for several other teachers to choose from on May 2, 1994. Admin. Ex. 6-3. Principal Friedrichs supplied Grievant with a list of teachers to choose from on May 4, 1994. Admin. Ex. 14. Grievant selected Ms. Brown on May 5, 1994, and informed Principal Friedrichs that hewanted to speak with Ms. Brown before she began her observations. Admin. Ex. 6-2.

20. Ms. Brown observed Grievant on four separate occasions: May 11, 1994 (announced); May 24, 1994 A.M. (unannounced); May 24, 1994 P.M. (unannounced); and June 1, 1994 (unannounced). Admin. Ex. 6-6 through 6-9. Ms. Brown reduced her observations to writing and conducted post-observation conferences with Grievant on each occasion.

21. Mr. Winter observed Grievant three times: April 29, 1994 (announced); May 13, 1994 (unannounced); and June 3, 1994 (unannounced). Mr. Winter completed the monitoring report forms for each visit and conducted post-observation conferences with Grievant on each occasion. Admin. Ex. 7-3 through 7-5.

22. Principal Friedrichs observed Grievant two times: May 6, 1994 (announced) and June 8, 1994 (unannounced). Principal Friedrichs completed the monitoring report forms, reduced his observations to writing, and conducted post-observation conferences with Grievant. Admin. Ex. 19-1

and 19-2.

23. None of the Improvement Team members had any discussion with other members during the Improvement Period. All the Improvement Team Members made their own individual recommendations without the knowledge of the recommendations being made by the other Team members. All of the Team members concluded that Grievant did not successfully complete the Plan of Improvement. Admin. Ex. 23.

24. Following notification to Grievant on June 10, 1994, Principal Friedrichs, Director of Elementary Education John Cavalier and Grievant met on June 13, 1994, to discuss the results of the Plan of Improvement. Admin. Ex. 15.

25. A memorandum of the conference and the formal results of the Plan of Improvement dated June 13, 1994, indicated that Grievant did not successfully remediate his deficiencies in any of the areas of the Plan of Improvement and the Improvement Team Members had concluded that, "although some improvement was noted in a few areas, Mr. Baker did not successfully and fully complete any of the five areas monitored nor the plan as a whole." Admin. Ex. 16.

26. Following the meeting on June 13, 1994, Principal Friedrichs and John Cavalier recommended to Superintendent Powell that Grievant's employment be terminated.

Discussion

1. Whether Respondent violated Grievant's due process rights under W. Va. Code §§ 18A-2-8 and 18A-2-12?

Grievant contends that Respondents violated the provision of W. Va. Code § 18A-2-8 which requires that charges against an employee "shall be stated in writing served upon the employee within two days of presentation of said charges to the board." Principal Friedrichs recommended Grievant's termination to Superintendent Powell on June 14, 1994. Admin. Ex. 3. Superintendent Powell communicated to Grievant on July 8, 1994, that he would be making a recommendation to the Board for Grievant's termination and that the matter would be taken up at theAugust 8, 1994 Board meeting. Admin. Ex. 24. Hearing was held and the Board voted to terminate Greivant on that day.

Superintendent Powell communicated to Grievant the Board's vote to terminate him on August 9, 1994. Grievant received the communication on August 10, 1994. See Fayette County Board of Education Grievance Form submitted by Grievant on August 15, 1994.

Grievant suggests that charges were presented to the Board sometime before August 8, 1994 and that he was not notified within two days of such presentation. Grievant assumes that Principal Friedrichs' letter was presented to the Board at or around the time of its issuance on June 14, 1994. However, there is no evidence which suggests that Principal Friedrichs' letter was presented to the Board by Superintendent Powell anytime before the Board meeting on August 8, 1994, and it is only the Superintendent, not the Principal, who has the authority to recommend an employee's dismissal to the Board. W. Va. Code § 18A-2-7.

Grievant's argument and interpretation of this provision of W. Va. Code § 18A-2-8 is misplaced. The language "within two days of presentation of said charges to the board" refers to the Board meeting wherein said charges are addressed and the two days following that meeting. See Bd. of Educ. of County of Mercer v. Wirt, No. 22117, ___ S.E.2d ___ (W. Va. 1994); Thomas v. Harrison County Bd. of Educ., Docket No. 91-17-201 (Oct. 14, 1992). The definition of "presentation" includes "the process of offering for consideration" or a "formal introduction". The American Heritage Dictionary, Second College Edition, 1991, p. 980. SuperintendentPowell's recommendation of Grievant's dismissal was formally offered to the Board for consideration at the August 8, 1994 Board meeting. Thus, even if Superintendent Powell's letter was forwarded to the Board at some earlier date for addition to the Board's agenda, it is the August 8, 1994 date that is controlling for purposes of complying with the statute. The Board met on August 8, 1994 to review the charges brought against Grievant. Superintendent Powell notified Grievant in writing of the Board's decision on August 9, 1994, clearly within two days of the presentation of the charges to the Board.

Grievant also claims Respondent violated W. Va. Code §§ 18A-2-8 and 18A-2-12 as those sections apply to the charge of unsatisfactory performance. It is undisputed that Principal Friedrichs had completed a performance evaluation of Grievant on March 15, 1994, from which a Plan of Improvement was developed on March 31, 1994. Principal Friedrichs recommended Grievant's termination in part for failing to meet the requirements of the Plan of Improvement. However, Principal Friedrichs did not perform another formal written performance evaluation of Grievant at the

end of the Plan of Improvement prior to recommending his dismissal to Superintendent Powell.

Grievant asserts that Code § 18A-2-12 (1990) "requires that a performance evaluation be completed at the end of any written improvement plan", and Principal Friedrichs failure to perform another evaluation of Grievant at the end of the Plan of Improvement constitutes a violation of Grievant's due processrights. See Memorandum on Behalf of Jay Baker, p. 2 (emphasis in original). W. Va. Code § 18A-2-12 states, in pertinent part:

> (a) The state board of education shall adopt a written system for the evaluation of the employment performance of personnel, which system shall be applied uniformly by county boards of education in the evaluation of the employment performance of personnel employed by the board.
>
> (b) The system adopted by the state board of education for evaluating the employment performance of professional personnel shall be in accordance with the provisions of this section. . . .
>
> A professional whose performance is deemed to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.
>
> . . .
>
> Any professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If such evaluation shows that the professional is still not performing satisfactorily, the evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of section eight of this article.

Contrary to Grievant's assertion, this Code provision does not require that a performance evaluation be completed at the end of any written improvement plan. Code § 18A-2-12 requires the state board of education to adopt a written system for evaluating the performance of school

personnel which system "shall be in accordance with the provisions of this section". The state boardof education adopted 9 W. Va. C.S.R. § 126 (1990), Policy 5300 and Policy 5310, in response to this directive. Policy 5300 provides, in part:

> Every employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/her job performance, prior to the terminating or transferring of his/her services, and can only do so with assistance of regular evaluation.

Policy 5310 provides that, for teachers with 3-6 years of experience, "a minimum of one written evaluation per year is required". The observations of the supervisor are recorded on the "evaluation instrument", an approved evaluation form containing the performance criteria listed in Policy 5310, including programs of study, classroom climate, instructional management systems, student progress, communication, and professional work habits. When an employee's performance is unsatisfactory in any area of responsibility listed above, an improvement plan shall be developed by the supervisor and the employee. The improvement plan shall designate how satisfactory performance will be demonstrated. A referral to an improvement team for an employee with an unsatisfactory evaluation may occur when the supervisor determines he/she needs such assistance. The improvement team shall monitor the improvement plan and may: a) conduct observations and conferences, b) provide training to assist the employee in meetingthe performance criteria outlined in the plan, and c) identify additional resources. See Policy 5310.

Nowhere in its discussion of "evaluations" or "improvement plans" does Policy 5310 require that a follow-up "formal" or "written" evaluation be conducted after the improvement plan. Rather, the observations conducted and conferences held throughout the period of the improvement plan serve as evaluating tools for determining whether the employee has successfully completed the plan. If the employee is found to have done so, then no further action need be taken. If, however, the employee is found to have failed in completing the terms of the improvement plan, then dismissal may be recommended to the board. Thus, the language in Code § 18A-2-12 refers to the ongoing evaluative process inherent in the improvement plan, rather than a second "formal" written evaluation as that term is used by Grievant in his argument.

2.

Whether Grievant's Plan of Improvement violated West Virginia State Board of Education Policy 5300 and 5310?

Grievant contends that the Plan of Improvement "did not comply with the statutory authority or the guidelines of the Fayette County Board of Education," and cites a violation of Policy 5300 in his statement of grievance. Grievant contends that the Plan of Improvement did not clearly and specifically set forth recommendations for improvements, and could not be completed in a reasonable fashion during the time allowed.

First, it is clear from the foregoing recitation of facts that Respondent strictly adhered to the directives and guidelines of Policy 5300 and 5310 in evaluating Grievant, in implementing thePlan of Improvement and in selecting the Improvement Team. The Plan of Improvement was well thought-out, included numerous suggestions for improvement, and various resources were provided to Grievant to aid in the implementation of these suggestions. Additionally, the Improvement Team members each supplied Grievant with his or her own specific recommendations and suggestions to assist him in improving his classroom climate and teaching skills. There is very little evidence that Grievant consistently attempted to implement any of the suggestions offered and, in fact, dismissed them as not being "appropriate" for his classroom. The undersigned finds no violation of Policy 5310 by Respondent in its evaluation of Grievant, development and implementation of a Plan of Improvement, or selection of an Improvement Team.

Grievant's Plan of Improvement extended from April 15, 1994 through June 10, 1994. Grievant contends that this was not reasonable and that it was impossible to successfully meet the requirements of the Plan in six weeks' time.

The aim of Policy 5300 and Policy 5310 is to provide a teacher with timely notice about the administration's views regarding his/her job performance as reflected by evaluations, observations, letters and conferences. Brown v. Wood County Bd. of Educ., 400 S.E.2d 213 (W. Va. 1990). Failure by a board of education to follow the evaluation procedure in Policy 5300 prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation,and which is correctable. Trimboli v. Bd. of Educ. of County of Wayne, 254 S.E.2d 561 (W. Va. 1979). W. Va.

Code § 18A-2-12 further provides that under a plan of improvement, "the professional shall be given a reasonable period of time for remediation of the deficiencies . . .".

In determining whether Grievant's Plan of Improvement provided Grievant with a reasonable opportunity to improve, we must first examine what Grievant reasonably should have known about the administration's views regarding his job performance, as reflected by the evaluations, observations, letters and conferences. Wilt v. Flanagan, 294 S.E.2d 189, 194 (W. Va. 1982).

Grievant's evaluation in March 1994 resulted in an unsatisfactory rating in five of six areas of performance criteria. Some of these deficiencies had been the subject of Grievant's two previous plans of improvement. Principal Friedrichs observed Grievant three separate times prior to the March evaluation and each time conducted post-observation conferences with Grievant. The December 12, 1993 observation reflects that Grievant needed to improve in five of six areas of performance criteria.

The February 12, 1994 observation found that Grievant needed to improve in the same five of six performance criteria and concluded that "Mr. Baker's overall problems seem to stem from two main areas: 1. Organization 2. consistency and fairness in discipline." Admin. Ex. 22.

The March 8, 1994 observation again found that Grievant needed to improve in yet again the same five areas of performancecriteria. Interspersed with these observations and evaluation, Principal Friedrichs had been issuing Grievant numerous written and verbal directives about his performance in many areas, as well as directives advising him of the numerous parental complaints which were being filed against him.

Thus, by the time Grievant was evaluated in March 1994, he had known for 4 months at the very least that he needed improvement in five areas of performance, and knew for a longer period than that that Principal Friedrichs and parents had concerns about his performance. When Principal Friedrichs developed the March 1994 Plan of Improvement with Grievant's input, he informed him that he would recommend Grievant's termination if he did not successfully complete the Plan of Improvement by the end of the period in June, 1994.

Finally, the Improvement Team continually observed Grievant throughout the improvement period, held conferences with him, provided input, resources and assistance to Grievant, ultimately to no avail. There is no evidence that the team members had any bias against Grievant; to the contrary, they all testified that their goal was to be fair and do everything they could to assist Grievant in successfully completing the Plan.

Thus, unlike other cases where it was found that one month or six weeks was not a reasonable time for improvement, cf., Slavin v. Cabell County Bd. of Educ., Docket No. 06-88-121 (Feb. 17, 1989); Whetstone v. Grant County Bd. of Educ., Docket No. 12-88-106 (Aug. 29, 1988), Grievant had every opportunity and reason to know wellin advance of his March evaluation and Plan of Improvement what the administration's views were of his performance, what was expected of him in terms of improvement, and the exact time frame given to succeed.

3.

Whether Respondent "harassed" Grievant in violation of

W. Va. Code § 18-29-2(n)?

Grievant claims Respondent violated W. Va. Code § 18-29-2(n) which defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy, and profession." Grievant's claim of harassment apparently stems from the many directives issued to him by Principal Friedrichs regarding, among other things, parental complaints, his teaching practices, and classroom climate. In addition, he cites in support of his claim of harassment, Principal Friedrichs' statement at the Board hearing that he had "gotten pressured -- to really jump all over [Grievant]." Tr., p. 301. Principal Friedrichs confirmed at the Level IV hearing that Superintendent Powell told him to do something about Grievant about the same time he implemented Grievant's Plan of Improvement.

It is clear from the numerous parental complaints which were filed against Grievant and the numerous directives issued to him by Principal Friedrichs that pressure was being put on both the Principal and the Superintendent to do something about Grievant. However, acting upon such complaints does not constitute harassment on the part of Respondent. Rather, "a county board of education may receive complaints against a school employee from citizenswhere the complaints involve the professional competency of the employee; the board should act upon such complaints, order an evaluation, and discharge the employee if an improvement plan period proves to be in vain." Syl. Pt. 5, Mason County Bd. of Educ. v. State Supt. of Schools, 274 S.E.2d 435 (W.Va. 1981). Thus, acting under pressure from parents, evaluating Grievant, and implementing a Plan of Improvement, as well as issuing directives designed to assist Grievant, is not contrary to the demeanor expected by

law; rather, it is mandated by it.

Conclusion

Grievant offers many excuses, including poor discipline in the school as a whole; having too many students in his classes that suffer from learning disabilities or other handicaps; having an irregular 5/7 split in studies skills' class; too many interruptions by Principal Friedrichs and other teachers; and too much parental influence in the school system. Indeed, other than admitting to being "soft" on discipline (Board Tr., p. 407), Grievant accepts no responsibility for any of the problems encountered in his classroom and in his teaching methodology.

An employer does not have the burden of proving deficiencies which it has presented in a Plan of Improvement, because, while certain aspects of improvement plans can be considered disciplinary in nature, such plans are more "rehabilitative" than punitive. Accordingly, an employee who makes allegations that a plan of improvement is arbitrary or violative of some policy or regulation of the employer, must bear the burden of proving those charges bya preponderance of the evidence. Oni v. BOD/Bluefield State College, Docket Nos. 93-BOD-515/408/302 (December 30, 1994); Goodman v. Putnam County Bd. of Educ., Docket No. 93-40-133 (July 8, 1993).

Grievant has not proven that the Plan of Improvement violated Policy 5310 or any policy of Respondent. To the contrary, Respondent followed the directives of Policy 5310 to the letter in carrying out Grievant's teacher performance evaluation, implementing the Plan of Improvement and selecting the Improvement Team. Grievant has also failed to prove by a preponderance of the evidence that the Plan was arbitrary and capricious. The Plan addressed all areas of unsatisfactory performance found in Grievant's evaluation. The Plan provided ample recommendations and suggestions for improvement, and specifically informed Grievant what was expected of him. Finally, the Plan provided Grievant ample time to improve in all areas of deficiency. Grievant had been put on notice of his deficiencies through prior Improvement Plans, numerous directives from Principal Friedrichs and from parent complaints. Grievant's behavior and inability to accept responsibility for any of the areas of deficiency indicate an unwillingness and inability to comply with the terms of the Plan and the time period given Grievant to improve was not unreasonable in light of the prior plans and directives for improvement.

Based upon the foregoing facts and discussion, the undersigned finds that Respondent adhered

to the mandate of Policy 5300 and Policy 5310 in evaluating Grievant, imposing an improvement planand improvement team on him to monitor his progress, and subsequent dismissal for failure to successfully complete the terms of the improvement plan. (See footnote 3)

Conclusions of Law

1. In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. Lilly v. Fayette County Bd. of Educ., Docket No. 89-10-436 (Dec. 11, 1992).

2. When grounds for a school employee's dismissal include charges relating to unsatisfactory performance or conduct which is deemed correctable, the Board must also establish that it complied with provisions of West Virginia Board of Education Policy 5300 requiring it to inform said employee of his deficiencies and afford him a reasonable period to improve. Policy 5300 contains provisions that an employee must be assisted in this goal and not thwarted from achieving objectives set forth in an Improvement Plan. Mason County Bd. of Educ. v. State Superintendent of Schools, 274 S.E.2d 435 (W. Va. 1987).

3. The Board has established by a preponderance of the evidence that Grievant was fully apprised of his deficiencies and given a reasonable period of time to improve, yet failed to achieve the goals outlined in the Improvement Plan and failed to remediate his deficiencies.

4. The Board has established that Grievant was provided ample assistance on the Plan which was mutually developed by the Principal and Grievant, that the Plan was developed, noticed and implemented in accordance with the applicable provisions of Policy 5300 and 5310.

5. The Board has established by a preponderance of the evidence that the unsatisfactory performance of Grievant and deficiencies noted in the March 1994 evaluation were not satisfactorily remediated during the period of the Improvement Plan and that Grievant failed to satisfactorily complete the Improvement Plan.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any

appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 24, 1995

Footnote: 1 *The transcript of the August 8, 1994 Board hearing consisting of 443 pages has been incorporated into the record herein.*

Footnote: 2 *Although cited in the grievance filed at Level IV, no further reference was made during the Level IV hearing or in pleadings regarding violations of W. Va. Code § 18-29-3 (the grievance process), and claims of such are considered to be abandoned by the Grievant.*

Additionally, Grievant argues in his proposed findings of fact and conclusions of law that Principal Friedrichs' entire testimony should be excluded because the evidence proves that Principal Friedrichs "manufactured" evidence. After reviewing the testimony, evidence and case law cited by Grievant in support of this argument, the undersigned finds the argument to be without merit.

Footnote: 3 *Superintendent Powell's letter to the Board recommending Grievant's termination also cited insubordination as a reason for dismissal. However, as the Board has met its burden of proof with regard to the charge of unsatisfactory performance, no further discussion of the insubordination charge is necessary.*