DAVID M. ALFRED

v. Docket No. 96-35-331

OHIO COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, David M. Alfred, employed by the Ohio County Board of Education (Respondent) as a music teacher and band director, initiated grievance proceedings at level two at a time unspecified in the record, in which he alleged that he was given an unfair evaluation and placed on a plan of assistance in violation of W.Va. Code §18A-2-12 and State Board of Education Policy 5310. He further asserted the action to be ongoing harassment and reprisal in violation of W.Va. Code §18-29-2(n) and (p). (See footnote 1) For relief, Grievant requested "an investigation by the Board of Education, if there is reasonable proof or these issues are found to be true, then the administrators should be suspended and dismissed from Triadelphia Middle School. [Grievant also requested] that an independent administrator/school employee should be assigned to Triadelphia Middle School to monitor, improve & repair the decorum, communication, and operation of the administration as it relates to the band program and band director." The grievance was denied at level two and consideration was waived at level three. Appeal was made to level four on July 31, 1996. A level four hearing was conducted on October 10, 1996, and the matter became mature for decision with the filing of post hearing proposals on November 12, 1996.

The basis of this grievance is the 1995-96 teacher evaluation completed for Grievant by Clifford Bowers, Assistant Principal at Triadelphia Middle School. This document consists of six sections, each of which encompasses five or more specific points which require comment by theevaluator. The employee is then rated "Satisfactory" or "Unsatisfactory" for the entire section. In this case, Grievant was rated "Satisfactory" in five of the areas, but was determined "Unsatisfactory" in "Professional Work Habits". (See footnote 2) Mr. Bowers found Grievant to be deficient in two points of this section. Under "[a]dheres to established laws, policies, rules, and regulations" Mr. Bowers noted:

Per Triadelphia Middle School Guideline - Classroom Management - When sending students out of class, "A completed Discipline Referral should be sent to the Assistant Principal promptly after the

offense."

Per Ohio County Schools regulation 2004.1 #3 - the principal of the school where services will be rendered must submit the approved volunteer application to the Director of Personnel for review.

Mr. Alfred faxed a list of band parent volunteers to the Superintendent's office without the approval of the Triadelphia Middle School administration. The list was intended to be attached to the Ohio County Schools Board of Education agenda.

Per Instructional Music Teacher job description #16- discusses all performances with the principal before placing them on the calendar.
Mr. Alfred presented Mr. Blake a two page letter on Monday, February 12, 1996, dated Sunday February 11, outlining his prior discussions with band parents and their subsequent decision to take a band trip May 10-11, 1996.

Under the second point, "[i]nteracts appropriately with other educational personnel",
Mr. Bowers placed the following comments:
Mr. Alfred placed in my mailbox a packet dated Thursday, May 2, 1996, citing pages 1 and 2:

'Bus Numbers' - 'Bus identification numbers will be provided to the administration when the buses arrive on May 10, 1996. It would be helpful if either of you could come out and help see us off and this information could be given to you then.'

Mr. Blake and Mr. Bowers were present as buses were being loaded and did see them off to Nashville. At no time did Mr. Alfred speak to either administrator nor did he present any bus identification information as previously stated in the packet. Medical information for students going on the trip was delivered to the office by a parent on Friday, May 10, 1996, the date of departure. Appropriately, this information should have been delivered by the teacher.

On several occasions, Mr. Alfred puts notes in the administration's mailbox. Mr. Bowers directed Mr. Alfred at the beginning of the school year to work in a collegial manner with the administration, since most topics may be dealt with verbally.

In September, 1996, a plan of improvement was developed and implemented to correct the above

cited deficiencies. The specific program Grievant was to follow was stated as follows:

A. David Alfred will make himself aware and follow the SSAC rules, policies and regulations pertaining to his employment assignment.

B. David Alfred will make himself aware and follow the Ohio County Board of Education's rules policies and regulations as they pertain to his employment assignment.

C. David Alfred will make himself aware and follow the Triadelphia Middle School rules, policies and regulations as they pertain to his employment assignment.

D. David Alfred will follow the Triadelphia Middle School flow chart of command relating to both his curricular and extra curricular activities. He will report all curricular questions to his curriculum coordinator. All questions and/or facts relating to the extra curricular activities, i.e., band boosters, will be directed to Frank Blake, Principal at Triadelphia Middle School, in person. A written text may be presented to Frank Blake in person, to reinforce the verbal conversation.

E. David Alfred will conduct business at Triadelphia Middle School in one-to-one manner as often as possible. Written text will be presented to staff only to reinforce a verbal conversation. Written materials will be dated with the date when presented.

F. Written materials for Mr. Blake and/or Mr. Bowers will be given to the school secretary according to Triadelphia Middle School guidelines.

The plan provided for observations throughout October and November, with a final evaluation of Grievant's progress by January 24, 1997.

Grievant asserts that the plan of improvement was not warranted and was motivated by ongoing harassment by the TMS administration and reprisal for a prior grievance which he had filed. In support of this complaint, Grievant states that after suffering three years, he filed a grievance in March 1995, alleging that TMS principal Frank Blake had harassed him with verbal abuse and professional misconduct, including threatening his employment degradation in front of his peers, and denying him the right to have a representative attend private conferences. This grievance was settled in May 1995; however, Grievant claims that the harassment resumed early in the 1995-96 school year when Mr. Bowers placed a letter of reprimand in only his personnel file after he, and others,

failed to attend a faculty meeting. At the level four hearing, Grievant offered evidence of other incidents which had occurred. Wilma Ferrell, a cook at TMS, testified that Mr. Bowers once asked her why she was talking to the enemy, referring to Grievant. Ms. Ferrell stated that she believed his comment had been made in a serious manner. John Cox, President of the TMS Band Boosters, expressed his opinion regarding the lack of administrative support for the band program at TMS. William Childers, a counselor at TMS, testified that some discussion had been held during a Faculty Senate meeting in which Grievant had indicated that more time was needed for the music program and that he was spending more time after school with the program than that for which he was paid. (See footnote 3) It was determined that allocating more time for band would result in a reduction of that allocated for other block classes. According to Mr. Childers, the teachers did not respond in a positive manner. He indicated that he also intervened in another Faculty Senate meeting in which hostility was directed toward Grievant. The counselor opined that he had not seen such hostility from a staff to an individual in thirty years. (See footnote 4)

Following receipt of, and in response to, his evaluation, Grievant forwarded a ten page letter, dated June 5, 1996, to Mr. Bowers in which he noted that during the 1995-96 school year he had received no commendations for his efforts. After commenting that participation in the Festival In Lights parade, the band festival, and a performance at the Wheeling Symphony had gone unnoticed, or at least without recognition, Grievant listed the following incidents relating to his work:

First, in stating several positive things for the first time, Mr. Bowers' only specific statement was that I had the 'ability to get the most from (my) students during the 1995-96 school year.'

Second, the Youth Appreciation Parade this year was cancelled due to poor weather. I question Mr. Bowers' noting our participation as a 'first rate marching band' when there was no parade. Mr. Bowers obviously did not listen to the radio, come to the school to see the buses, or go to watch the parade or he would have known. This is to be noted of the administration of Triadelphia Middle School and their voluntary involvement with the band.

Third, the band performed on-stage at the Wheeling Symphony Concert in January. The band did a wonderful job, but once again without recognition from the administration of their own school. The jazz band performed that week for the Governor of West Virginia (for the second time) and also was not recognized for its efforts. I call to mind the fact that our first performance ever at the symphony in January of 1995 was a result of a meeting held between Mr. Blake, symphony officials, the strings

instructor, the choral instructor, with myself, the band director noticeably absent. I was not invited. They made plans at that meeting for the band without including me in the formation of those plans and yet I went both in 1995 and 1996 on a Thursday night and performed as required. I did as the administration required of me and received no formal or informal credit for it. This is to be noted of the administration of Triadelphia Middle School.

Fourth, more than fifty solos and ensembles participated in Region I Solo and Ensemble at West Liberty State college in February 1996. We received fifteen superior ratings and more than thirty excellent ratings. Mr. Blake himself once called Solo and Ensemble Festival the "CTBS of music' and yet made no commendation of my participation or the students I direct. This is to be noted of the administration of Triadelphia Middle School.

Fifth, I note that on a weekend in the Fall of this year, my eighth grade band was asked to perform for the Steenrod Elementary School dedication. We played well and were received magnificently by the audience there. Mr. Bowers was there and did not speak to me, offer praise or recognition to me or acknowledge the students present. This is to be noted of the administration of Triadelphia Middle School.

Sixth, the West Virginia Secondary Schools Activities Commission requires all bands to attend and participate in their regional band festival. Under my direction and for the second year of my tenure at Triadelphia Middle School, the band received overallsuperior ratings and a superior in sightreading. This was not formally or informally recognized by the administration both then (April) or on my evaluation now. Instead, a sign was posted in the second floor hallway congratulating the chorus on their musical which was performed three times that week. The sign said, 'Great Job! Super Show!' There was nothing for the band students. This is to be noted of the administration of Triadelphia Middle School.

Seventh, the band sent seven representatives to Region I Honor Band held at Brooke High School in January 1996. I went with those students. Their involvement, participation, and my involvement and participation with Region I Band Masters is not noted under commendations or elsewhere on the evaluation. This is to be noted of the administration of Triadelphia Middle School.

Eighth, I was asked specifically (in a note) from Mr. Bowers why I had not signed up to chaperon

for the chorus during the Spring Musical. Rather than argue the point that no one this year helped chaperon any band event, (so why should I?), I offered my services voluntarily on the evening of the day that the band went to Band Festival. This is to be noted of the administration of Triadelphia Middle School.

Ninth, I attended the Scholars Banquet and read the biographical information of five students. I also attended eighth grade promotion. I also chaired the PTA Sponsored school dance. I believe these should have been listed as commendations for my voluntary commitment. This is to be noted of the administration of Triadelphia Middle School.

Tenth, I quote the following line from the third paragraph of commendations, 'The TMS ensembles were Judges Choice at Nashville 'Music in the Parks' competition'. This statement is inaccurate, It should say that the concert band received First Place, and the jazz ensemble received first place and the Judges' Choice Jazz Ensemble Awards.

Eleventh, I voluntarily chaperoned students to three Wheeling Symphony concerts. My contribution of time to the betterment of my students and other students in the school should be commended. This is to be noted of the administration of Triadelphia Middle School.

Twelfth, I gave up my own Saturday on Memorial Day Weekend to direct the band in front of the school for the Elby's Race. I forwent [sic] my own personal plans for this and yet Mr. Bowers' was there but did not leave his office window long enough to commend the group or me for our efforts. Why should we participate if we are not valued?

Thirteenth, I received County Life Membership for PTA from the Ohio county council of PTA/PTSA. Where is that in this evaluation?

Fourteenth, I conducted an enormous Band Awards Reception for over 300 people where more than 170 awards were distributed. This is one of the most extensive awards programs I know of. I received several standing ovations that night for my work with the band. Mr. Blake and Mr. Bowers were there and yet there was no mention on my evaluation.

After addressing the remaining sections of the evaluation, Grievant noted that following the bands' “spectacular trip and triumphant return” from Nashville, there was no mention of “how detailed I was

with presented information, how well my chaperons worked with the students and myself, how well the children behaved, and of course, what awards we brought home." He continued to state that "[w]ere there adequate leadership from the Triadelphia Middle School Administration, there would have been few, if any, problems." Finally, he concluded that "[t]he deficiencies of this evaluation are contrived, minimally fact based, opinionated, and without foundation. I demand that the evaluation be destroyed with an accurate one to replace it."

At the level four hearing, Grievant alleged that when he met with Mr. Bowers in June 1995, to discuss his evaluation, he "caught the assistant principal trying to secretly record him." The meeting was held in Mr. Bowers' office, and Grievant perceived that a "boom box" device was being used to record their conversation. The final episode of harassment alleged by Grievant was that the administration had erected a camera directed at the end of the building where his room is located. Grievant opined that the purpose of the camera was to monitor the comings and goings from his room.

Respondent argues that in his alleged violations of Code §18A-2-12 and Policy 5310, Grievant did not specifically point to any one proviso, or offer any evidence that the evaluation system it used was flawed, or that the plan of improvement was imposed as a punishment rather than as a tool to promote professional growth and development and quality performance. Respondent noted that Grievant had exhibited deficiencies in the area of professional work habits during the 1994-95 school year when he failed to follow Board Policy 3025 by allowing two students from Ohio to participate in an out of state trip without notifying the administration, and exhibiting a lack of knowledge regarding SSAC regulations regarding student eligibility and sanctioned events for the middle school band. Based upon the ongoing deficiencies exhibited by Grievant in the 1995-96 school year, Respondent argues that a rating of unsatisfactory, and the plan of improvement, was warranted.

Respondent argues that Grievant failed to establish a prima facie case of reprisal, defined by W.Va. Code §18-29-3(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it", or harassment, defined by W.Va. Code §18-29-3(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession", in that the evaluation was completed by Mr. Bowers, while Grievant's first complaint involved Mr. Blake. Respondent states that following the settlement of the

first grievance, a “Chinese wall” had been erected between the administrators to ensure that Mr. Bowers would not be influenced by Mr. Blake regarding Grievant. Addressing the specific incidents cited by Grievantas evidence of harassment, Mr. Bowers testified that indeed every faculty member who had missed the meeting had been issued a letter of reprimand. These letters were destroyed at the end of the year, except for Grievant's which had been retained pending resolution of this grievance. John Jordan, a teacher at TMS, confirmed that he had received a reprimand for his failure to attend the meeting in question.

In support of Mr. Bowers' testimony that he did not record any discussion between himself and Grievant, Respondent provided a Service Invoice from “The TV Shop” which indicated that a Fisher boom box had been serviced to ascertain whether the unit included a record function. It was determined that it could not record without an external microphone plugged into a jack on the back of the unit. Also made part of the record was a videotape which documented traffic passing a certain portion of TMS, at a location that included Grievant's classroom. Assistant Superintendent Larry Miller testified that the purpose of the tape, which was made between 3:13 and 3:58 p.m., was to record the flow of traffic as part of a project to reconfigure the campus and resolve issues relating to buses. Although Wilma Ferrell, a cook at TMS testified that Mr. Bowers did ask her why she was talking to the enemy, and that she interpreted his inquiry to be serious in nature, Respondent argues that the single utterance of one thoughtless remark does not constitute the continual disturbance, irritation, or annoyance required to constitute harassment.

Grievant has failed to prove that the evaluation and plan of improvement were improper. On the contrary, he admitted, at least to some extent, to all of the deficiencies cited in the plan. He conceded that he sent one student to the office without a referral slip because he did not want to lose instructional time. He denied knowledge of sending a second student without the slip, and argues that he was not given benefit of progressive discipline to correct this deficiency. Grievant alsoadmitted that for one of the band trips, two volunteer chaperons were added and he faxed their names to the Board for approval without first providing them to Mr. Blake. While acknowledging that he did not follow protocol, he states that this was the same procedure he had used during his first two years of employment.

Scheduling a performance without the principal's approval was also conceded by Grievant, who again stated that it was done consistent with prior practice. Grievant also recalled that he failed to

provide the bus numbers to the administration prior to leaving on a trip, but notes that he called them in after they were on the road. He agrees that a severe communications problem exists between himself and the administrators, and uses this fact as the basis for his use of notes to provide information. He claimed the notes were a protective device since matters were taken out of context, but that he had never failed to meet with the administrators when requested.

In light of Grievant's admissions, it cannot be determined that the evaluation and plan of improvement were the result of reprisal for his prior complaint. Neither did Grievant prove the claim of harassment in that he was video or audiotaped. While it does appear that problems exist between the music department and the administration, it would appear that the conflict is generated by both parties. Grievant has failed to prove the allegations of this grievance, and the evaluation and plan of improvement must be found valid.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by the Ohio County Board of Education since 1992. 2. During the 1995-96 school year Grievant was assigned to teach music at Woodsdale, Steenrod and Madison Elementary Schools, and music and band at Triadelphia Middle School.

3. At the conclusion of the 1995-96 school year, TMS Assistant Principal Clifford Bowers completed a performance evaluation which determined Grievant was unsatisfactory in the area of “Professional Work Habits”.

4. A plan of improvement was developed and implemented to correct the deficiencies included on Grievant's evaluation.

Conclusions of Law

1. In a non-disciplinary grievance the grievant must prove the allegations of his complaint by a preponderance of the evidence. W.Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 C.S.R. 1 (1996); Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994).

2. Grievant has failed to prove that the comments contained in the evaluation were inaccurate or

that the evaluation was otherwise completed incorrectly or with ill intent.

3. Grievant has failed to prove that the plan of improvement was developed and/or implemented in violation of W.Va. Code §18A-2-12 or State Board of Education Policy 5310.

4. Because Grievant conceded that he had committed the acts included on the evaluation as unsatisfactory, it cannot be determined the evaluation or plan of improvement were motivated by reprisal, as it is defined in W.Va. Code §18-29-2(p).

5. Although Grievant has proven that some problems exist in the music department at TMS, and that he perceives ill will from the administration, the implementation of a plan of improvementto correct acts inconsistent with policy cannot be characterized as harassment, as defined in W.Va. Code §18-29-2(n).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio 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.

Date: February 20, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Under the "Procedural Summary" section of the level four appeal form, "waived to level II" is handwritten on the line designed for the immediate supervisor. In any event, Grievant's immediate supervisor would undoubtedly lack the authority to resolve this issue.

Footnote: 2

Grievant contended that while those sections deemed "Satisfactory" were marked with a double "XX", the "Unsatisfactory" section was marked "XXX", yet another example of harassment. However, Diane Earliwine, school secretary, testified that she typed the evaluation forms and the additional X was not an indication from Mr. Bowers, but rather was simply an extra key strike on her part, and held no significance.

Footnote: 3

Grievant is paid an additional salary supplement as provided by the Board for the Music Staff. (Board Exhibit No. 1).

Footnote: 4

It does not appear that Grievant's relationship with the faculty was influenced or promoted by the administration, and is not relevant to this matter.