DAVID JONES,

Grievant,

v. Docket No. 96-04-282

BRAXTON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, David Jones, appeals the Level III Decision by the Braxton County Board of Education ("BCBOE") and states his February 7, 1996, "job performance evaluation was not done in accordance with WV BOE Policy 5300/5310 and county policy." He requests as relief that "this evaluation be declared null and void and expunged from [his] file." (See footnote 1) **This grievance was denied at all lower levels. At Level III, BCBOE "reluctantly affirmed" the Level II Decision, and stated that if the grievance had been more broadly pled to include harassment or discrimination and/or whether the evaluation was performed in a fair, professional, and credible manner as per W. Va. Code § 18A-2-12, the outcome would have been different.** (See footnote 2) **Level III Trans. at 713-14. This grievance was then appealed to Level IV, and the parties decided to submit the case on the record. This grievance became mature for decision on October 17, 1996, the deadline for the parties' proposed findings of fact and conclusions of law.**

The undersigned finds the following material facts from the record.

Findings of Fact

1. Grievant is currently employed at Braxton County High School ("BCHS") as a math instructor. He has approximately fifteen years of seniority.

2. Grievant has been both a "regular" math teacher, instructing in transitional math, algebra, and geometry, and a Chapter I math teacher, assisting eligible students who experience difficulty, to pass certain math courses.

3. Grievant has been placed on numerous Improvement Plans ("IP") because of

unsatisfactory performance. He had been on three consecutive IP's prior to the unsatisfactory evaluation at issue in this grievance, and was on an IP during the time frame of the Fall evaluation, which is the subject of this grievance.

4. Grievant received an unsatisfactory evaluation in the Spring of 1995, which resulted in his placement on an IP for the Fall of 1995.

5. Grievant was rated as unsatisfactory in the section titled "Instructional Management System". This area relates to "strategies for teaching to maximize the use of allocated instructional time to increase student learning" and includes such areas as lessons plans, organization of class time and materials, appropriate presentation of instructional materials, and assessing student understanding. Grievant's prior performance was unsatisfactory in the following instructional areas within this section: "Preparation and implementation of lesson plans"; "Begins lesson or instructional activity with a review of previous materials as appropriate"; "Introduces the instructional activity and specifies instructional objectives"; "Provides instructional pacing that ensures student understanding"; and "Summarizes the main point(s) of the instructional activity".

6. To assist Grievant with these areas of deficiency, noted on his Spring evaluation, he was placed on another IP and given an Improvement Team ("Team") to assist him in developing appropriate teaching and classroom skills.

7.Per HS, Assistant Principal John Rogers, and Ms. Louise Grindo, a math teacher with many years of experience. Ms. Grindo was the individual Grievant selected to be on his Team. Ms. Barbara Cox (See footnote 3) , a resource person from the Central Office, was also included as an ex officio member, to offer additional support and direction to Grievant.

8. Principal Lambert and Ms. Cox had received the training required by the State Department of Education to perform evaluations. Ms. Grindo had not received this training and was not required to have completed this training to be a member of the Team.

9. Because Grievant was beginning a new assignment (he was switched from Chapter I teacher to a regular classroom teacher) he was given approximately two months to adjust to this change before the Team met to formulate the IP and before the observations for the IP began.

10. Grievant actively participated in formulating his IP. The first IP meeting was held on

October 23, 1995, and Principal Lambert observed Grievant that day, and Ms. Cox observed on October 24, 1995, per Grievant's request.

11. Subsequent IP input meetings, to formulate the IP, were held on October 27, 1995, November 1, 1995, and November 13, 1995. Principal Lambert and Grievant also met to discuss the IP on October 31 and November 2, 1995. This IP was signed by Principal Lambert and Grievant on November 13, 1995.

12. This IP clearly identified unsatisfactory areas. The deficiency areas needing correction were: 1) preparing and implementing lesson plans; 2) reviewing previously presented class material; 3) introducing succeeding learning objectives and their placement within the course as a whole; 4) pacing instructional materials to insure 80% comprehension; (See footnote 4) and 5) summarizing the class's main points on a daily basis.

13. This IP stated the corrective actions to take and the resources to utilize in attaining the goals. As part of his involvement in the IP, Grievant selected the Madeline Hunter lesson plan format for his classroom instruction. Ms. Hunter's plan delineates the need for setting objectives prior to class and outlined seven basic steps to planning a lesson. Although each step does not have to be performed each time, it is clear from the handout that much time and thought must go into planning each class presentation. It is also clear it is important for the teacher have these plans written out in some detail.

14. Grievant's Lesson Plan Format contained the following areas: Subject; Period; Date; Objectives (SWBAT) (See footnote 5) ; Anticipatory Set; Presentation Activity (input, modeling, and check for understanding); Guided Practice; Independent Practice; Closure; and Materials: Textbook, Pencil, Paper, Chalkboard.

15. The IP noted that completion of appropriate Lesson Plans had been a continuing problem, and stated Lesson Plans need "to be prepared as outlined in previous Improvement Plans and feedback. Particular attention as far as planning needs to be focused on the following instructional indicators in this section."

16. Grievant's completion and detail on the lesson plans submitted as exhibits in this grievance varied widely. Some plans were filled out completely, and some contained almost no information other than Subject, Period, and Date.

17. During the Fall semester, Principal Lambert received multiple complaints about

Grievant's class from parents and students. Many of these discussed Grievant's failure to "get" the material across to the students. Numerous requests were made to have students removed from Grievant's class. These complaints and requests came from all grade levels and frequently from students who had received good grades in their other classes. The number of complaints Principal Lambert received about Grievant's classes was greater than the number of complaints he received concerning all the classes of the other teachers at BCHS combined.

18. Principal Lambert discussed these complaints and requests with Grievant, and usually asked Grievant to talk to the parents and the student and try to keep the student in the class. Principal Lambert also noted this continuing student problem on one of his classroom observations.

19. The grades in Grievant's classes for the first semester were:

Transitional Math; Second Period: 1=A; 5=B; 5=C; 2=D; 3=F

Transitional Math; Third Period: 0=A; 3=B; 2=C; 5=D; 1=F; 1=W/F; 1=I

Geometry (Honors); Fourth Period: 4=A; 7=B; 9=C; 2=D; 0=F

Algebra I; Fifth Period: 0=A; 4=B; 6=C; 5=D; 1=F; 2=I

Algebra I; Sixth Period: 0=A; 3=B; 7=C; 6=D; 3=F; 1=I

Algebra I; Seventh Period: 0=A; 3=B; 1=C; 4=D; 1=F; 2=W/F

It must be noted that Grievant did not use the grading guidelines stated in the Student's Handbook, which identified an A as 100-94; B as 93-86; C as 85-76, etc. Grievant graded his students on a ten point scale which identified an A as 100-90; a B as 89-80, etc. Numberwise, Grievant's grades, although on a different scale than mandated by the BCBOE were: A=5; B=25; C=30; D=24; F=9; W/F=3; I=4. Further, some students were given an additional ten points for attendance to achieve their final grade. With the exception of Honors Geometry, the majority of students in all other classes made either D's or F's on all of Grievant's tests. (See footnote 6) Further, if the final grades from the Honors Geometry class are removed from the grade total, Grievant's grade distribution would be: A=1; B=18; C=24; D=22; F=9; and W/F=3.

20. The Team was to perform six evaluations of at least 30 minutes in length during the semester, and to notify Grievant of the first observation. This requirement of Policy 5310 was met, and in fact, Grievant was observed eight times by Principal Lambert. Grievant agrees he

was notified of most, if not all, of these observations in advance. This advance notice was sometimes several days and sometimes only a few hours.

21. All Team members evaluated Grievant. Ms. Grindo evaluated Grievant one day during five classes, Mr. Rogers evaluated Grievant at least one time for three classes, and Ms. Cox evaluated Grievant five times.

22. Frequently, Principal Lambert and Ms. Cox evaluated Grievant at the same time. Their observations were consistent, and they noted recurring and continuing problems with Grievant's lesson plans, pacing of course material, review of previous material, and summarization of the day's content at the end of class. Grievant also continued to have difficulty in assessing and permitting student feedback. Principal Lambert and Ms. Cox frequently noted the same improvements, especially on November 30, 1995. Other problem and improved areas were also noted.

23. On January 4, 1996, Principal Lambert, Ms. Grindo, and Mr. Rogers all evaluated Grievant during his second, third, and fourth period classes. Ms. Grindo noted Grievant did a good job in all areas, and his lesson plans were in place. She wrote at length about the quality of Grievant's teaching strategies. Principal Lambert noted second and third period were improved in the areas of feedback and pacing, but that fourth period was too fast, confusing, and only two or three students participated. Mr. Rogers noted in second and third period, that Grievant did not give students time to answer his questions and answered them himself and worked mainly with two students who were doing well. Mr. Rogers also noted the fourth period class was confusing, unplanned, and that Grievant again did not give the students the opportunity to answer his posed questions before he did so.

24. Ms. Grindo's evaluations differed markedly from all other evaluators. Her observations were very positive and did not include any negative comments whatsoever.

25. Although improvement was noted in some areas at some times in some evaluations, the overall impression and e his IP. Grievant continued to have difficulty in the areas of writing lesson plans (See footnote 7) , reviewing materials, stating objectives, pacing materials, assessing student feedback, and organizing and summarizing class material.

26. Feedback from all these observations and the multiple deficiencies noted were shared with Grievant in a timely manner as required by Policy 5310. He signed these

observation forms each time after he had been told of their content. These feedback sessions included directions for improving teaching skills to meet the goals set out in the IP.

27. On February 7, 1996, Grievant received an unsatisfactory evaluation in the areas of "Programs of Study" and "Instructional Management System".

28. The specific area of deficiency noted under "Programs of Study" section was "Employs appropriate instructional strategies" and had not been marked as an area of deficiency on the unsatisfactory Spring 1995 evaluation.

29. Under "Instructional Management Systems" the previously identified areas from the IP remained unsatisfactory. Additionally, Grievant was found to be unsatisfactory in the area of "Provides remediation activities for students".

30. This evaluation indicated Grievant's instructional strategies were confusing and ineffective, and Grievant was poorly organized and unprepared for class. It was also noted that students were not understanding the content; pacing of the materials presented was not appropriate or based on student feedback; introductions and summaries to begin and end the classes were not consistently done; and Grievant did not interact with all the students in the class. This evaluation also noted Grievant usually had his materials ready for use, usually provided good examples, and usually kept students on task. Principal Lambert also noted under the "Professional Work Habits" section that Grievant was very dependable with duty assignments.

31. Grievant placed an addendum on this evaluation which stated "[t]he Teacher Evaluation has mTeacher Evaluation is discriminatory."

32. Grievant originally filed this grievance on or about March 11, 1996 (See footnote 8) .

33. At the lower level hearings, Grievant testified that all the procedural requirements of Policy 5300 and 5310 were met. Level II Trans. at 230 & 232-241.

Issues

The grievance form states Grievant's evaluation did not conform to the standards required by Policies 5300 and 5310. At hearing, Grievant seemed to argue the observations of the evaluators were inconsistent and contradictory. He also argued his evaluation was not performed in an honest and open manner as required by these Policies. However, at Level IV,

Grievant's attorney consistently indicated Grievant was grieving his IP (See footnote 9) , and that it was not carried out in accordance with the above-identified policies, the policies of BCBOE, and W. Va. Code § 18A-2-12. Respondent argues Grievant's evaluation met all the requirements of Policies 5300 and 5310 and his evaluation was performed in an open and honest manner.

Clearly, the issue before the undersigned is whether Grievant's evaluation was properly performed. To meet this standard of proper performance, an evaluation must be handled according to Policies 5300 and 5310; conducted in the open and honest manner required by these Policies and W. Va. Code § 18A-2- 12; based on the observations of the Team; and reflect the timely feedback given to Grievant after these observations, that his classroom teaching remained unsatisfactory.

Discussion

W. Va. Code § 18A-2-12(3) states that the purpose of an evaluation is to "serve as a basis for the improvement of the performance of the personnel in their assigned duties . . . and serve as a basis for programs to increase the professional growth and development of professional standards." Evaluations should contain the standards for "satisfactory performance and criteria to be used to determine whether the performance of each professional meets such standards . . .". Id. at (4). Further, improvement plans shall be specific as to what improvements are needed and "shall clearly set forth recommendations for improvements . . .". Id. at (5).

Additionally, W. Va. Code § 18A-2-12 states:

> 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 time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.

Policy 5300 states:

> 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. . . . 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 the assistance of regular evaluation.

§ 126-CSR-141-2.6

Policy 5310 identifies the rules and regulations governing the evaluation of school personnel. It mandates that all monitoring or observation of employees shall be "conducted openly" and that an employee whose performance is unsatisfactory shall be "given an opportunity to correct the deficiency." 126-CSR-142-7 B&C. An employee's performance in each rating category should be rated as "Satisfactory - Performance is consistently adequate and acceptable" or as "Unsatisfactory - Performance is not consistently adequate or acceptable." Id. at § 8.

Section 10 of Policy 5310 also clarifies that the immediate supervisor is the individual responsible for the employee's evaluation. He must share the evaluation with the employee, and the employee has a right to attach a written addendum to the evaluation. Id. at 10.4-10.6.

Observations of teachers are to be at least thirty minutes in length and conducted during instructional activity. Id. at § 9 B. At least one of these observations must be scheduled in advance with the employee: other observations may be conducted at the discretion of the supervisor. Id. After each observation a post- observation conference must be held with the employee within five working days, and a copy of the observation form is given to the employee. Id. at C.

Generally, this Grievance Board will not intrude on the evaluations 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. Berkley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 286 S.E.2d 682 (W. Va. 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). As previously stated, an evaluation would not be properly conducted if it was not "open and honest" and based on the requirements in the previously stated policies and statutes. See Brown v. Wood County Bd. of Educ., 400 S.E.2d 213 (W. Va. 1990); Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).

In terms of the mechanics of the evaluation, such as scheduling, length of time of the observation, number of observations, timely feedback, etc., Grievant testified these requirement were all met. Level II Trans. at 230 & 232-241. After a detailed review of the record, the undersigned agrees, and finds that these criteria in Grievant's evaluation were performed in an open, fair, and proper manner, and met all the requirements of the above-identified policies.

The next issue to examine is whether Grievant's evaluation was performed in an open and honest manner. Grievant alleges that it was not, but presented little evidence to support his contention. The inconsistencies alleged by Grievant in the observations were not found on a detailed review of the record. The mere fact that Grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive on the part of Principal Lambert. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988).

The true test of the validity of the evaluation is whether it is based on the observations of the individual assigned to evaluate the employee. "[T]he observations conducted and the conferences held throughout the period of the improvement plan serve as evaluating tools for determining whether the employee has successfully completed the plan." Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995). Because the expected teaching behaviors are somewhat vague and generalized they must be "qualified with the behaviors the evaluator observes before [they] can be validly rated." Romeo v. Harrison County Bd. of Educ., Docket No. 17-86-208-2 (June 6, 1988).

In this case, the multiple observations conducted by Principal Lambert, Ms. Cox, and Mr. Rogers noted the problematic teaching behaviors of Grievant. These evaluators, individually and routinely, identified the same instructional problem areas over and over. Although there may be minor inconsistencies that would be expected from evaluations from three different people, the over-all picture presented by these observations is one of a teacher who did not perform in a consistently satisfactory manner in the identified problem areas.

Because of the lack of consistency in Ms. Grindo's observations, vis-a-vis the other evaluators, and her apparent mistrust of the administration (See footnote 10) , in general, and Principal Lambert, in particular, the undersigned finds her glowing observations of Grievant

to be unreliable. (See footnote 11) See Borninkhof v. Dept. of Justice, 5 MSBP 150 (1981). Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). Her observations are different from all the other observations, especially as they related to the problematic, fourth period class on January 4, 1996, that she, Mr. Rogers, and Principal Lambert all observed at the same time.

Other facts are clear from the record. Grievant did not execute his lesson plans completely or consistently. His students routinely could not pass the chapter tests or retests. Parents and students complained about his inability to teach within his subject area and frequently requested a transfer or just dropped a needed class. This Grievance Board has ruled in each of these areas.

In the area of failure to complete lesson plans, this Board has upheld disciplinary action taken against or improvement plans required for teachers who do not complete them. See Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr. 8, 1996). The subject of test scores and grades has been reviewed by the West Virginia Supreme Court of Appeals as well as this Board. The grades a student receives in a course indicate his understanding of the material and can reflect on the teacher's ability to pace instructional material, assess feedback from the students, and adjust instruction and expectations for students. Brown, 400 S.E.2d at 219-20. Thus, a student's achievement in class can be used to evaluate a teacher if he is placed on notice that this is a problem. Principal Lambert's observations repeatedly questioned how Grievant graded his students and questioned the need for retests. He also noted student and parental concerns about grades and their reflection on whether students were understanding the course content.

Parental input may be used to assess a teacher if he is placed on notice that there are concerns and complaints. Mason County Bd. of Educ. v. State Superintendent of Schools, 274 S.E.2d 435 (W. Va. 1980). See Wright v. Gilmer County Bd. of Educ., Docket No. 95-11- 100/245 (Sept. 8, 1995); Goodman v. Putnam County Bd. of Educ., Docket No. 93-40-133 (July 8, 1993); Grant v. Harrison County Bd. of Educ., Docket No. 17-87-328-2 (Nov. 10, 1988). Here, Principal Lambert gave Grievant the opportunity to resolve the complaints first, noted these complaints on one observation, and referred these questions to Grievant. It must be noted that the

complaints about Grievant's teaching abilities were numerous when compared to other teachers, and came from parents of the students in all of his classes and at all grade and ability level.

In total, the undersigned finds Grievant's evaluation was performed correctly, fairly, and competently in all respects. The expectations set for Grievant in the IP were appropriate, clear, and set with his full knowledge. He was frequently informed, at least on a monthly basis, where his performance needed improvement and where he showed improvement. Grievant did not meet the standard set for satisfactory performance as stated by Policy 5310: "Performance is consistently adequate and acceptable." Although Grievant did at times show improvement, this progress was not consistent. Principal Lambert's final evaluation of Grievant was accurate, as reflected by the intervening observations, was open and honest, and did not demonstrate any abuse of discretion in its rating.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As a grievance about an employee's evaluation is not a disciplinary grievance, a 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).

2. Generally, this Grievance Board will not intrude on the evaluations 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. Berkley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 286 S.E.2d 682 (W. Va. 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).

3. An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in Policies 5300 and 5310 and W. Va. Code §18-2-12. See Brown v. Wood County Bd. of Educ., 400 S.E.2d 213 (W. Va. 1990); Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).

4. 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).

5. The true test of the validity of the evaluation is whether it is based on the observations of the individual assigned to evaluate the employee. "[T]he observations conducted and the conferences held throughout the period of the improvement plan serve as evaluating tools for determine whether the employee has successfully completed the [improvement] plan." Baker, supra.

6. Because expected teaching behaviors are somewhat vague and generalized they must be "qualified with the behaviors the evaluator observes before [they] can be validly rated." Romeo v. Harrison County Bd. of Educ., Docket No. 17-86-208-2 (June 6, 1988).

7. Failure to complete lesson plans in an appropriate manner is a significant act and justifies some action on the part of the administrator assigned to evaluate the educator who does not perform this basic task. See Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr. 8, 1996).

8. The grades a student receives in a course indicate his understanding of the material and can reflect on the teacher's ability to pace instructional material, assess feedback from the students, and adjust instruction and expectations for students. Brown, 400 S.E.2d at 219-20. Thus, a student's achievement in class can be used to evaluate a teacher if he is placed on notice that this is a problem.

9. Parental input may be used to assess a teacher if he is placed on notice that there are concerns and complaints. Mason County Bd. of Educ. v. State Superintendent of Schools, 274 S.E.2d 435 (W. Va. 1980). See Wright v. Gilmer County Bd. of Educ., Docket No. 95-11-100/245 (Sept. 8, 1995); Goodman v. Putnam County Bd. of Educ., Docket No. 93-40-133 (July 8, 1993); Grant v. Harrison County Bd. of Educ., Docket No. 17-87-328-2 (Nov. 10, 1988).

10. Grievant's evaluation was performed correctly, fairly, and competently in all respects. Not only were the procedural requirements set by Policy 5310 met, but the expectations established for Grievant in the IP were appropriate, clear, and determined with his full knowledge. He was frequently informed, at least on a monthly basis, where his performance needed improvement and where he showed improvement.

11. Grievant did not meet the standard set for satisfactory performance as stated by Policy 5310: "Performance is consistently adequate and acceptable."

12. Grievant did not establish a violation of W. Va. Code § 18-2-12, State Board Policies, 5300 and 5310, or a violation of BCBOE's own policies pertaining to performance appraisals.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Braxton 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 28, 1997

Footnote: 1

The parties mistakenly believed that when they filed this grievance dealing with Grievant's Fall 1995 evaluation, they consolidated it with another action dealing with Grievant's evaluation for the Spring of 1996. This second grievance form and lower level decision had not been filed with this Grievance Board. Following a phone conference with the parties on April 11, 1997, the parties agreed to file this second grievance separately, and it would be considered timely filed.

Footnote: 2

It should be noted that Policy 5300 requires that school employees be offered "the opportunity of open and honest evaluations of his/her performance on a regular basis."

Additionally, it should be noted that the Administration's counsel (this action was presented at the Level III hearing by the Administration's counsel, and BCBOE was represented during this hearing by a separate attorney) asked one of BCBOE's Board Members to recuse himself from the Level III hearing because he had talked with both Grievant and one of the other evaluators about this complaint prior to the hearing. This Board Member refused to recuse himself.

Footnote: 3

Ms. Cox's exact title was not identified in the proceedings below.

Footnote: 4

Grievant was frequently informed by Principal Lambert and others that 80% of his students needed to demonstrate comprehension of class materials before he went on to the next course objective.

Footnote: 5

There was no information in the record to explain this acronym.

Footnote: 6

Final grades were apparently increased through completing homework, obtaining parental signatures on certain papers, and turning in notebooks.

Footnote: 7

It is unclear from the record whether Grievant would not or could not consistently write lesson plans, as they were frequently so incomplete or terse as to provide insufficient data to answer this question.

Footnote: 8

Apparently there was some difficulty in the filing of this grievance, and it had to be resubmitted and amended to include the proper policy numbers, Grievant's name, and the date.

Footnote: 9

Because Grievant made no formal complaint about his placement on the IP at the time it occurred, and did not complain about the content of the IP at the time it was formulated, these areas are deemed waived by Grievant. Wright v. Gilmer County Bd. of Educ., Docket No. 95-50-260 (Mar. 27, 1996). Further, Grievant may not change his statement of grievance without the approval of the other party. W. Va. Code § 18-29-3(j).

Footnote: 10

Although it is not necessary to discuss the issue at length, the evidence presented during the Level III hearing demonstrates Ms. Grindo has a deep distrust of the administration at BCHS. Whether this mistrust is based on good cause or not, is not for the undersigned to judge in this case, but it is sufficient to place her credibility in question when considering her glowing evaluations of Grievant, vis-a-vis the evaluations of all other raters.

Footnote: 11

The United States Merit System Protection Board Handbook is helpful in setting out factors to examine when assessing credibility. In Borninkhof v. Department of Justice, 5 MSBP 150 (1981), the Merit Systems Protection Board identified factors to assist an administrative law judge in assessing testimony. Whether witnesses were disinterested in the events, and whether their accounts were consistent with other information, other witnesses,

and other statements were factors to consider.

Further, Harold J. Asher and William C. Jackson, in Representing the Agency before the United States Merit Systems Protection Board, 152-53 (1984), identified some factors to consider in assessing a witness's testimony. They are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, an administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.