ANGELINE SELLERS,

Grievant,

v. **DOCKET NO. 97-52-183**

WETZEL COUNTY BOARD
OF EDUCATION,

Respondent.

DECISION

Grievant, Angeline Sellers, initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., contending that the evaluation she received on January 14, 1997, was improper and constituted harassment, in violation of Code § 18-29-2(n). As relief, she requests that the evaluation be expunged from her personnel file. After the grievance was denied by Grievant's immediate supervisor, a level two hearing was conducted on March 27, 1997. Following the level two decision denying the grievance, dated April 8, 1997, Grievant elected to waive consideration at level three, as authorized by Code § 18-29-4(c). Grievant appealed to level four on April 16, 1997, where the parties agreed to have this matter decided upon the record developed below, accompanied by written submissions received by July 16, 1997. For administrative reasons, this matter was transferred to the undersigned for final decision on August 15, 1997.

The following findings of fact are made from a preponderance of the evidence submitted at level two.

Findings of Fact

1. Grievant is employed as an aide at New Martinsville School by the Wetzel County Board of Education ("WCBOE") and has been so employed since April 16, 1974. 2. On December 11, 1996, Grievant escorted a disruptive student to the assistant principal's office, at the classroom teacher's direction. She was instructed by the teacher not to return the child to the classroom.

3. The assistant principal, Scott Varner, was not in his office, so Grievant left the child in Mr. Varner's office and went in search of another assistant principal. She found Brian Jones, an assistant principal, in the office of Larry West, the school's principal.

4. After Mr. Jones and Mr. West finished their conversation, Grievant explained the situation regarding the disruptive child to Mr. Jones. Mr. Jones did not immediately respond to Grievant's request for assistance, and she was told to go back to where the student was and wait there with him. Grievant said nothing to Mr. Jones at that time, but made a gesture by raising her hands. (See footnote 1)

5. Mr. Jones interpreted Grievant's hand gesture as “throwing her hands up in disgust” at his failure to immediately assist her. Accordingly, by letter dated December 11, 1996, Mr. Jones advised Grievant that, in the future, she should “express herself in an acceptable manner.”

6. Grievant responded to Mr. Jones in a written response dated December 12, 1996. She explained that her gesture was her “talking with her hands” and saying to herself “what do I do now?” She stated that her gesture reflected her disgust with herself and that she felt Mr. Jones had misinterpreted her response.

7. On December 13, 1996, Grievant attended an in-service training session withapproximately 22 other teacher aides, where an open discussion and question and answer session was held. Subsequently, Mr. West heard that Grievant made critical and/or inappropriate remarks regarding the school's Individualized Education Program at that meeting. (See footnote 2) At Mr. West's request, Mr. Jones investigated the matter by questioning two other aides who attended the same session, who confirmed that Grievant had, indeed, made the remarks.

8. On December 18, 1996, Mr. West called Grievant to his office for a meeting, at which time he explained to her that her remarks at the in-service training were professionally inappropriate.

9. Following the December 18 meeting, Grievant submitted a written memorandum to Mr. West, in which she stated that she had not made the remarks alleged. She further stated that she did not understand why she had been singled out of 22 aides who were also asking questions and making comments, and wanted to know why she had not been told who her accusers were. She requested that her name be cleared of the accusations.

10. Grievant received a written observation/evaluation from Mr. Jones on January 14, 1997. She received satisfactory ratings in all categories listed on the evaluation form, except for deficient

ratings in “works cooperatively with others” and “maintains positive attitude towards work.” In addition, Mr. Jones added a written comment, “M. Sellers does not accept constructive criticism with the intent in which it is given, which is to be constructive.”

11. The deficient ratings and written comment on the January 14 evaluation were based upon the incidents involving Grievant's hand gesture and the comments made at the in-service training session.

Discussion

In general, a grievant alleging that she has received an improper evaluation bears the burden of establishing, by a preponderance of the evidence, that there was “such an abuse of discretion on the evaluator's part that the primary purpose of the evaluation process was confounded.” Dancy v. Raleigh County Bd. of Educ., Docket No. 95-41-168 (Sept. 7, 1995). See Brown v. Wood County Bd. of Educ., 400 S.E.2d 213 (W. Va. 1990); Oni v. Bluefield State College, Docket No. 93-BOD- 515 (Dec. 30, 1994). See also Higgins v. Randolph County Bd. of Educ., 286 S.E.2d 682 (W. Va. 1981). It has further been established that the primary purpose of most performance evaluations is to correct the employee's problem behaviors, rather than to discipline. Dancy, supra; Oni, supra. Thus, Grievant bears the burden of proving that her evaluation was unfair and inaccurate, and that good cause exists for its removal from her personnel file. Myers v. Wetzel County Bd. of Educ., Docket No. 94-52-530 (May 19, 1995). See Rupich v. Ohio County Bd. of Educ., Docket No. 89-35- 719 (June 29, 1990). However, if a grievant provides sufficient evidence that the evaluation was used for disciplinary purposes, the burden may be shifted to the employer to prove that the grievant was actually deficient in her duties, meriting the negative evaluation. Dancy, supra.

Grievant alleges that the evaluation at issue was “used as a tool of discipline” and was improper, because it was based upon hearsay and misunderstanding. The only witnesses who testified at level two were Grievant and Mr. Jones. Both witnesses admit that they had opposing interpretations of Grievant's hand gesture on December 11, 1996. Under such circumstances, the evidence is merely one person's word against the other's, and the undersigned could not observe either witness in order to assess credibility. Additionally, although Grievant did not know who told the administration about her alleged comments at the in-service training, she did not attempt to produce any witnesses from that meeting to corroborate her contention that she made noinappropriate comments. Mr. Jones testified that his investigation confirmed that improper comments were made, leading to Mr. West's

meeting with Grievant to counsel her regarding her unprofessional conduct.

A preponderance of the evidence means “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary 819 (6th ed. 1991). The evidence submitted by Grievant does not meet this standard. Both sides have differing versions of the two incidents at issue here, and neither side's evidence is stronger than the other's. Accordingly, the undersigned finds that Grievant has not provided sufficient evidence to prove that the evaluation by Mr. Jones was used as a disciplinary tool, rather than to correct her inappropriate behavior. Mr. Jones' testimony was that he perceived the two incidents to indicate a negative attitude on Grievant's part, which he believed she needed to improve. Therefore, under the standards set forth in Dancy and the other cases discussed above, the undersigned concludes that there was no abuse of discretion by Mr. Jones.

Grievant also argues that this deficient evaluation constitutes a pattern of harassment of her by the administration at New Martinsville School. W. Va. Code § 18-29-2(n) 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.” What constitutes harassment varies based upon the factual situation in each individual grievance. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997) and Oni, supra. The undersigned finds that Respondent's conduct regarding the matters involved in this grievance do not rise to the level of harassment, as it is defined by the statute. Two incidents occurred which called into questionwhether Grievant's professional attitude and conduct needed improvement, which WCBOE appropriately discussed with her and noted on her performance evaluation. Also, although dated at least a month after this grievance was filed, WCBOE's next evaluation of Grievant in March of 1997 reflected satisfactory ratings in all categories. This, when considered in combination with the fact that all of Grievant's previous evaluations were also satisfactory, lends credence to Respondent's contention that no harassment has occurred.

In accordance with the foregoing findings and discussion, the following conclusions of law are made in this matter.

Conclusions of Law

1. A grievant alleging that she has received an improper evaluation bears the burden of establishing, by a preponderance of the evidence, that there was "such an abuse of discretion on the evaluator's part that the primary purpose of the evaluation process was confounded," meaning that the evaluation was used to discipline rather than correct. Dancy v. Raleigh County Bd. of Educ., Docket No. 95-41-168 (Sept. 7, 1995). See Brown v. Wood County Bd. of Educ., 400 S.E.2d 213 (W. Va. 1990); Oni v. Bluefield State College, Docket No. 93-BOD-515 (Dec. 30, 1994). See also Higgins v. Randolph County Bd. of Educ., 286 S.E.2d 682 (W. Va. 1981). Thus, Grievant bears the burden of proving that her evaluation was unfair and inaccurate, and that good cause exists for its removal from her personnel file. Myers v. Wetzel County Bd. of Educ., Docket No. 94-52-530 (May 19, 1995). See Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990).

2. "Harassment" is defined as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va. Code § 18-29-2(n). 3. Grievant did not prove by a preponderance of the evidence that the evaluation dated January 14, 1997, was based upon an abuse of discretion, nor did it constitute harassment as defined by statute.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuit court of the county in which the grievance occurred, 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: September 30, 1997 _____ **V.**

DENISE MANNING

Administrative Law Judge

Footnote: 1

During the level two hearing, Grievant apparently repeated the gesture, but it was not explained for the benefit of a reader of the record. Since no level four hearing was held, the undersigned is still uncertain as to what the exact gesture was, but the record seems to indicate that it may have been a sort of "shrug."

Footnote: 2

The record does not reveal the content of these remarks.