DON KECKLEY,

Grievant,

v. **Docket No. 98-28-380**

MINERAL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Don Keckley, employed by the Mineral County Board of Education (MCBE) as a guidance counselor, filed a level one grievance on July 1, 1998, in which he alleged:

Observations dated April 26, 1998 and May 12, 1998 are inaccurate, contain evaluation of performance responsibilities which were not part of my job responsibilities during the observation period, add[s] areas not covered in West Virginia Board of Education Policy 5310, Section 17 while completely omitting other areas enumerated therein. There was no orientation meeting in the fall of 1997 as per West Virginia Board of Education Policy 5310, Section 9 to advise me of this evaluation system. Neither observation was scheduled with me; neither involved Mr. Fitsch [sic] making a direct, personal, on-site observation of my work when I knew he was present and observing; and both observations occurred within less than a three (3) week period near the end of school, with one dated on a Sunday when school was not in session.

West Virginia Board of Education Policy 5310, Sections 15-18 which relate to evaluation of counselors and administrators makes no provision for observations, nor was I advised at the beginning of the 1997-98 school year that any deviation from Policy 5310, i.e. observation, was to be incorporated into the evaluation process for the year.

David M. Fritsch, principal at the Clary Street Learning Center and Grievant's immediate supervisor, denied the grievance at level one. Following an evidentiary hearing, MCBE Superintendent Charles B. Kalbaugh denied the grievance at level two. Grievant elected to by-pass consideration at level three, as permitted by W. Va. Code §18-29-4(c),and advanced his appeal to level four on October 1, 1998. The matter was set for hearing on December 14, 1998, but was continued for good cause shown. Subsequently, the grievance was transferred to the undersigned for

administrative reasons, and the hearing was conducted on February 15, 1999. Grievant was represented at level four by Harvey Bane of WVEA, and MCBE was represented by Kimberly Croyle, Esq. The matter became mature for decision with the submission of responses to proposed findings of fact and conclusions of law on April 9, 1999.

The following findings of fact are derived from the record, including the level two transcript and exhibits, and evidence submitted at level four.

Findings of Fact

1. Grievant has been employed by MCBE for more than twenty years, and has been assigned as a guidance counselor at the Clary Street Learning Center (CSLC) on a full-time basis since 1987. Previously, Grievant was assigned to Keyser High School/ CSLC, and served each on a half-time basis.

2. Observation and evaluation forms establish that Mr. Fritsch had rated Grievant as “Meets Standard” from 1986 through 1993. The evaluation forms used by MCBE during this period of time provided only three rating categories, “Does Not Meet Standards”, “Meets Standards”, and “Exceeds Standards.”

3. Beginning with the 1995-96 school year, Grievant's evaluations did not include a summary rating, but review was in a narrative format. The comments on both the 1995-96 and the 1996-97 annual evaluations were generally good. 4. Mr. Fritsch completed observation forms for Grievant dated April 26, 1998, and May 12, 1998. Both forms noted deficiencies in Grievant's performance, including that his arrival and sign out sheets were not completed daily or accurately, his personal dress was casual, and in some instances, not up to professional standards, and that student files were not promptly processed or stored.

5. On May 13, 1998, Grievant received his 1997-98 evaluation, in which Mr. Fritsch rated his performance as “Unsatisfactory”. The evaluation included seven issues to be addressed in an improvement plan. Those issues were as follows:

- Accurate completion and timely submission of records and documents.
- Log in procedure for student and staff contacts and activities.
- Compliance with state, county and school regulations and procedures.
- Clear and accurate communication with supervisors, colleagues, students and parents.
- Evidence of the consistent use of a personal organizational system.

- Effective support for School to Work, Program of Studies, Alternative School and other school based initiatives.

-Use of a variety of counseling and instructional techniques in individual and group counseling sessions.

6. The improvement plan was produced following the level two hearing, and completed prior to the level four hearing. Neither the plan, nor any related documentation was made part of the record; however, both parties represent that Grievant successfully completed the objectives.

Argument

Grievant asserts that the unsatisfactory evaluation followed a conversation with Mr. Fritsch during which Grievant declined his request to accept an administrative transfer into a teaching position. Grievant's recollection of that incident, which took place in April 1998, was that Mr. Fritsch was not pleased with his response, and advised Grievant that he could RIF his position if he did not accept the transfer. (See footnote 1) Grievant observes in hindsight that his response, to laugh and tell him to “go ahead”, his seniority would simply allow him to bump into another counseling slot, was probably not in his best interest. Grievant observed that after that conversation with Mr. Fritsch, he could do nothing correctly.

Grievant argues that for a number of years, at the request of Mr. Fritsch, he has acted not as a guidance counselor, but performed the duties and functions normally assigned to an assistant principal. Grievant claims that he was not advised when his immediate supervisor no longer considered him to be functioning in the role of assistant principal, but opines that he functioned as an administrator and was evaluated as a guidance counselor in 1997-98. Grievant charges that Mr. Fritsch failed to explain the evaluation procedure to him at the beginning of the school year, or provide him copies of the evaluation instruments to be applied. Grievant further argues that he should not have been evaluated for “providing purpose and direction for schools/county”, or on his attendance at Faculty Senate meetings. He disputes that his appearance and dress did not meet professional standards. Finally, Grievant asserts that he was allowed no inputinto the development of the improvement plan, and was not provided with resources and assistance during its completion. Grievant requests that the 1997-98 observation forms, evaluation, and documents relating to the improvement plan, be removed from his personnel file.

MCBE argues that Grievant's claims relating to the 1998 observation forms are untimely, and the

development and implementation of the improvement plan were not part of the grievance, and moved for dismissal of those issues. (See footnote 2) In response to Grievant's claim that the deficiencies were not raised until he refused a transfer, MCBE notes that many of the issues raised in his 1998 evaluation had been listed on prior observation and evaluation forms.

Mr. Fritsch testified that the April conversation was not an important event to him, and he did not recall, but he may have said he needed a teacher more than a guidance counselor. He avers that he would not have known if Grievant could have been RIFFED, and the evaluation was unsatisfactory simply because it reflected Grievant's performance. Mr. Fritsch also commented that he had spoken with Grievant regarding the deficiencies throughout the year, that the issues did not suddenly appear in April. He recalled that he had discussed the evaluation process on August 27, 1997, and offered a page from his appointment book to confirm that act, but acknowledged that the information was limited, since he had an experienced staff.

Discussion

MCBE's Motion to Dismiss those issues relating to the observation reports and the improvement plan will first be addressed. Where the employer seeks to have a grievance, or a portion of a grievance, dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Harvey v. Bureau of Employment Programs, Workers' Compensation Div. and W. Va. Dept. of Admin., Div. of Personnel, Docket No. 96-BEP-484 (Mar. 6, 1998); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29,1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17,1996).

It is noted that Grievant did not file a complaint addressing the observation forms, and did not specifically address the observations or improvement plan in his complaint. MCBE is also accurate in stating that the improvement plan was never made part of the record. However, Grievant persuasively argues that the observations were the basis for the evaluation, and the improvement plan arose from the evaluation, therefore, they were all part and parcel of the complaint. Although the observations were not individually challenged, they do not carry the weight of the annual evaluation. Nevertheless, because they did lead to an unsatisfactory evaluation in this case, they will be

considered. The issue of the improvement plan differs somewhat because it was not developed until after the level two hearing. The grievance could have been amended, but to a certain degree, the issue became moot upon its successful completion. It too shall be considered to theextent that evidence of the plan remains in Grievant's personnel file. Should the evaluation be found improper, the improvement plan would be voided, and Grievant would be entitled to have any documentation relating to the plan removed from his file.

___Addressing the merits of the evaluation, it is first noted that because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

Grievant cites a number of improprieties relating to his evaluation. His claim that he functioned as an assistant principal, but was evaluated as a guidance counselor, is not fully developed, and not supported by the evidence of record. The matters of his attire and attendance at Senate Faculty meetings are appropriately addressed in an evaluation. By his own admission, Mr. Fritsch did not provide a detailed accounting of the evaluation process for the 1997-98 school year, but as a twenty-plus year veteran of the school system, Grievant reasonably was aware of the procedure. In any event, these issues merely illustrate Grievant's primary assertion, that the evaluation was improper.

Prior evaluations reveal that a number of matters needing improvement have been brought to Grievant's attention over the years. However, these deficiencies were not documented as ongoing over the years, and do not support MCBE's claim regarding Grievant's performance for the 1997-98 school year. MCBE also submitted eight messages from Mr. Fritsch to Grievant during the 1997-98 school year. Five of themessages either requested that Grievant complete a certain assignment, or noted that something had not been completed. They were all factual in content, and did not appear to be in the nature of a reprimand. Three of the messages addressed the fact that Grievant had called off at 8:30 a.m., and advised him of the proper procedure; advised Grievant to follow the sign-out procedure when he left the building; and notified him that his failure to shave was unacceptable. Five of the eight messages were dated prior to December 31, 1997.

The Grievance Board has previously held that 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). As a general rule, the Grievance Board will not intrude on the evaluations of employees, and recommendations related thereto, unless there is evidence to demonstrate "such an arbitrary abuse on the part of the school official to show the primary purpose of the policies [i.e., W. Va. Code §18A-2-12] has been confounded." Jones v. Braxton County Bd. of Educ., Docket No. 96-04-282 (June 28, 1997); Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988).

An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. DocketNo. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

Because Grievant's evaluations prior to the 1997-98 school year were satisfactory, and there is no evidence that his deficiencies were ongoing, they are not supportive of the claim that his performance was unsatisfactory for that year. Additionally, if Mr. Fritsch perceived Grievant's performance to be so flawed that it would warrant an unsatisfactory evaluation, the question arises why he did not complete an observation form much earlier in the year to inform the long-term employee of the deficiencies, and allow him the opportunity to correct them prior to the end of the year. Grievant's long record of satisfactory performance, and the failure to bring any deficiencies to his attention through observation prior to the end of the school year, depriving him of an opportunity to correct said deficiencies before his final evaluation was completed, leaves the undersigned unconvinced that Grievant's deficiencies were of "unsatisfactory" magnitude. While there may have been room for improvement in Grievant's performance, the completion of the two observations so late in the school year, and in such close proximity to each other and the evaluation, supports a finding

that the evaluation process was arbitrary and capricious.

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

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

3. Grievant has proven that the evaluation process was applied to him in an arbitrary and capricious manner for the 1997-98 school year. Accordingly, the grievance is **GRANTED**, and MCBE Ordered to remove the observations, 1997-98 evaluation, and all documents relating to the improvement plan from Grievant's personnel file.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mineral County. Any 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and transmitted to the appropriate circuit court.

Date: April 20, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

"RIF" is an acronym for "reduction in force", a procedure by which boards of education may eliminate positions and personnel.

Footnote: 2

MCBE did not assert that the complaint regarding the evaluation document itself was untimely filed.