SHIRLEY TURNER,

Grievant,

v. **Docket No. 05-03-278**

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Shirley Turner, filed this grievance against the Boone County Board of Education ("BCBOE" or "Board") over her unsatisfactory evaluation and the resulting Improvement Plan. Her original Statement of Grievance stated, "Mr. King, the principal, placed me on an Improvement Plan, gave me an unsatisfactory evaluation." Relief sought was, "I want the evaluation changed to Meets Standards (MS). I want the evaluation dated May 31, 2005 removed from my Personnel File."

This grievance was denied at Level I. At the Level II hearing, Respondent asked Grievant to clarify her Statement of Grievance and specify what rule, policy, etc., BCBOE had violated. This second Statement of Grievance stated:

> State Board Policy 5310, Performance Evaluation of School Personnel, Section § [sic] 126-142-9 (Evaluation Criteria for Classroom Teachers) was violated in that Mrs. Turner's Teacher Evaluation dated 5/31/05 was based on written comments from one classroom observation dated 5/16/05, and not the compilation of other observations dated 3/15/05 and 5/25/05. Additionally, her teacher observations that accompanied this were also not taken into consideration. This resulted in discriminatory practice as it related to Mrs. Turner's job performance rating assigned by Mr. King, Principal of Van Elementary School.

The grievance was denied at Level II, and Level III was by-passed. Grievant appealed to Level IV on July 25, 2005, and a Level IV hearing was held on September 20, 2005, at the Grievance Board's office in Charleston. At Level IV, the undersigned Administrative Law Judge asked Grievant to clarify what she was alleging BCBOE

haddone incorrectly. Grievant's counsel indicated Grievant had been discriminated against as she was held to a different standard than other teachers, and the finding that her job performance was unsatisfactory was not supported by the observations. Respondent's attorney objected to what he viewed as another change in the Statement of Grievance. After discussion, the undersigned Administrative Law Judge ruled the issue of discrimination could be addressed as it was discussed at the Level II hearing, but no new alleged violation of Policy 5310 could be raised, and only previously addressed issues from this Policy could be addressed. This case became mature for decision on October 11, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts she was treated differently than two other teachers, and her performance in the areas of "Classroom Climate" and "Instructional Management System" was satisfactory. Grievant also asserts she was rated as unsatisfactory because she correctly reported disciplinary problems, and many of the negative comments were subjective and unproven.

Respondent asserts Grievant has many satisfactory areas in teaching, but has sufficient problems to earn an unsatisfactory rating in two areas on her second evaluation of the 2004 - 2005 school year. This rating was supported by the three observations conducted by Grievant's supervisor during the second semester.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by BCBOE from 1980 to 1984. Thereafter, she taught in her family's Christian school for approximately fifteen years. She then returned to

BCBOE for the 1998 - 1999 school year. At the time of the unsatisfactory evaluation, she was teaching the sole third grade class at Van Elementary School.

2. During the 1998 - 1999 school year, Grievant's then-Principal, Jack Elkins, told her she was unsatisfactory, and he was placing her on an Improvement Plan, but he did not do so. However, following the 1999 - 2000 school year, Principal Elkins rated Grievant as unsatisfactory, and she was placed on an Improvement Plan for the 2000 - 2001 school year. Because she was transferred, Grievant successfully completed this Improvement Plan at another school.

3. Grievant did not grieve this evaluation or Improvement Plan.

4. The placement on an Improvement Plan requires three observations and an evaluation each semester for five years. Policy 5310.

5. Grievant returned to Van Elementary for the 2004 - 2005 school year. At that time Kirk King was the principal, and Grievant was assigned to the third grade. In recognition of Grievant's prior difficulties, and the fact there were several rowdy children in this classroom, Principal King assigned the part-time Title I teacher, Teresa Cochran, to Grievant's room for much of her time at Van. Ms. Cochran was in Grievant's classroom most of the day on Mondays and for approximately an hour and one half on Tuesdays, Wednesdays, and Thursdays. (See footnote 2) Grievant was also assigned mentor teachers to assist heron an occasional basis and was granted time away from her classroom to observe teachers who were considered to excel in the classroom. Principal King gave Grievant verbal suggestions for improvement and written materials to assist her.

6. Principal King observed Grievant on September 23, 2004, November 1, 2004, and January 10, 2005. While most of Grievant's first semester observations were satisfactory, Principal King found Grievant to have frequent problems in certain areas, such as, inconsistent application of discipline, poor use of instructional time, failure to inform students why they were studying a specific area, poor transitions, and failure to

use positive reinforcement for positive behavior. These areas were discussed after each observation. Principal King informed Grievant of the areas needing improvement and gave her concrete suggestions.

7. By the last observation of the first semester, Principal King found Grievant's teaching performance to be improved, and she was rated satisfactory in this end-of-semester evaluation. Many of the areas noted as problematic in the September 2004 evaluation had been corrected. Principal King noted Grievant still had some areas that needed correction.

8. Grievant continued to work with the mentor teachers and the Title I teacher in the Spring semester.

9. Grievant's first observation for the Spring semester was on March 15, 2005. At this observation Principal King found Grievant had slipped back into some of her old habits and "classroom management was lacking again." Principal King again noted the rules were not consistently enforced, transitions were poor, explanations of why thelessons were important were not given, and Grievant gave students the answers instead of giving the students time to answer.

10. Grievant's next observation was scheduled for April 20, 2005, but Grievant's son died on April 16, 2005, and this observation was postponed.

11. Principal King waited for a time before scheduling the next observation. With the WESTEST coming up, and the requirement that he perform two more observations that semester, Principal King told Grievant he would complete her second observation on May 16, 2005, a day scheduled for WESTEST prep. Grievant believed Principal King wanted her to prepare a special lesson, and she did, but this was not at his request. During this observation, Principal King found numerous problems, many of them ones he had discussed with Grievant in the past. He noted classroom management was lacking again and there was "VERY little consistency," positive reinforcement was not noted, not all students were engaged, again the importance of the lesson was not given, Grievant

did not circulate within the room, Grievant still did not wait for students to answer the questions asked in the classroom, transitions were slow, and CSO's were not listed. (See footnote 3)

12. Grievant and Principal King discussed the observation, and Principal King told Grievant she might need to be put on an Improvement Plan. After signing the form, Grievant informed Principal that it was the one month anniversary of her son's death.

13. On May 23, 2005, Principal King completed the third, required observation. Although Grievant's performance was improved over the May 16, 2005 observation, Grievant still had many of the same problems that had been noted throughout the schoolyear, such as unclear explanations, failure to use positive reinforcement, and a lesson plan that was not consistently implemented.

14. Grievant received her second semester evaluation on May 31, 2005, and she was rated unsatisfactory in two areas: "Classroom Climate" and "Instructional Management System." (See footnote 4) Overall, Principal King found Grievant, who had been borderline the first semester, had slipped and was now unsatisfactory. He told Grievant she would be placed on an Improvement Plan, and if she did not improve she could be dismissed. Grievant told Principal King that she had been teaching for 24 years and did not "see any chances of [her] making major changes." Test. Grievant and King at 59 & 78, Level II Hearing.

15. In this evaluation in the area of "Classroom Climate" Principal King noted Grievant focused on inappropriate behavior instead of appropriate behavior, was inconsistent in applying discipline, and some students were corrected while others were not. This inconsistency did not create a positive learning environment. He noted Grievant had 93 disciplinary referrals to the office. In the area of "Instructional Management System," Principal King found Grievant's Lesson Plans were prepared but not implemented, the instructional objectives were not clear, Grievant did not keep the students on task or use effective transitions. He informed Grievant she would be placed

on an Improvement Plan for the following year. Principal King also noted Grievant had madenumerous disciplinary referrals during the school year. He believed some of these were valid, but were some out of frustration.

16. Contrary to Grievant's assertions, Principal King did not tell Grievant not to discipline students or not to send them to the office when needed. He did tell Grievant to use more positive reinforcement when she saw good behavior, and this failure is one he noted repeatedly on her observation forms. (See footnote 5)

17. Grievant attached an Addendum to this evaluation dated June 2, 2005. Grievant felt the evaluation was subjective and unwarranted, and stated she was "not going to work under the duress of another Improvement Plan and be constantly scrutnized [sic]," but she was willing to work with Principal King to develop a Classroom Climate plan. She believed there was a school wide breakdown in discipline, and this fact contributed to her classroom discipline problems. Grievant noted several of her students were being evaluated for additional services because of behavior problems. In the section on "Instructional Management System," Grievant believed Principal King was "looking for areas to criticize," and the observation was not properly scheduled. (See footnote 6) Grievant believed Principal King had tried to help her with her performance during the school year. Test. Grievant, Level IV Hearing. 18. During the 2004 - 2005 school year, the Special Education teacher, Jim Stewart, had difficulties with classroom discipline. He was the resource room teacher and had all types of disabilities assigned to this one room. These problems were reported to Principal King in November 2004, by Sharon Ball, an Aide IV. Principal King discussed the situation with Mr. Stewart, and there was improvement. Later, Ms. Ball believed Mr. Stewart had returned to his old ways, but did not report her observation to Principal King. Mr. Stewart has been counseled, but he has not been placed on an Improvement Plan because Principal King saw improvement when he observed Mr. Stewart in the classroom.

19. During the 2004 - 2005 school year, Kendra Gogas, a teacher at Van

Elementary came to work late on numerous occasions. The amount of lateness varied from two minutes to fifteen minutes. Principal King discussed this issue with Ms. Gogas frequently, but has not yet placed her on an Improvement Plan. Principal King noted Ms. Gogas' behavior has improved this school year. Principal King believed the most important area in which to seek improvement is within the classroom setting.

20. Some teachers did not always turn in their Lesson Plans.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep'tof Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). The issues raised by Grievant will be addressed individually.

I. Unsatisfactory Evaluation

"Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving her case by a preponderance of the evidence. Baker v. Fayette County Bd. of Educ., Docket No. 94-10- 427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement Plans 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. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286

S.E.2d 682 (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), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." Turner v. Kanawha County Bd. of Educ., Docket No. 00-20-300 (Feb. 26, 2001)(quoting Beckley v. Lincoln County Bd. of Educ., Docket No. 99- 22-168 (Aug. 31, 1999)).

The standard for assessing an evaluation or improvement plan grievance is the arbitrary and capricious standard. "Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be ascribed to a difference of opinion. See BedfordCounty Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Ears v. Dunkel, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Ears, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

A professional employee must be placed on an improvement plan when her performance is deemed unsatisfactory, so that she has the opportunity to correct her deficiencies. In this regard, W. Va. Code § 18A-2-12 states:

> (f) A professional whose performance is considered 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.
>
> . . .
>
> (h) 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.

W. Va. Code § 18A-2-12(3)(A) & (D) states the purpose of an evaluation is to "[s]erve as a basis for the improvement of the performance of the personnel in their assigned duties . . ." and "[s]erve as a basis for programs to increase the professional growth and development of professional standards." Evaluations should contain the standards for "satisfactory performance and the criteria for professional personnel to be used to determine whether the performance of each professional meets such standards . . .". W. Va. Code § 18A-2-12(4).

State Department of Education Policy 5310 provides that the immediate supervisor is responsible for the employee's evaluation, and he or she must share the evaluation with the employee. The employee has a right to attach a written addendum to the evaluation. 126 C.S.R. 142 §§ 10.4, 10.5, and10.6. Jones v. Braxton County Bd. of Educ., Docket No. 97-04-311 (Apr. 28, 1998). Principal King was Grievant's immediate supervisor, and he shared his observations and the evaluations with Grievant. Grievant did attached a written addendum.

Grievant's evaluation rated her performance unsatisfactory in several areas, and Grievant has challenged this evaluation. An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in State

Department of Education Policy 5310 and W. Va. Code §18A-2-12. See Brown, supra; Wilt v. Flanigan, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a grievant disagrees with her unfavorable evaluation does not indicate 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). See Rider v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-348 (Apr. 7, 2000). Grievant did not establish her evaluation was incorrect or conducted in an arbitrary and capricious or unfair manner. The evidence demonstrated Grievant was minimally satisfactory at the end of the first semester, but she did not maintain this level of performance for the second semester. While it is clear from the evaluation and Principal King's testimony Grievant had areas within "Classroom Climate" and "Instructional Management System" that were satisfactory, overall her performance in these areas was rated unsatisfactory, "Performance is not consistently acceptable in meeting performance criteria." 126 C.S.R. 142-8.1.4. Additionally, Grievant did not demonstrate the only reason for her unsatisfactory evaluation in "Classroom Climate" was the excessive number of referrals to the office for disciplinary action. (See footnote 7)

While Grievant may not agree with Principal King's assessment, the undersigned Administrative Law Judge cannot overturn Grievant's evaluation unless Grievant proves the evaluation was "such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded." Kinder, supra. See Turner, supra; Beckley supra. Such showing has not been made in this case.

II. Discrimination

Grievant has alleged she has been treated differently than other teachers at her school. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees." Notice is

taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 8)

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has not met her burden of proof and demonstrated she was similarly situated to the two teachers to whom she compared herself. Although it was clear there were two teachers who had some difficulties, it is also clear Principal King found one teacher sufficiently improved to warrant a satisfactory rating at the end of the school year, and he did not find the tardy teacher warranted an Improvement Plan at the end of the 2004 - 2005 school year. Pursuant to Policy 5310, these assessments and decisions are within the purview of Principal King, and unless they are arbitrary and capricious they should not be disturbed. Grievant did not establish her assertions that these teachers were similarly situated to her and were unsatisfactory in their teaching and professional performance.

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

Conclusions of Law

1. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving her case by a preponderance of the evidence." Baker v. Fayette County Bd. of Educ., Docket No. 94-10- 427 (Jan. 24, 1995).

2. The Grievance Board will not intrude on the evaluations and Improvement Plans 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. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (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), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." Turner v. Kanawha County Bd. of Educ., Docket No. 00- 20-300 (Feb. 26, 2001); Beckley v. Lincoln County Bd. of Educ., Docket No. 99-22-168 (Aug. 31, 1999).

3. The arbitrary and capricious standard is used in assessing whether an evaluation should be set aside. 4. "Generally, an action is considered arbitrary and capricious if the agency 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 was 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); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Ears v. Dunkel, 196 W. Va. 604, 474

S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Ears, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts. 5. An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in Policy 5310 and W. Va. Code §18-2-12. See Brown, supra; Wilt v. Flanigan, 170 W. Va. 385, 294 S.E.2d 189 (1982).

6. 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).

7. Grievant's observations and subsequent evaluation were performed correctly, fairly, and competently in all respects. The procedural requirements set by Policy 5310 were met. 8. Grievant did not meet the standard set for satisfactory performance as stated by Policy 5310: "Performance is consistently adequate in meeting performance standards" in the areas of "Classroom Climate" and "Instructional Management System." 126-142-- 8.1.3.

9. Grievant did not establish a violation of W. Va. Code § 18A-2-12, or State Board of Education Policy 5310.

10. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

11. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-

situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

12. Grievant has not met her burden of proof and demonstrated she was similarly situated to the individuals to whom she compared herself.

13. Grievant did not demonstrate she was treated differently from any other similarly situated employee. Therefore, she failed to prove discrimination.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Boone 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 properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 31, 2005

Footnote: 1

Grievant was represented by Katherine Dooley, Esq.,and BCBOE was represented by Timothy Conaway, Esq.

Footnote: 2

Since Ms. Cochran spent fifty percent of her work time at Van Elementary, the amount of time she spent with Grievant was a substantial amount of her time there.

Footnote: 3

This acronym was not explained by the parties, but, within the context of the evaluation, appeared to relate to classroom teaching objectives.

Footnote: 4

There are nine areas to observe in the "Classroom Climate" section, and eighteen areas to observe in "Instructional Management System." Some of the areas appear to overlap and instructional activity can be cited to support the findings in more than one area.

Footnote: 5

While the parties agreed that the use of positive reinforcement was not the answer to all the discipline problems in Grievant's classroom, Principal King strongly believed Grievant was inconsistent in her application of discipline, and this inconsistency created problems. He also believed the use of positive reinforcement would decrease the number of office referrals.

Footnote: 6

This issue was not addressed within the grievance and is deemed abandoned.

Footnote: 7

The record revealed another teacher had more disciplinary referrals, but she was not rated as unsatisfactory.

Footnote: 8

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).