THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARTHA BAILEY,
Grievant,

v. **Docket No. 2009-1594-KanED**

KANAWHA COUNTY
BOARD OF EDUCATION
Respondent.

DECISION

Grievant Martha Bailey filed a grievance against her employer, Kanawha County Board of Education, on May 29, 2009. Her statement of grievance reads, "Violation of State Board Policy 5310; Grievant was given an unsatisfactory evaluation based upon improper criteria which is not a valid assessment of her performance."

For relief, Grievant seeks, "Evaluation removed from Grievant's personnel record and the implementation of an Improvement plan for the 2009-2010 school year stopped."

A level three hearing was held at the Grievance Board's Charleston office on November 5, 2009, with a second day on December 2, 2009. Grievant was represented by Felicia Law, West Virginia Education Association, and Respondent was represented by Jim Withrow, Esq. The parties desired to file proposed findings of fact and conclusions of law with the date for submission being December 16, 2009. However, on December 16, 2009, Respondent's counsel requested an extension which was granted. Therefore, this case became mature on December 21, 2009, upon the parties' filing findings of fact and conclusions of law.

Synopsis

Grievant was placed on an Improvement plan for the 2009-2010 school year to address deficiencies in the areas of Classroom Climate, Communication, and Professional

Work Habits. Grievant asserts that Kay Lee, Principal at Dunbar Primary School, did not observe the incidents which led to the Improvement plan, and Principal Lee did not hold a post-observation conference within five working days. Grievant avers that she followed the common practice when she asked the aide in her room to supervise the students on the playground. Grievant asserts the evaluation she received on May 29, 2009, rating her unsatisfactory in the areas of Classroom Climate, Communication, and Professional Work Habits were not based on Principal Lee's observations and therefore was not open and honest.

Respondent asserts Grievant's interactions with coworkers, her supervisor, and the students in her class were unsatisfactory. Respondent also argues that the evaluation was conducted properly, and the Improvement plan identified Grievant's deficiencies and provided corrective actions to remedy those deficiencies.

Grievant has not met her burden in this case. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent as a kindergarten teacher at Dunbar Primary School. Grievant has been assigned to Dunbar Primary for approximately fourteen (14) years.

2. Grievant has been a teacher for approximately thirty (30) years.

3. In the fall of 2008, Jane Roberts, Assistant Superintendent for Elementary Schools, began to receive complaints about Grievant.

4. Ms. Roberts received two bullying complaints from Grievant's coworker, along with various other complaints from both the school counselor and the school nurse.

5. These complaints caused Ms. Roberts to investigate the allegations.

6. Ms. Roberts confirmed that Grievant was excluding a child in her class for allegedly having lice. However, the school nurse verified the child did not have live lice.

7. Kanawha County Schools Health Services Pediculosis (Head Lice) Procedure on Screening allows that students found to have nits, after being treated for head lice, are no longer to be excluded from the classroom.

8. Grievant was suspended on December 16, 2008.

9. A hearing was scheduled on January 22, 2009. That hearing never took place, as Grievant and Respondent reached an agreement whereby Grievant agreed to utilize the Employee Assistance Program, relinquish all leadership roles at the school, and to meet with Ms. Roberts and Principal Lee to discuss any issues and provide documentation that Grievant was following any recommendation from her health care provider. In exchange, Respondent agreed Grievant would return to school on January 26, 2009.

10. Grievant never grieved her suspension.

11. Ms. Roberts and Principal Lee met with the staff on January 23, 2009, and advised that it was their hopes that the environment would improve, and they encouraged staff members to put any ill feelings toward Grievant behind them and to begin anew.

12. Grievant returned to school on January 26, 2009.

13. On February 23, 2009, Grievant, Principal Lee, Ms. Roberts, and Felicia Law, Grievant's representative, met pursuant to the agreement entered into on January 22, 2009. At that meeting, Grievant accused Principal Lee of reporting her to Child Protective

Services.[1] Grievant had been late four times since returning to school, and this was discussed with her as well.

14. They met again on March 23, 2009. Greivant refused to tell Principal Lee and Ms. Roberts how frequently she was meeting with her health care provider.

15. On April 4, 2009, Ms. Roberts, Principal Lee, Grievant, and Ms. Law met again. The following concerns were discussed with her and reduced to writing:

1. Ms. Bailey continues to disregard school procedures and rules.
   - Arrived late at school: Feb. 9, Feb. 11, March 30, April 2, April 6, April 10
   - Did not refer a child who had diarrhea to the school nurse on March 19. This child had repeated diarrhea earlier in the year. This stopped during the period of time that Ms. Bailey was out of her class. When it happened again, she washed the clothes and kept the child in class instead of informing the nurse or school principal.
   - Called parents to pick up a student as a disciplinary measure rather than refer the child to the principal - April 14
   - Ordered a lift bus for a child who had a broken leg, rather than consult with the principal regarding this need. Did not attend a 504 meeting scheduled during her planning time to address this need. The meeting was moved to her classroom to get her input. Did not send a child to physical education as a disciplinary measure: Feb. 10,11,25, March 11, April 3.
2. Ms. Bailey continues to be disrespectful to her supervisor and to other staff members.
   - When Mrs. Lee passes Ms. Bailey in the hall and speaks, Ms. Bailey turns her head and does not speak.
   - On April 9, Mrs. Lee asked Ms. Bailey's aide to tell Ms. Bailey to come and see her that day. Ms. Bailey did not come, but wrote an email instead.
   - Ms. Bailey questioned the counselor about why she was working with a student in front of other students - March 27, April 3.
3. Ms. Bailey called all of her students' parents about the school-wide trip to Pittsburgh. She relayed to them that she nor the

[1]Principal Lee has continued to adamantly deny this allegation.

aide would be going on the trip, and that she felt the trip was not appropriate for 5 and 6-year-old children.

4. Ms. Bailey has not provided documentation that she is cooperating with the treatment plan set forth by her doctor. She met with Mrs. Lee and Ms. Roberts on Feb. 23. At that time, she informed us that she had met with a medical provider on Feb. 19. She stated that she liked this person, and she planned on seeing her weekly. The next meeting occurred on March 23. She stated that she had been back to her medical provider on Feb. 27. She refused to answer questions regarding whether she was meeting monthly, weekly, or bi-weekly. She stated that she had been more than twice. She said she liked her health care provider. She did not provide any documentation that she is cooperating with the treatment plan.

16. As punishment, Grievant would not allow students to attend physical education. If students did not complete their morning work, Grievant would make them stay in from physical education.

17. Students are required to attend physical education, and Grievant was aware of this requirement.

18. On April 3, 2009, Jennifer Marinacci, the school counselor, went to get a student from Grievant's class for individual counseling. Grievant's students were in music class, but this student was not. Ms. Marinacci went to Grievant's room where the student was. Grievant held this student out of music class because she had not completed her morning work. Grievant questioned Ms. Marinacci as to the reason for the individual session and opined the child did not need counseling for her behaviors.

19. Ms. Marinacci did not reveal any information about the reasons for the individual session due to confidentiality.

20. On May 7, 2009, Grievant was taking her students to lunch. As they were going down the hallway, the custodian was putting away her cleaning equipment in the hall

closet. Grievant pushed the equipment toward the custodian and said, "This is unsafe," loudly. This took place in front of the students.

21. The custodian was embarrassed, and she went to Principal Lee.

22. The aide assigned to Grievant's room for the 2008-2009 school year, Gloria Gibbs, has a medical condition that prevents her from being in the sun. Grievant was aware of this.

23. On May 13, 2009, Grievant instructed the aide to supervise the children on the playground. This is an acceptable practice at the school.

24. Ms. Gibbs reminded Grievant she could not be in the sun. Grievant instructed her to put a chair outside in the shade near the classroom. From where Ms. Gibbs was seated she could not adequately supervise all of the children.

25. Principal Lee saw where Ms. Gibbs was sitting and was concerned. She questioned Ms. Gibbs as to whether she could see all of the children, and Ms. Gibbs acknowledged that she could not. Principal Lee had someone else go out and supervise the students.

26. Ms. Gibbs explained to Principal Lee that this was where Grievant had instructed her to sit and monitor the students.

27. When Ms. Gibbs recounted the events to Grievant, she confronted Ms. Gibbs. The confrontation ended with Grievant telling Ms. Gibbs she did not want to have anymore private conversations with Ms. Gibbs. Grievant also said she did not want Ms. Gibbs in her classroom when the children were not there.[2]

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[2]This seems to be a pattern with Grievant. Through the course of the two day hearing testimony was presented that, prior to the 2008-2009 school year, Grievant had told

28. Grievant's room has a door to the outside and a door to the hall. Grievant would put students outside as punishment. The student would be out doors without an adult, supervised only by the aide looking through the classroom window while still working with the children.

29. On May 18, 2009, Principal Lee prepared two Teacher Observation/Data Collection sheets. The first was concerning the incident with the custodian, and the second was concerning her class being improperly supervised on the playground.

30. Grievant and Principal Lee do not have a good working relationship.

31. On May 18, 2009, Grievant met with Principal Lee and Bill Courtney, Director of Employee Relations, to discuss ways to improve their relationship. This was a directive from Ron Duerring, Superintendent.

32. On that date, Principal Lee provided the Teacher Observation/Data Collection sheets to the Grievant. Grievant did not wish to discuss these observation sheets because her representative was not present.

33. Principal Lee observed Grievant teaching on May 28, 2009. Grievant is proficient at classroom instruction.

34. On May 29, 2009, Grievant and Ms. Law met with Ms. Roberts and Principal Lee. At that time, Grievant was given her teacher evaluation.

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the custodian not to come back into her room. As a result the custodian changed the area in which she worked, taking on a bigger area to clean, so as to avoid the kindergarten hallway where Grievant's classroom was. Also prior to the school year in question, Grievant had an argument with a first grade teacher, and Grievant told that teacher not to come back into Grievant's room.

35. Grievant was rated unsatisfactory in Classroom Climate with comments that said:

> The teacher follows our student attendance policy and encourages students attendance. She always checks if a student is absent to what is wrong. All students are not treated in a fair and equitable manner. A student has been isolated for having nits, some students have been held out of P.E. for punishment for not being finished with classwork [sic] and a student was put outside the classroom door without supervision for punishment.

36. Grievant was rated unsatisfactory in Communication with comments that said:

> Ms. Bailey does not seem to want to be a team player with her colleagues. There have been numerous reports from staff members which detail a pattern of harassing behavior.

37. Grievant was rated unsatisfactory on Professional Work Habits with comments that said:

> Ms. Bailey exhibits behavior which reflects negativism toward other employees. Several complaints have been reported throughout the school year and the Kanawha County Administrators have tried to work with her through informal processes but that has not worked. It has been reported that she took a fax copy out of the nurses's hands, made disrepectable [sic] remarks to a custodian in the hallway in front of students, called another custodian "do-less," told her aide not to be in the classroom unless there were students in there, and stated that the aide said I yelled at the aide.

38. All Grievant's evaluations prior to this have been satisfactory.

39. Grievant was put on an Improvement plan to address these issues.[3] The Plan runs from August 21, 2009, to January 15, 2010.

Discussion

"Evaluations and subsequent Improvement plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education

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[3]The undersigned finds it significant to note that Grievant chose not to have a teacher serve on her Improvement Team, after 14 years of employment at Dunbar Primary.

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)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

"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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant asserts a violation of West Virginia State Board Policy. West Virginia State Board Policy 5310 §126-142-10.3 states:

> For teachers with five (5) or more years of experience who have not received an unsatisfactory rating, an evaluation shall be conducted or professional growth and development plan required only when the supervisor determines it to be necessary for a particular classroom teacher, or when a classroom teacher exercises the option of being evaluated at more frequent intervals.

Clearly, Principal Lee, Grievant's supervisor, determined it necessary to conduct an evaluation, given the altercation with the custodian and the incident with the aide. While it is uncontested that Grievant is proficient in presenting the material to the students, there are ongoing behavior issues that should have been addressed long before now. Principal Lee was correct in conducting the evaluation.

An evaluation is properly conducted if it is performed in an "open and honest" manner, and is fair, and professional. W. Va. Code § 18A-2-12.2. *See Brown*, *supra*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). 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). 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. *Jones v. Braxton County Bd. of Educ.*, Docket No. 97-04-311 (Apr. 28, 1998).

Grievant argues the evaluation was not conducted in an open and honest manner. Grievant knew there were problems with her attitude at school. She had been suspended several months before due to her behavior. As a result of that suspension, she and her

representative had agreed to meet with Principal Lee and Ms. Roberts regularly. At those meetings, the four discussed Grievant's performance and attitude. The first meeting went well, but those after show a deterioration of communication. The meetings did not seem to help Grievant exhibit acceptable behavior. Instead her bad behavior increased in frequency and severity.

Clearly Grievant knew what Principal Lee and Ms. Roberts considered to be problems with her behavior. She was afforded an opportunity to discuss the issues with them, but chose not to do so. It is disingenuous for Grievant to assert her evaluation was not open and honest because each specific instance was not discussed with her. Principal Lee and Ms. Roberts continually discussed the overriding issue of communication with coworkers.

Grievant also asserts Principal Lee failed to meet with her and discuss the two observation reports within the prescribed time frame. However, Principal Lee provided Grievant with the observation reports on May 29, 2009, and was willing to discuss those issues on that date. Grievant, however, did not feel comfortable and wanted her representative, which is completely acceptable and well within her right. It was therefore, postponed until all the parties could attend. It was not improper for Principal Lee to wait until Ms. Law, Grievant's representative, could be with Grievant to discuss the observation reports.

It is very clear that Principal Lee and Grievant do not have a good working relationship. Principal Lee has been aware of the conflicts between Grievant and other staff, and has not addressed the issues until Ms. Roberts began providing Principal Lee with direction on how to handle the situation. Principal Lee is an administrator and is paid to

handle personnel issues. She should have been more proactive in dealing with the chaos Grievant created in the school environment.

These issues can be corrected, and the Improvement plan is a way to make Grievant aware of her deficiencies and assist her in strengthening those weaknesses. However, Grievant appears to have no recognition that her attitude and communication with her coworkers is inappropriate. For the atmosphere to be better, Grievant has to recognize that throwing people out of her classroom because they questioned her or disagreed with her is disrespectful. Grievant has to accept that the custodian was doing her very best to put her cleaning equipment away as quickly as possible, and instead of charging down the hall with her class, perhaps the wiser course of action would have been to have the class wait until the hall was clear. Grievant may not agree with Respondent's policy on nits and lice, but she has to have compassion for the student and instead of ostracizing her, welcome her into the class, always remembering she is shaping young minds and attitudes.

Nothing about the Improvement plan Grievant was placed on in an effort to make her an even better teacher was arbitrary and capricious. Therefore, this grievance is DENIED.

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 [his] 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)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

2. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. An evaluation is properly conducted if it is performed in an "open and honest" manner, and is fair, and professional. W. Va. Code § 18A-2-12.2. *See Brown*, *supra*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). 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).

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. *Jones v. Braxton County Bd. of Educ.*, Docket No. 97-04-311 (Apr. 28, 1998).

4. Grievant's evaluation was conducted properly and performed in an open and honest manner, was fair and professional.

5. Grievant's evaluation and subsequent improvement plan was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: January 19, 2010

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Wendy A. Elswick
Administrative Law Judge