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May 12, 2022

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Bonita Redd,
Petitioner Below, Petitioner**

vs.) No. 21-0635 (Kanawha County 21-AA-7)

**McDowell County Board of Education,
Respondent Below, Respondent**

MEMORANDUM DECISION

Self-represented petitioner Bonita Redd appeals the July 9, 2021, order of the Circuit Court of Kanawha County affirming the January 19, 2021, order of the West Virginia Public Employees Grievance Board (“Grievance Board”) denying her grievance challenging the “below standard” ratings she received for the categories of “policy and procedure” and “respect” during her 2019 year-end summative performance evaluation. Respondent McDowell County Board of Education, by counsel Howard E. Seufer, Jr. and Joshua A. Cottle, filed a response in support of the circuit court’s order. Petitioner filed a reply.

The Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court’s order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner works as a teacher at Welch Elementary School. On June 3, 2019, the elementary school principal prepared petitioner’s 2019 year-end summative performance evaluation and discussed the evaluation with petitioner. The principal gave petitioner a summative rating of “emerging,” which is defined as “teaching that demonstrates knowledge and skills to implement essential elements albeit not always successfully at times.”

Petitioner’s summative rating of “emerging” reflects the ratings the principal gave petitioner in eighteen categories regarding petitioner’s teaching performance, which were: “accomplished” in one category, “emerging” in fifteen categories, and “below standard” in two

categories. Accordingly, the principal provided petitioner a summative rating that represented the rating petitioner received in a substantial majority of categories, unaffected by the two “below standard” ratings she received in the categories of “policy and procedure” and “respect.”

The principal gave Petitioner “below standard” ratings in the categories of “policy and procedure” and “respect” due to an incident that occurred at a May 30, 2019, awards assembly in which petitioner participated with her third and fourth grade students in the presence of other students, parents, and faculty. While presenting the students with awards, petitioner addressed four of her highest achieving students regarding their difficult and talkative behavior throughout the school year. Petitioner told the students that they always had to get the last word but that she would get the last word that day. Petitioner also asked the mother of one of the students if the student was equally difficult at home. Petitioner’s remarks embarrassed the students and offended at least one of their parents, who complained about petitioner’s conduct.

Neither the principal nor respondent disciplined petitioner because of her comments at the May, 30, 2019, awards assembly. Moreover, as indicated above, the two “below standard” ratings petitioner received in “policy and procedure” and “respect” did not affect the summative “emerging” rating the principal provided for petitioner’s 2019 year-end summative performance evaluation.

Nevertheless, on June 24, 2019, petitioner filed a grievance with the Grievance Board, challenging the “below standard” ratings she received for the categories of “policy and procedure” and “respect.” Following a July 11, 2019, Level I grievance hearing,¹ the McDowell County Superintendent of Education, by a decision entered on August 6, 2019, denied petitioner’s grievance. The parties participated in mediation during the Level II grievance proceeding that was not successful. Thereafter, the parties appeared at a Level III hearing before the Grievance Board on November 5, 2020. The Grievance Board, by an order entered on January 19, 2021, denied petitioner’s grievance.

On February 19, 2021, petitioner filed an appeal of the Grievance Board’s January 19, 2021, order in the Circuit Court of Kanawha County.² On April 19, 2021, petitioner filed a memorandum of law in support of her appeal. Respondent filed a response on May 17, 2021, and petitioner filed a reply on June 1, 2021. The circuit court, by an order entered on July 9, 2021, affirmed the Grievance Board’s denial of petitioner’s grievance.

Petitioner now appeals the circuit court’s July 9, 2021, order affirming the Grievance Board’s decision. “A final order of the [Grievance Board], made pursuant to W. Va. Code[§§ 6C-2-1 through 6C-2-8], and based upon findings of fact, should not be reversed unless clearly wrong.” Syl. Pt. 3, *Armstrong v. W. Va. Div. of Culture and History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (quoting Syl. Pt. 1, *Randolph County Bd. of Educ. v. Scaltia*, 182 W. Va. 289, 387 S.E.2d

¹The grievance process consists of three levels. See W. Va. Code § 6C-2-4.

² West Virginia Code § 6C-2-5(c) provides that any appeals from orders of the Grievance Board shall be filed in the Circuit Court of Kanawha County.

524 (1989)). In Syllabus Point 1 of *Darby v. Kanawha County Board of Education*, 227 W. Va. 525, 711 S.E.2d 595 (2011), we held that:

“[g]rievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*.” Syllabus Point 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

On appeal, petitioner argues that the circuit court erred in affirming the Grievance Board’s denial of her grievance. Respondent counters that the circuit court properly upheld the Grievance Board’s order. Respondent further argues that this Court should decline to review any issue that petitioner has failed to adequately raise on appeal.

We find that petitioner’s arguments have never been well-organized or clearly stated at any level of this case. In its January 19, 2021, order, the Grievance Board found that petitioner had abandoned several issues by “not providing any evidence [to support those issues] or even mentioning them during the [Level III] hearing or in her [proposed findings of fact and conclusions of law].” The circuit court similarly declined to review the twenty-five issues raised in petitioner’s petition for appeal, finding that the petition set forth bare assertions unsupported by pertinent authorities or citations to the record. While the circuit court reviewed the issues raised in petitioner’s memorandum of law, the circuit court liberally construed those arguments because, although the memorandum of law set forth six “[q]uestions presented,” the circuit court addressed eleven issues, including petitioner’s argument that it improperly cancelled a hearing set for June 9, 2021, hearing without written notice. *See State ex rel. Dillon v. Egnor*, 188 W. Va. 221, 227, 423 S.E.2d 624, 630 (1992) (“When a litigant chooses to represent [her]self, it is the duty of the trial court [and this Court] to insure fairness, allowing reasonable accommodations for the pro se litigant so long as no harm is done an adverse party[.]” (Internal quotations and citations omitted)).

In *Franklin v. Pence*, 128 W. Va. 353, 36 S.E.2d 505 (1945), we found that the assignments of error in that case failed to clearly delineate “the exact points relied upon for reversal” and relied upon “statements in the brief” that were “considered as indicating the main grounds of attack[.]” *Id.* at 356, 36 S.E.2d at 508. Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure provides:

Argument: The brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error. The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

Therefore, pursuant to Rule 10(c)(7), we find that petitioner's assignments of error, as best as this Court can understand them, correspond to the eleven issues reviewed and rejected by the circuit court.³

Having reviewed the circuit court's July 9, 2021, "Final Order," we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions, which we find address petitioner's assignments of error. The Clerk is directed to attach a copy of the July 9, 2021, order to this memorandum decision. Accordingly, we conclude that the circuit court did not err in affirming the Grievance Board's denial of petitioner's grievance.

For the foregoing reasons, we affirm the circuit court's July 9, 2021, order affirming the Grievance Board's January 19, 2021, order.⁴

Affirmed.

ISSUED: May 12, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton
Justice C. Haley Bunn

³While petitioner clearly argues on appeal that the circuit court judge who presided in this case should have been disqualified due to an alleged conflict of interest, we decline to review that issue, pursuant to Rule 10(c)(7), because petitioner never raised it with the circuit court. As we have held, "[t]his Court will not pass on a non[-]jurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 2, *Sands v. Sec. Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958).

⁴Petitioner argues that Justice Elizabeth D. Walker should be disqualified due to an alleged conflict of interest. We find this argument should have been made not in petitioner's appellate brief, but in a motion for disqualification pursuant to Rule 33 of the West Virginia Rules of Appellate Procedure. That rule provides, in pertinent part, that "[t]he motion shall be addressed to the Justice whose disqualification is sought and shall state the facts and reasons for disqualification[.]" W. Va. Rul. App. Proc. 33(d) (Footnote added.); Syl. Pt. 1, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984) ("Where a motion is made to disqualify or recuse an individual justice of this Court, that question is to be decided by the challenged justice and not by the other members of this Court."). Accordingly, because petitioner failed to file a motion pursuant to Rule 33, we find that she has waived this issue.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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BONITA REDD,
Petitioner,

v.

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
Civil Action No. 21-AA-7
The Honorable Louis H. Bloom

MCDOWELL COUNTY BOARD OF EDUCATION,
Respondent.

FINAL ORDER

Pending before the Court is an Appeal filed on February 19, 2021, by the Petitioner, Bonita Redd, *pro se*. The Appeal seeks to reverse the Decision entered on January 19, 2021, by the West Virginia Public Employees Grievance Board. The Decision denied the Grievance filed by the Petitioner on June 24, 2019. The Grievance alleged a multitude of violations and infractions against Petitioner by the Respondent McDowell County Board of Education. On April 19, 2021, the Petitioner filed a Memorandum of Law. On May 17, 2021, the Respondent Board of Education filed a Brief. On June 1, 2021, the Petitioner filed a Reply. Based upon the record, briefs, and applicable law, the Court finds and concludes as follows.¹

STANDARD OF REVIEW

A party may appeal a decision of the West Virginia Public Employees Grievance Board ("the Grievance Board") within 30 days of the decision.² The decision may be appealed on the grounds that it

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the administrative law judge's statutory authority;
- (3) Is the result of fraud or deceit;

¹ The Court notes that Petitioner sent a letter to the Circuit Clerk on June 11, 2021, seeking written confirmation that no hearing would occur in this matter. Such written notice is not required, and Petitioner was promptly notified by Court staff that no hearing would take place.

² W. Va. Code § 6C-2-5(c).

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- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 6C-2-5(b) (2007). "Grievance rulings involve a combination of both deferential and plenary review."³ In reviewing a Grievance Board decision, the reviewing court gives deference to the Grievance Board's findings of fact but reviews *de novo* all conclusions of law and applications of law to the facts.⁴ The Grievance Board's decision should not be reversed unless it was clearly wrong.⁵

Particularly relevant to this case, the Supreme Court of Appeals of West Virginia has held, "there is obviously a need to permit a latitude of discretion as the issue [evaluation of teacher's qualifications] cannot be framed with mathematical precision or exactitude." As long as this 'latitude of discretion' is subject to the requirement that the evaluation be open and honest, then the teacher will receive the minimal due process protection from arbitrary and capricious actions to which he is entitled. Absent evidence of 'arbitrary abuse of discretion', we will not intrude ourselves into the process of a teacher's evaluation."⁶

FINDINGS OF FACT

1. Petitioner has been employed as a teacher by the Respondent Board of Education for 35 years.
2. On May 30, 2019, Petitioner participated in an awards assembly for her third and fourth grade students. Present at the assembly were parents, faculty, and other students. During the assembly, Petitioner publicly addressed four students regarding their behavior throughout the year. Specifically, Petitioner said the students always needed to get the last word in, but that

³ Syl. Pt. 1, *Cahill v. Mercer County Board of Education*, 208 W. Va. 177, 177, 539 S.E.2d 437, 437 (2000).

⁴ *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995).

⁵ *Id.*

⁶ *Brown v. Wood County Board of Education*, 184 W. Va. 205, 211, 400 S.E.2d 213, 219 (1990) (internal citations omitted).

Petitioner would have the last word that day. Petitioner then publicly asked a student's mother if the student was difficult at home as well.

3. The next day, a parent filed a complaint with the Respondent Board of Education regarding Petitioner's remarks. The parent also made a lengthy social media post regarding the incident.
4. On June 3, 2019, Petitioner attended her annual Summative Evaluation with Principal Kristy East. Principal East provided Petitioner with a copy of her evaluation as well as an incident report regarding Petitioner's comments at the awards assembly.
5. The Evaluation Rubrics for Teachers, prepared by the West Virginia Department of Education, establishes and describes the "Levels of Performance" upon which teachers are evaluated.⁷ The levels, from best to worst, are: Distinguished – Accomplished – Emerging – Unsatisfactory. These standards are defined as follows:

Distinguished – Distinguished performance describes professional teaching that engages students to be highly responsible for their own learning. Performing at this level involves contributing to the professional learning of others through teacher leadership.

Accomplished – Accomplished performance describes professional teaching that exhibits mastery of the work of teaching while improving practice and serving the professional community.

Emerging – Emerging performance represents teaching that demonstrates knowledge and skills to implement essential elements albeit not always successfully at times.

Unsatisfactory – Unsatisfactory performance describes teaching that does not convey sufficient understanding of concepts or the successful implementation of essential elements.

⁷ Respondent's Ex. 2, Rec. at p. 467.

6. These levels are utilized to grade teachers in six categories called "Professional Teaching Standards." Petitioner received a rank of Emerging for each Professional Teaching Standard and subsection thereof except one subsection for which she received a rank of Accomplished.⁸
7. A seventh Professional Teaching Standard is titled "Professional Conduct" and uses only three ranks: Meets Standard – Below Standard – Unsatisfactory.⁹ Petitioner received marks of "Meets Standard" in the subcategories of "Attendance" and "Schedule." However, Petitioner received marks of "Below Standard," the middle rank, in both "Policy and Procedure" and "Respect." In the comment section below this seventh standard, Principal East wrote "[o]ne incident report filed during the 18-19 school year." In the Incident Report section entitled "Standard 7 – Professional Conduct – Policy and Procedures," Principal East wrote,

During the 3rd and 4th grade awards ceremony on May 30, Mrs. Redd publicly discussed the behavior of four individual students. This specific identification of students is a violation of FERPA [the Family Educational Rights and Privacy Act]. Additionally, this is also a violation of State Policy 5902, the Employee Code of Conduct, sections 4.2.3 and 4.2.7. By making comments of demeaning and discriminatory nature, Mrs. Redd failed to demonstrate professional conduct as defined in the aforementioned policies and laws.

Likewise, in the Incident Report section entitled "Respect," Principal East found that

Mrs. Redd did not maintain professionalism and show respect to students as individuals by failing to discuss student behavior in a confidential manner. The teacher's comments about students embarrassed not only the students but also their parents, which resulted in harassment complaints filed against her by the parents of the students Mrs. Redd singled out during the awards ceremony.

8. Petitioner received an overall "Summative Performance Rating" of Emerging. This was apparently unaffected by the two "Below Standard" findings, as Petitioner received the rank

⁸ Respondent's Ex. 1, Rec. at p. 462.

⁹ *Id.*, Rec. at p. 463.

of Emerging in fifteen categories, Below Standard in two, and Accomplished in one. An overall rating of Emerging was thus clearly appropriate in light of Petitioner's complete evaluation.

9. On June 16, 2019, Petitioner filed a grievance with the West Virginia Public Employees Grievance Board. Petitioner's description of the grievance referred to the "demerits on teacher evaluation" and sought "removal of demerits from teacher evaluation with no further actions, cease workplace harassment and intimidation, compensation for slander and defamation in PLC and community school." A Level One Hearing was held July 11, 2019. On August 26, 2019, Superintendent Carolyn H. Falin entered a Level One Decision denying the Grievance on August 26, 2019. A mediation session was held on November 1, 2019, and on November 13, 2019, Petitioner appealed to a Level Three Hearing before the West Virginia Public Employees Grievance Board.
10. The Grievance Board cited W. Va. Code St. R. § 156-1-3, which provides that a grievant bears the burden of proving their case by a preponderance of the evidence unless the action involves a disciplinary matter. The Grievance Board held that Petitioner's grievance did not involve a disciplinary matter, as no disciplinary action was taken against Petitioner. Instead, Petitioner only received a lowered mark on her annual evaluation. The Grievance Board cited several Grievance Board decisions holding that teacher evaluations and any subsequent improvement plans are not disciplinary in nature, as the goal thereof is to improve the teacher's performance and thereby the students' education rather than punishing the teacher for their conduct. The Grievance Board cited more of its own precedent in holding that Petitioner needed to prove that her evaluation was performed in an arbitrary and capricious manner to prevail in this matter. Finally, the Grievance Board cited precedent providing that teacher evaluations are proper if they are performed in an "open and honest" manner, fair, and professional. On these

bases, the Grievance Board entered a Decision on January 19, 2021, affirming the denial of Petitioner's grievance.

11. On February 19, 2021, the Petitioner, Bonita Redd, filed a Petition for Appeal of the Grievance Board's Decision. Petitioner asserted seven factual errors, seven errors of law, and eleven "unconstitutional errors" made by the Grievance Board.

CONCLUSIONS OF LAW

12. This action is largely determined by the fact that no disciplinary action was taken against Petitioner. In the Petition for Appeal, Petitioner argues that "demerits on the evaluation are disciplinary and are treated in case law as progressive discipline." The Court notes that Petitioner failed to offer any point of law indicating that negative evaluation findings should be viewed as a disciplinary action. To the contrary, in *Brown v. Wood County Board of Education*, the Supreme Court of Appeals of West Virginia held, "the aim of State Board Policy 5300 [the section governing educator evaluations] is to provide a teacher with timely notice 'about the administration's views regarding her job performance, as reflected by the evaluations, observations, letters, and conferences.'"¹⁰ In *Brown*, a teacher filed a grievance regarding a mark on his evaluation that he "does not meet performance standards."¹¹ The State Supreme Court affirmed the denial of his grievance, holding that the purpose of an evaluation is to notify a teacher of the administration's views regarding his job performance.¹² At no point in *Brown* – nor any other opinion located by this Court – did the State Supreme Court indicate that an unfavorable evaluation score alone could be disciplinary in nature.

¹⁰ *Brown*, 184 W. Va. At 211.

¹¹ *Id.* at 206.

¹² *Id.*

13. The Court finds it to be telling that no action was taken against Petitioner. Petitioner was not terminated, suspended, demoted, transferred, or subject to a reduction in salary for her actions. Instead, it is undisputed that the only outcome of Petitioner's comments at the awards ceremony was an unfavorable mark on her annual evaluation. The Court **CONCLUDES** that Petitioner was not subject to discipline and thus bears the burden of proof in this action. The Court further **CONCLUDES** that the Grievance Board did not err in holding that Petitioner needed to prove her case by a preponderance of the evidence pursuant to W. Va. Code St. R. § 156-1-3.
14. The Court notes that several of Petitioner's arguments relate to the fact that Principal East did not personally witness Petitioner's comments at the awards ceremony, instead relying on "hearsay" and social media posts. Petitioner thus seems to argue that the comments may not have occurred, or at least were mischaracterized. However, Petitioner admits in multiple instances that she made the comments. In her Memorandum of Law, Petitioner states, "[o]n May 30, 2019, the Petitioner made teasing comments to her four highest ranking students when she presented them their awards." Later in the Memorandum, Petitioner rhetorically asks, "[d]id the Petitioner violate FERPA by making teasing comments to students at Awards Day ceremony?" Accordingly, the Court **CONCLUDES** that the parties do not dispute that Petitioner made the comments at the awards ceremony. Regardless of Petitioner's concession, the Court **CONCLUDES**, based on the great deal of evidence in the record indicating as much, that Petitioner made the comments at issue.
15. Petitioner offers a total of 25 arguments in the Petition for Appeal. Most are only a sentence or two in length and contain no points of authority or citations to the record. The Supreme Court of Appeals of West Virginia has long held that it is not the duty of an appellate court to

transform a bare assertion into a meritorious legal argument. The State Supreme Court has explained, “[a]lthough we liberally construe briefs in determining issues presented for review, issues which are . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.”¹³ The State Supreme Court has further held, “a skeletal argument, really nothing more than an assertion, does not preserve a claim . . . Judges are not like pigs, hunting for truffles buried in briefs.”¹⁴ The Court **CONCLUDES** that the statements made in the Petition for Appeal amount to bare assertions representing every possible argument Petitioner could think to make, none of which are adequately supported by law or citations to the record. The Court **FINDS** meaningful appellate review of these undeveloped assertions to be impossible and shall thus only consider the arguments Petitioner made with ample support in her Memorandum of Law.

16. Petitioner first argues that Respondent violated Policy 5310 “by placing demerits on her evaluation.” Policy 5310 outlines the evaluation process, detailing the Levels of Performance as well as who must be evaluated and how often. Petitioner again argues that “[t]he Incident Report compiled by Ms. East was a result of hearsay by the parent and other individuals. Ms. East did not witness and statements made by the Petitioner at the Awards Day ceremony.” However, in the very same section of the Memorandum, Petitioner admits, “[o]n May 30, 2019, the Petitioner made teasing comments to her four highest ranking students when she presented them their awards.” Whether Principal East personally witnessed Petitioner’s comments is irrelevant, as Petitioner admits making the comments in multiple instances throughout the

¹³ *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) (citing *State v. Lilly*, 194 W. Va. 595, 605, n.16, 461 S.E.2d 101, 111 n.16 (1995)).

¹⁴ *Dept. of Health and Human Resources v. Morris*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

record and her pleadings. Regardless, the Court FINDS that the record overwhelmingly indicates that Petitioner made the comments in question.

17. Petitioner also argues that the lowered evaluation score was the “result of being malicious and vindictive to retaliate against the Petitioner who has reported Welch Elementary School and McDowell County to the State for not providing students with much needed interventions.” The Court CONCLUDES that Petitioner’s claim of retaliation is wholly unsupported by the record and not supported in any material manner by Petitioner.

18. Petitioner does not cite specific portions of Policy 5310 she believes the Respondent violated in performing her annual evaluation. Instead, Petitioner offers a variety of arguments, few of which relate to Policy 5310. Petitioner places great weight on Rule 13.11 of Policy 5310 which reads, in relevant part, “[t]he teacher may provide an addendum to the final evaluation.” Petitioner argued that “[a]ccording to Ms. East, the Petitioner was going to be given the opportunity to respond to the complaint by the end of the week and tell her side of the alleged incident. Petitioner memorialized that she wanted the opportunity to respond to the complaint at the bottom of the incident report.” Petitioner then does not expand upon how the Respondent violated any portion of Policy 5310 or any other policy in permitting Petitioner to file an addendum to the evaluation. This may be because Petitioner was clearly permitted to provide an addendum to the final evaluation as required by Rule 13.11 of Policy 5310. A box titled “Educator Addendum” is located at the very end of Petitioner’s Evaluation. In it, Petitioner once again argued that Principal East lacked firsthand knowledge of the comments. Petitioner further wrote, “I disagree with being marked below standard, when I know that teachers have described student behavior in the Awards Ceremony without a complaint being filed against them.” Regardless of the content of what Petitioner said in the Educator Addendum, it is clear

that Petitioner was afforded the opportunity to "provide an addendum to the final evaluation" as required by Policy 5310. Petitioner fails to demonstrate how Respondent violated Policy 5310 in conducting Petitioner's annual evaluation. Accordingly, the Court **CONCLUDES** that the Grievance Board did not err in holding that Petitioner failed to prove that Respondent violated Policy 5310.

19. Petitioner next argues that she did not violate the Family Educational Rights and Privacy Act ("FERPA") in making the comments at the ceremony. Petitioner argues that she "did not release any educational records during the Awards Day ceremony. The Petitioner lacks knowledge in the students' full educational records. The Petitioner made general, teasing comments to her students. This is not a violation under the protections provided by FERPA." In short, FERPA prohibits the disclosure of students' education records except in limited circumstances, none of which apply here. 20 U.S.C. § 1232g defines the term "education records" as "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an education agency or institution or by a person acting for such agency or institution."
20. The question of whether Petitioner violated FERPA is not dispositive here, as Principal East provided several grounds for Petitioner's evaluation score beyond a potential violation of FERPA. The Court notes the Incident Report completed by Principal East that accompanied Petitioner's evaluation specified that Principal East viewed Petitioner's Awards Day comments as violative of FERPA, State Policy 5902, and sections 4.2.3 and 4.2.7 of the Employee Code of Conduct. Section 4.2.3 provides that "[a]ll West Virginia school employees shall maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination." Section 4.2.7 states that such

employees shall "comply with all Federal and West Virginia laws, policies, and regulations, and procedures." Here, Principal East found that "[b]y making comments of demeaning and discriminatory nature, Mrs. Redd failed to demonstrate professional conduct as defined in the aforementioned policies and laws." The Court **CONCLUDES** that Petitioner failed to prove that Principal East's findings were arbitrary and capricious. The Court finds no problem with Principal East's belief that Petitioner's comments were demeaning and/or disrespectful. Petitioner made these comments at a public assembly regarding four students' behavioral issues and directly addressed a student's mother regarding the student's behavior at home. The Court **CONCLUDES** that regardless of whether Petitioner violated FERPA, it is clear that Respondent did not err in concluding that Petitioner violated numerous other policies and regulations. Nevertheless, the Court **CONCLUDES** that it was not arbitrary and capricious for Respondent to conclude that Petitioner's comments violated FERPA, as the comments pertained to the students' behavior inside the classroom and were made at a public assembly without any legitimate basis for the disclosure. Such comments gave Respondent a sufficient basis to believe that Petitioner violated FERPA, or at the very least, gave Respondent good cause to address the potential violation of FERPA in Petitioner's evaluation, notably without any disciplinary action. The Court thus **CONCLUDES** that the Grievance Board did not err in holding that Petitioner failed to prove that Respondent acted arbitrarily and capriciously in ranking her as Below Standard in the Policy and Procedures category of the evaluation.

21. Petitioner next argues that the Respondent Board of Education has violated FERPA by negligently disclosing student information. Moreover, Petitioner argues that the Respondent violated FERPA by failing to report Petitioner's comments to the United States Department of

Education. In short, the Court CONCLUDES that these arguments are wholly irrelevant to the underlying issue of whether the Respondent properly performed Petitioner's evaluation.

22. Petitioner next argues that the Respondent violated Policy 7-012 by failing to interview Petitioner regarding her comments. Petitioner asserts that "Policy 7-012 was used to investigate the alleged incident of Petitioner violating FERPA and the Standards of Professional Conduct." Policy 7-012 "prohibits any form of harassment, including disability harassment, or discrimination . . . racial harassment or discrimination, sexual harassment or discrimination, or religious/ethnic harassment or discrimination or violence towards students and staff."¹⁵ Policy 7-012 governs the handling and investigation of complaints made regarding these types of discrimination. Regarding racial, sexual, religious, and ethnic harassment, Policy 7-012 provides that "[i]f the complaint is filed against an employee, the principal will notify the Title IX Coordinator who will conduct the investigation." The record reflects, and the Grievance Board found, that a Title IX investigation occurred and no discipline resulted from the Title IX investigation. Petitioner seems to confuse the requirements of the Title IX investigation with the annual evaluation process. Petitioner does not allege that Principal East failed to notify the Title IX Coordinator. Following the receipt of the complaint from a parent against Petitioner, Principal East's sole obligation was to notify the Title IX Coordinator, who would in turn perform the investigation. Any failure of the Title IX Coordinator is not attributable to the Respondent as error in the teacher evaluation process. Regardless, the record reflects that Respondent's employees appropriately responded to the parent's complaint by fulfilling their obligation to refer the matter to the Title IX Coordinator. Accordingly, the Court

¹⁵ Grievant's Exhibit 7, Rec. at p. 392.

CONCLUDES that Petitioner failed to prove that the Respondent violated Policy 7-012 and the Grievance Board did not err in concluding as much.

23. Petitioner next argues that the Respondent violated both the West Virginia and United States Constitutions. Petitioner first argues that the entire public employee grievance procedure is unconstitutional because the Level One Decision was rendered by Carolyn Falin, Superintendent of McDowell County Schools and thus an employee of the Respondent Board of Education. Petitioner argues that this arrangement violates due process, as the Level One Hearing Officer is employed by the Respondent. Simply put, this argument has no merit. Petitioner cited no point of authority prohibiting such an arrangement. Moreover, this type of grievance procedure is very common in both public and private employment, with a high-ranking employee of the employer being the level one hearing officer responsible for hearing the initial evidence and issuing the first decision in the matter. Regardless, Petitioner's grievance may be appealed to the Grievance Board, this Court, and the Supreme Court of Appeals of West Virginia, all of which are entirely separate from the McDowell County Board of Education and empowered to correct any errors made by the Superintendent.
24. Petitioner further argues that her due process rights were violated because Roger Hanshaw is both Speaker of the House of Delegates and a member of Bowles Rice, LLP, counsel for the Respondent Board of Education. Petitioner argues that Mr. Hanshaw's dual employment violates the Rules of Professional Responsibility, the oath sworn by members of the West Virginia Legislature, and Petitioner's due process rights to a fair proceeding. Simply put, whether Mr. Hanshaw has violated any Rule of Professional Responsibility or oath – which the Court concludes he has not – is entirely irrelevant to the instant matter. Moreover, Petitioner has offered no evidence that she was denied a fair grievance proceeding, and the Court finds

no weight in the assertion that the entire West Virginia Legislature crafted the grievance procedure in this manner simply to benefit Speaker Hanshaw's private employer. The Court **CONCLUDES** that the Respondent did not violate either the West Virginia or United States Constitution in performing Petitioner's evaluation and the Grievance Board did not err in holding as much.

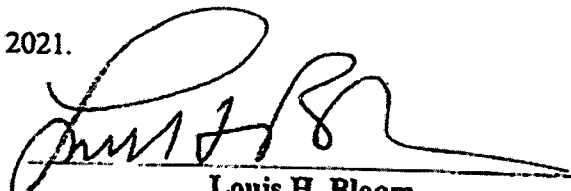
25. Petitioner's final argument is that she was discriminated against because another teacher made a comment regarding a student at the Awards Ceremony and did not receive negative marks on her evaluation. Petitioner argues that another teacher, Mrs. Goldie Freeman, testified at the Level III Hearing and admitted that she called a student "a little wild child" during the ceremony.¹⁶ The Court **FINDS** very little, if any, similarity between Petitioner's comments and those of Mrs. Freeman. Petitioner discussed students' behavior in the classroom, specifically their penchant to argue with Petitioner and "get the last word." Petitioner also specifically addressed a student's mother regarding the student's behavior at home, asking if the student was as troublesome at home as they were in the classroom. In contrast, Mrs. Freeman used a sort of nickname for a student that did not reveal or discuss any in-classroom information to attendees of the ceremony. The Court **FINDS** the comments made by Petitioner to be demeaning while Mrs. Freeman's comments were not. The Court thus **CONCLUDES** that no basis exists upon which a claim of discrimination could be made. The Court **CONCLUDES** that the Grievance Board did not err in holding that Petitioner failed to prove a claim for discrimination.

¹⁶ Level III Hearing Transcript, p. 105, lines 15 – 22 (Nov. 5, 2020).

DECISION

The Court **CONCLUDES** that Petitioner failed to prove that the Respondent Board of Education acted in an arbitrary and capricious fashion in performing Petitioner's annual evaluation. The Court therefore **CONCLUDES** that Petitioner failed to prove that the Public Employees Grievance Board abused its discretion or committed clear error in its Decision. Accordingly, the Court **ORDERS** that the Appeal be **DISMISSED** and the Grievance Board Decision **AFFIRMED**. There being nothing further, the Court **ORDERS** that this matter be **STRICKEN** from the docket of this Court. The Clerk is **DIRECTED** to send a certified copy of this Final Order to all parties and any counsel of record.

ENTERED this 8th day of July 2021.


Louis H. Bloom

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT. 9th
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF July 2021
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA mk