JANIE M. BARKER,

Grievant,

v.

DOCKET NO. 00-HHR-400

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/BUREAU FOR

CHILD SUPPORT ENFORCEMENT,

Respondent.

D E C I S I O N

Grievant, Janie M. Barker, filed this grievance against her employer, the West Virginia Department of Health and Human Resources/Bureau of Child Support Enforcement ("DHHR") on October 26, 2000:

> After PSI took over New Hire, I advised my supervisor verbally several times that I had not been trained to perform locate.

Relief sought: Want my evaluation changed based on the jobs I was performing. (See footnote 1)

The grievance was denied at level one on October 30, 2000, by Grievant's supervisor, Constance L. White, and again at level two on November 16, 2000, by Sue Arthur Grimes, Director of Central Operations, based on untimeliness. (See footnote 2) A level three hearing was held on December 7, 2000, and the grievance was denied on December 14,2000, by David Welker, Commissioner, Bureau for Child Support Enforcement. Grievant appealed to level four on December 26, 2000, and the parties subsequently agreed this matter could be decided based upon the lower level record. The grievance became mature on March 9, 2001, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant appeared pro se. DHHR was represented at level three by David Alter, Esq., and at level four by Anthony D. Eates, II, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Employee Performance Evaluation for period 9/1/99 through 8/31/2000.

Ex. 2 -

Management Report for SPLU for period April through November, 2000.

DHHR Exhibits

Ex. 1 -

October 30, 2000 memorandum re: Grievance Hearing Level I; October 26, 2000 e-mail re: training dates; April 4, 2000 Employee Performance Appraisal; October 6, 2000 Employee Performance Appraisal; Grievance forms dated October 24 and October 26, 2000.

Ex. 2 -

February 15, March 13, and March 16, 2000 Employee Evaluations.

Testimony

Grievant testified in her own behalf. DHHR presented the testimony of Constance White.

FINDINGS OF FACT

After a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

1. Grievant is employed by DHHR as an Office Assistant II for the LOCATE section of the Bureau of Child Support Enforcement ("Bureau"), which locates absent or custodial parents. Grievant has held this position since October 1999. 2. Between January 2000 and April 3, 2000, the LOCATE unit was responsible only for data entry for the New Hire program (See footnote 3) in

preparation for its takeover by PSI, a private company. There were no referrals to LOCATE during this time period. PSI formally took over the New Hire program on April 3, 2000. Once this transition was complete, the employees in the LOCATE unit returned to their LOCATE duties.

3. Grievant's immediate supervisor is Constance White, Administrative Assistant and supervisor of the LOCATE, Central Registry and Employer Relations Units. Ms. White became Grievant's supervisor in January 2000.

4. On April 4, 2000, Ms. White completed her initial six-month evaluation of Grievant. After completing this evaluation, Ms. White met with Grievant and explained Grievant's objectives, goals, and responsibilities as a member of the LOCATE unit. The April 2000 evaluation states the following: **"Responsibilities**: Essential duties and responsibilities as identified in the functional job description. Location of non-custodial parents using databases of DMV, EPLN, Worker's Compensation, Rapids, Internet, Credit Bureau and FPLS. To compile the information obtained and get to the case worker so that case can be processed." DHHR Ex. 1.

5. In July 2000, Ms. White generated a management report which indicated that Grievant was not effectively working her case load as she had only located four people that month. G. Ex. 2. As a result, Ms. White met with Grievant and explained that her case load needed better attention. To assist Grievant, Ms. White offered to allow her to observeother workers in the unit. Also, Grievant trained one half day with Judy Reed, and two days with Kathy McCutcheon. Grievant had previously completed Levels 1 and 2 of the Legal Assistant training in February 2000 and March 2000 which included some LOCATE training.

6. No employees in the Bureau have received any formal training in LOCATE. While Grievant was given the opportunity to sit with co-workers and learn the system, Ms. White acknowledged it is a system that one must "muddle through" to learn.

7. During the meeting in July, Grievant informed Ms. White that she did not know she was supposed to maintaining a LOCATE case load, as she had been given assignments from three other people in the Bureau. Ms. White was not aware Grievant had been doing this other work, and informed her she was not to do that work, but that she was to concentrate on her LOCATE duties.

8. From July forward, Grievant's LOCATE numbers improved. G. Ex. 2.

9. The Bureau has a customer hotline which is to be manned by Legal Assistants. The hotline telephone is located on Grievant's desk, and she is often the one answering the telephone. Grievant

is not a Legal Assistant and cannot answer the hotline questions, and therefore, must locate a Legal Assistant to take the calls.

10. Ms. White acknowledged Grievant should not have been responsible for answering the hotline, and contacted the phone company to come in and switch the hotline telephone from Grievant's desk. However, it took several months for that order to be processed, and during that time, Grievant continued to answer the hotline. 11. In September 2000, Ms. White completed Grievant's Employee Performance Appraisal for the time period September 1, 1999 through August 31, 2000. Grievant received an overall rating of 1.39 which a corresponding alpha score of “needs improvement”. G. Ex. 1.

12. Grievant asked Ms. White to reconsider her evaluation based on the fact she had worked for the three other people for a portion of the rating period, she had not received adequate training in LOCATE, and she had to answer the Bureau Hotline.

13. Ms. White told Grievant she could not fairly evaluate Grievant on work she did not know she was doing. Ms. White stands by the September performance appraisal, however, she did author a memorandum to be placed in Grievant's personnel file explaining the misunderstandings during the evaluation period with regard to Grievant's work. DHHR Ex. 1.

DISCUSSION

Grievant was rated in six (6) categories with twenty-three (23) subcategories. She received thirteen “needs improvement” scores under the general categories of maintains flexibility, demonstrates credibility, and quantity of work, no “exceeds expectations” ratings, and ten ratings of “meets expectations” under the categories of maintains flexibility, demonstrates credibility, customer service, and availability for work.

Specifically, Grievant received a rating of “needs improvement” in the subcategories of: adapts to new situations in a positive manner; is resourceful and generally seeks work process improvements; shares information with others when appropriate; acts independently while keeping supervisor informed; performs work according to currentguidelines and directives; exhibits ability to secure and evaluate facts before taking action; work output matches the expectations established; employee completes all assignments; employee consistently meets deadlines; work results satisfy organization's goals; work is organized and presented professionally; work product is thorough and

complete; and work product is free of flaws and errors.

There is no evidence based either on testimony or Grievant's six-month performance evaluation that Grievant's work from her date of hire in October 1999 through April 2000 was unsatisfactory. In April, all of the Bureau employees' job responsibilities changed from performing data entry for the New Hire program to managing case loads for the LOCATE program. Ms. White testified she did not make a formal announcement to her staff about this change, because she assumed they all knew what their job duties were under the LOCATE program. Ms. White reminded Grievant of these changes when she met with her on April 4, 2000, to discuss her six-month performance evaluation, and discussed what her job duties and responsibilities would be in the future.

Nevertheless, from April 4 through July 25, 2000, Grievant did little work on the LOCATE program, because three other employees began giving her other types of work to do. In addition, Ms. White testified that, although she became supervisor of the Bureau in January 2000, she did not know she could retrieve LOCATE Management Reports on employee productivity until July 2000. Upon retrieving that July 2000 Management Report, Ms. White first learned Grievant's LOCATE numbers were too low. Ms. White testified that once she explained Grievant's duties and responsibilities to her, her LOCATE numbers improved, but unfortunately too late for that evaluation period. Ms. White acknowledgedshe did not know Grievant was not working on LOCATE from April through July, nor was she aware Grievant had been performing duties for three other workers during that period.

Following that July revelation, Ms. White offered Grievant training and assistance in the LOCATE program, some of which Grievant accepted, while also indicating to Ms. White and her co-workers that she knew how to do the work. From July through August, 2000, Grievant's LOCATE numbers improved, but were still not up to standards, and it appears that Grievant disrupted her co-workers by asking too many repetitive questions about the process, indicating she was not able to absorb the necessary procedures for operating the LOCATE program.

Ms. White's decision to rate Grievant's overall performance as needing improvement appears to have been largely based upon Grievant's failure to comprehend the nature of her job duties between April and July, 2000, four months out of a twelve-month rating period. Based on that conclusion, the level three grievance evaluator suggested Grievant be “re-evaluated in such a way that her performance from date of hire is given equal relative weight to her performance during early April

through July." I disagree. There is no policy or law that dictates that an employee's performance appraisal be evenly weighted over twelve months of job performance. Indeed, one single incident of unsatisfactory performance, neglect, or misconduct, can cause an otherwise excellent employee to receive an unsatisfactory performance rating. In this case, while there clearly was a misunderstanding with respect to Grievant's job duties during the time period April through July, some of which can be attributed to Ms. White's failure to accurately monitor her employees' work through available Management Report data, that misunderstandingresulted in Grievant's overall LOCATE numbers being low for the entire rating period. Employee performance evaluations are not disciplinary in nature. Grievant is not being punished for her failure to adequately perform her LOCATE functions; she is being instructed through her evaluation how better to perform her job, and it appears that Grievant is already improving. One of the reasons Grievant was unsuccessful in meeting expectations during the rating period was because she did not perform the jobs she was hired to perform for a significant portion of that rating period. While I understand Grievant's position in this matter, she has failed to prove Ms. White's evaluation of her was arbitrary, capricious, or an abuse of discretion.

CONCLUSIONS OF LAW

1. In non-disciplinary matters, the Grievant bears the burden of proving her grievance by a preponderance of the evidence. W. Va. Code § 29-6A-6; Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. § 4.21.

2. An employee challenging his or her performance evaluation must prove that the performance evaluation was prepared as a result of the supervisor's misinterpretation or misapplication of established policy or law addressing the evaluation process, or that the evaluation was established by an abuse of discretion. Messinger v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993); Kemper v. W. Va. Dept. of Transp., Docket No. 91-DOH-325 (Mar. 2, 1992); Wiley v. W. Va. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989). 3. In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, Grievant must prove that the evaluation was the result of arbitrary or capricious decision-making. Kemper, supra.

4. In determining that a discretionary decision was arbitrary and capricious, a reviewing body applies a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. Generally, an agency's decision is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Moreover, under the arbitrary and capricious standard of review, an administrative law judge may not simply substitute his or her judgment for that of the agency decision maker. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Dec. 29, 1997); Bedford County Memorial Hosp. v. Health and Human Services, 769 F.2d 1017 (4th Cir. 1985).

5. If an incident that should not have been considered results in a lower evaluation, the evaluation can be ordered removed from the Grievant's personnel file. Williston v. Dept. of Health and Human Services, Docket No. 90-DHS-089 (June 25, 1990).

6. Grievant has failed to establish her performance appraisal was the result of abuse of discretion or a misinterpretation or misapplication of policy, or that Ms. White failed to consider important aspects of Grievant's performance during the subject rating period.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: March 13, 2001

Footnote: 1

Grievant amended her relief at the level three hearing to include removal of her employee performance appraisal from her personnel file.

Footnote: 2

The level three grievance evaluator denied DHHR's timeliness defense, and DHHR did not pursue the untimeliness defense at level four.

Footnote: 3

The New Hire program is part of the Employer Relations Unit.