BETTY HISSAM,

Grievant,

v. **Docket No. 01-HHR-067**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILD SUPPORT ENFORCEMENT,

Respondent.

D E C I S I O N

Grievant, Betty Hissam, employed by the Department of Health and Human Resources (DHHR or Respondent) as a Legal Assistant in the Moundsville office of the Bureau for Child Support Enforcement (BCSE), filed a level one grievance on October 12, 2000, in which she stated, “I do not believe that my evaluation is accurate, or that my preformance [sic] is below average.” For relief, Grievant requested that her evaluation be adjusted.

After the grievance was denied at all lower levels, appeal was made to level four on March 2, 2001. Grievant filed a revised statement on April 12, 2001, in which she alleged that “[e]valuations are to be standarized [sic] based on quality, quantity of work and attendance. WV Div. of Personnel 143-12-15. Evaluations in Marshall, Wetzel, and Tyler counties are not based on 'recorded' measures of performance.” Grievant also amended her request for relief to include a 6% merit pay increase, effective November 2000. Following a number of continuances, a level four hearing was conducted in the Grievance Board's Wheeling office on June 7, 2001. Grievant was represented by Scott Cundiff of AFSCME, and DHHR was represented by Assistant Attorney General Jon R. Blevins. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law on or before July 9, 2001.

The following facts have been derived from the record in its entirety.

Findings of Fact

1. Grievant has been employed by DHHR for approximately 15 years, and has been assigned as a Legal Assistant for BCSE at all times pertinent to this decision.

2. On October 4, 2000, Team Leader Mary Randolph provided Grievant an Employee Performance Appraisal form for the period 9/1/99 through 8/31/00. Ms. Randolph's rating of Grievant

on 23 performance elements resulted in a numeric score of 1.96, and an alpha score of “meets expectations.”

3. The rating key attached to the Employee Performance Appraisal defines “exceeds expectations” as “performance at a level exceeding that of a satisfactory evaluation. The employee's performance regularly surpasses the standards expected.”

4. The rating key defines “meets expectations” as a demonstration of “success and competency in the performance of the job. The employee has produced the desired or intended results and completely satisfies the established standards and expectations.”

5. The rating key defines “needs improvement” as “performance that is unacceptable due to the employee's own lack of effort or skills. The employee has not met the standards as expected and must take immediate corrective action.”

6. Grievant was rated as “exceeds expectations” under Customer Service, “Responds to customer needs within agreed time frames.”

7. Grievant was rated as “needs improvement” under Maintains Flexibility, “Adapts to new situations in a positive manner,” and “Displays an openness to learning and apply new skills.” Comments by Ms. Randolph were that Grievant, [h]as exhibited negativity and difficulty in adapting to use of Groupwise and WordPerfect and to the new requirements set by the Attorney regarding preparation of legal referrals.” 8. Grievant was rated as “meets expectations” in all other categories of performance.

Discussion

Because evaluations are not disciplinary in nature, Grievant has the burden of proof in regard to the allegations made in her grievance. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). Further, an employee grieving her evaluation must establish by a preponderance of the evidence that the evaluation is wrong because her evaluator abused her discretion in rating the grievant. Messenger v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993); Wiley v. W. Va. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989). To establish an abuse of discretion, Grievant must prove the decision was arbitrary and capricious.

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 different point 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 Serv/, 769 F.2d 1017 (4th Cir. 1985).

A grievant may also establish that her evaluation was erroneous because it was the result of some misinterpretation or misapplication of established policies or rules governingthe evaluation process. Maxey v. W. Va. Dep't of Health & Human Serv., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); Hurst v. W. Va. Dep't of Transp., Docket No. 91-DOH-326 (Feb. 27, 1992).

Grievant argues that she should have received a rating of “exceeds expectations” in all but the two categories in which she was found to need improvement. These areas, Grievant asserts, should have been “meets expectations.” It is Respondent's position that Grievant is a good, but not perfect, employee as evidenced by her satisfactory performance evaluation. Respondent denies that the review was arbitrary and capricious, or contrary to policy.

Clearly, Grievant perceives the evaluation to inaccurately portray her as a less than exemplary employee, and that the deflated rating has caused her to receive a lesser merit pay increase than she deserves. Division of Personnel Administrative Rule § 143-12-15, “Performance Evaluations,” states that “[i]nsofar as practicable the system of performance evaluation in the classified service shall be standardized.” While Ms. Randolph did not entirely complete Grievant's performance appraisal based upon recorded measures of performance, she was not required to do so by the DOP Administrative Rule. Certainly, some elements of the evaluation, such as the number of cases assigned, are objective and recordable, but other elements, such as “Maintains appearance appropriate to job,” are not amenable to standardized, recordable data.

The evidence indicates that Grievant is an experienced and productive employee. It is likewise clear that Grievant has been unwilling to learn and use new computer software, and her supervisor perceived this attitude to be detrimental to Grievant's performance. Although Grievant did not officially receive training for the new software untilApril 2000, Ms. Randolph cited a number of subsequent incidents indicating it was still not being used. Grievant acknowledges that she did not fully utilize her computer, but opines that it did not affect her work, since any message of importance

would be provided in hard copy. Whether Grievant's performance has been negatively influenced is Ms. Randolph's determination, and her conclusion that Grievant was not displaying an openness to learning and applying new skills is supported by Grievant's own testimony.

Further, BCSE Attorney Pamela Paith testified regarding difficulties she had experienced with Grievant in making necessary programmatic changes. Grievant's response was that if had she been told of the errors, she would have corrected them; however, Ms. Paith's testimony indicated her concern was not just that errors were made, but rather Grievant's failure to comply with changes in procedures in a positive manner. Again, this determination is more subjective, but does not lack credibility.

In conclusion, a preponderance of the credible evidence indicates that the evaluation was neither arbitrary and capricious, nor was it contrary to any policy.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriately made in this matter.

Conclusions of Law

1. In a grievance which does not involve a disciplinary matter, the 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 (2000); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. 2. An employee challenging her performance evaluation must prove that the performance evaluation was erroneously 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. Dep't of Health and Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993); Kemper v. W. Va. Dep't 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. Grievant has failed to establish her performance appraisal was inaccurate, arbitrary and capricious, or a misinterpretation or misapplication of policy. Accordingly, the 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 §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: August 9, 2001 _____

Sue Keller

Senior Administrative Law Judge