KATHY SUE SHAFFER,

Grievant,

v.

DOCKET NO. 02-HHR-109

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/PINECREST HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Kathy Sue Shaffer, filed this grievance against her employer, the West Virginia Department of Health and Human Resources/Pinecrest Hospital ("DHHR"), on November 14, 2001:

> I was not provided a copy of my performance appraisal after I signed it. I was surprised when I got a letter in the mail stating my score was lowered. I was not given privacy without interruption to go over my changes, which I disagree with. I didn't go over my performance appraisal with the nurse because of the way it was presented to me.
>
> Relief sought: I want to be made whole in every way.

The grievance was denied at levels one and two, a level three hearing was held on April 9, 2002, and the grievance was denied by decision dated April 16, 2002. Grievant appealed to level four on April 22, 2002, and a hearing was held in the Grievance Board's Beckley, West Virginia, office on June 25, 2002. The parties chose not to file written proposed findings of fact and conclusions of law, and this matter became mature fordecision on June 25, 2002. Grievant represented herself, and DHHR was represented by Darlene Ratliff-Thomas, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

Grievance filing; levels one, two, and three decisions; October 26, 2001 letter from Tom McGraw to Kathy Shaffer; October 26, 2001 letter from Paul L. Nusbaum to DHHR Employee.

Ex. 2 -

Employee Performance Appraisal, signed September 2, 2001.

Ex. 3 -

October 26, 2001 letter from Tom McGraw to Kathy Shaffer.

LIV Grievant's Exhibits

Ex. 1 -

Handwritten statement of Kathy Shaffer.

DHHR Exhibits

None.

Testimony

Grievant testified in her own behalf, and presented the testimony of Cheryll Farley, Michelle Sanger, Elizabeth Thewes, and Thomas McGraw.

The material facts in this matter are not in dispute, and after a careful review of the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by DHHR as a Health Service Worker assigned to Pinecrest Hospital.

2. On September 10, 2001, Kathy Ballard, the LPN responsible for assessing Grievant's performance, asked Grievant to sign her evaluation for the period September 1, 2000, to August 31,

2001. LIII G. Ex. 1. Ms. Ballard explained that the evaluation had tobe mailed to DHHR's central office in Charleston that day, and there was no or little time to discuss the assessment.

3. In the few minutes allowed for her to review the document, Grievant noted that her total numerical or “alpha” score was 2.50, and that this was the top score for the “Meets Expectations” category. Grievant signed the performance appraisal. Ms. Ballard did not provide Grievant with a copy of the performance appraisal.

4. At some point between September 10 and October 26, 2001, someone discovered that Ms. Ballard's mathematical calculations were incorrect, not only on Grievant's evaluation, but on other employees' evaluations, as well. Grievant's correct score was 2.04. Someone crossed out the 2.50 score and inserted 2.04 on Grievant's evaluation, and forwarded that score to the Charleston office.

5.

Grievant was not notified this change had been made to her evaluation.

6. DHHR employees were awarded merit raises in October, 2001, if their “alpha” scores fell within the “Meets Expectations” or “Exceeds Expectations” categories. Employees whose scores fell between 2.26 and 2.50 received an increase of $1,008.00 Employees whose scores fell between 2.01 and 2.25 received an increase of $756.00. LIII G. Ex. 1.

7. On October 26, 2001, Grievant received a letter from Pinecrest CEO Thomas McGraw, notifying her that she had received a merit raise of $756.00, as a result of her 2.04 score on her performance appraisal. LIII G. Exs. 1, 3. This was the first notice Grievant had that her performance appraisal numerical score had been changed from a 2.50 to a 2.04. 8. Despite inquiries of those individuals directly involved with Grievant's performance appraisal, including Ms. Ballard, Patricia Hunt, Mr. McGraw, and Elizabeth Thewes, Director of Administrative Services, Grievant was unable to determine who changed the score on her performance appraisal.

9. Several days later, Grievant obtained a copy of her evaluation and determined that her correct overall score was 2.04, and that the 2.50 was a mathematical error.

10.

No changes were made to the substance of Grievant's evaluation.

11. One of Grievant's co-workers, Michelle Sanger, had also received a rating of 2.50 on her performance evaluation, which was changed after she signed it to a 2.04. This employee grieved the

change in her score, and her grievance was granted at Level II of the grievance procedure, so that the score on her performance evaluation was returned to a 2.50. The original of this employee's evaluation had been lost.

12. This employee claimed she had made comments on the evaluation form which could not be located, and that the document had been altered.

13. The original of Grievant's performance evaluation was not lost, and Grievant made no claim that she had made comments on her evaluation.

DISCUSSION

In non-disciplinary matters the Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant asserts that it was inherently unfair for Ms. Ballard to require her to sign her evaluation without an opportunity to examine it more closely. Second, Grievant asserts it was also unfair for Pinecrest administrators to correcther overall score without notifying her. Third, she contends she should have received “Exceeds Expectations” in several of the performance areas assessed. Finally, Grievant has raised a claim of discrimination with respect to her co-worker, Michelle Sanger, who was given the 2.50 rating after the discovery of the mathematical errors.

With respect to the evaluation procedure, DHHR concedes Ms. Ballard erred in not providing Grievant ample opportunity to examine and respond to the evaluation, and that she should have provided her a copy of the corrected version. Mr. McGraw has apologized to Grievant for the unfortunate incident, and vows the evaluation process will be scrutinized and corrected to prevent this sort of thing from happening again.

With respect to correcting her performance appraisal without notifying her of the change, Mr. McGraw has again apologized to Grievant, and has testified he has no knowledge of why the changes were not communicated to the employees. Again, he has vowed this situation will not happen again. However, DHHR correctly points out that correcting the mathematical error was not done in malice, or otherwise intended to harm the employees. It simply had to be done in order to maintain the integrity of the performance appraisals.

While Grievant asserts she would have challenged the categories in her performance appraisal had she known she was getting a 2.04, that would not have changed the substance of her evaluation.

Her supervisor gave her the ratings she believed she deserved, and while Grievant could have challenge those ratings through the grievance process, she did not, and that type of relief is not warranted in this grievance.

Finally, with respect to her claim of discrimination, W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless suchdifferences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has demonstrated that she is similarly-situated to another employee, Michelle Sanger, who had initially received a 2.50, but had her score changed to a 2.04, but after filing a grievance, had her score changed back to 2.50. Grievant was not afforded this relief, and she has successfully established a prima facie case of discrimination.

DHHR explained that in Ms. Sanger's case, the original performance appraisal had been lost, and Ms. Sanger contended that, not only had the numerical score been changed, but that substantive

changes had been made, as well. DHHR made a decision that, without the original document to demonstrate what ratings were originally assignedto individual categories, it would not be able to support its position during the grievance procedure, so the grievance was granted at level two. Grievant's original performance appraisal was not lost, and no substantive changes were made to the individual categories.

DHHR has demonstrated that the change in Grievant's score on her performance evaluation was necessary because Grievant's supervisor had not correctly calculated the score. It has shown that Grievant's situation is different from Ms. Sanger's.

Clearly it was wrong for Ms. Ballard to tell Grievant to sign her evaluation without taking the time to discuss it with her, or leaving her a copy of her evaluation. However, it would be equally wrong to simply award Grievant a higher rating than she earned to punish DHHR for this behavior. Farley v. W. Va. Dept. of Health and Human Resources, Docket No. 02-HHR-088D (May 8, 2002). As stated in Farley,

> It would not be fair to Grievant's fellow employees. While an agency is required to abide by its own lawfully established policies, its actions will not always be reversed where it has failed to follow its policies. "The grievant must prove that the error was harmful, in that 'a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10." Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997). See Walker v. Dept. of Public Safety, Docket No. 98-DPS-056 (Sept. 11, 1998).

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CONCLUSIONS OF LAW

1. In non-disciplinary matters the Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. "'When an agency does not follow its own policies, this does not invalidate an action, unless 'the error was harmful, in that 'a different result would likely haveoccurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10.' Kloc v. Bd. of Trustees, Docket No. 96-

BOT-507 (Aug. 20, 1997). See Walker v. Dept. of Public Safety, Docket No. 98-DPS-056 (Sept. 11, 1998)." Farley v. W. Va. Dept. of Health and Human Resources, Docket No. 02-HHR-088D (May 8, 2002).

3. W. Va. Code § 29-6A-2(d) defines "discrimination" 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." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

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that she is similarly situated, in a pertinent way, to one or more other employee(s);

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that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

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4. Grievant established a prima facie case of discrimination vis-a-vis her coworker, Michelle Sanger, who successfully grieved the changing of her performance evaluation rating from a 2.50 to 2.04.

5. DHHR demonstrated a legitimate, non-discriminatory reason for the difference in treatment of Ms. Sanger's grievance by explaining that Ms. Sanger's original performance appraisal had been lost, and she had claimed she made notations on it and that the substance was changed, which they

could not rebut without the original. Therefore, Grievant's discrimination claim fails.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 1, 2002