ANDREW MACDONALD, et al.,

Grievants,

v v.

Docket No. 05-DOH-069

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondents.

D E C I S I O N

Grievants, Andrew MacDonald, Bill Zaferatos, William Robinson, and Raymond "Cliff" Adkins, filed a grievance on November 3, 2003, against their employer, the Division of Highways ("DOH"), asserting their 2002 performance evaluations were not properly completed. Grievants, Andrew MacDonald, Bill Zaferatos, and William Robinson, filed grievances on March 9, 2004, March 11, 2004, and February 19, 2004, respectively asserting their 2003 performance evaluations were not properly completed.

For relief sought, Grievants wished to have the performance evaluations thrown out, new ones completed, and their supervisors disciplined. In the 2003 grievances, Grievants indicated they wanted their evaluations to be completed by their crew leaders.

These grievances were denied at all lower levels. At Level III, the performance evaluation grievances were consolidated by agreement with other grievances dealing with merit increases. The grievances relating to the 2003 performance evaluations were found to be untimely filed, and the other grievances dealing with performance evaluations were denied. Grievants appealed to Level IV on October 15, 2004, and after several continuances, a Level IV hearing was held on March 25, 2005, on just the performanceevaluation issue. This case became mature for decision on May 16, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievants asserted the performance evaluations were incorrectly performed because the midpoint and beginning evaluations were not completed. For the 2002 performance evaluations grievance filed on November 3, 2003, Grievants requested the following relief: 1) their supervisors disciplined; (See footnote 2) 2) the 2002 evaluations thrown out; 3) the withdrawn performance evaluations to be replaced with evaluations conducted by their crew leaders because they would be more fair and accurate; and 4) Jeff Lilly and Roger Fisher to not interfere with the crew leaders and attempt to manipulate the outcome of the redone evaluations.

For the second grievance filed about the 2003 evaluations, Grievants wanted the performance evaluations to be thrown out, the evaluation policy to be followed, and for harassment and retaliation to cease. Additionally, Grievant MacDonald wanted all the performance evaluations thrown out for all employees. He then wanted all employees who had not received a record of significant occurrence (disciplinary action) for the 2003 year to receive a 2.0. In addition, Grievants MacDonald and Robinson averred they had been subjected to harassment and retaliation, and Grievant Zaferatos stated the committee had failed to discuss his one "needs improvement" with him. Respondent stipulated midpoint evaluations were not completed, but avers the beginning evaluations were conducted, and all other portions of the performance evaluations were completed properly and correctly. Respondent maintains the performance evaluations accurately reflect Grievants' performance. Respondent also noted the relief requested by Grievants would not solve the problem, as there was no way to go back in time and complete midpoint evaluations. Additionally, Respondent continued to maintain these grievances were untimely filed.

It should be noted much time has passed between the receipt of the 2002 evaluations in approximately March of 2003, and multiple changes have been made in Grievants' district in the performance evaluation process. As of the 2003 performance evaluations, the evaluations are completed by the committee suggested by Grievants. As of the 2004 performance evaluation, Grievants are receiving initial and midpoint evaluations, and Grievants are clearly told what portion of the evaluation pertains to the initial evaluations.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are all employed by DOH in Raleigh County as either Equipment Operators or Crafts Workers.

2. A new evaluation process became effective on April 15, 2000, and all state agencies were required to follow it.

3. Training for all supervisors was not conducted prior to the implementation of these new forms and procedures. 4. Jeff Lilly, the Raleigh County Highway Administrator, was told the midpoint evaluations were optional. This information was incorrect.

5. Mr. Lilly was told the initial evaluations for the new year could be performed immediately after the last year's evaluations. This information was correct. Grt. No. 4 at Level IV.

6. Mr. Lilly and Roger Fisher, the General Foreman, meet with the crew leaders on a daily basis. Work issues and employee performance are discussed during these meetings. Mr. Fisher checks the work of the various crews on an almost daily basis. Employees are given direction and feedback on the job, as needed.

7. The 2002 final performance evaluations were filled out by Mr. Fisher, and he then reviewed them with Mr. Lilly. Mr. Lilly has the final responsibility for these evaluations.

8. No midpoint evaluations were conducted during 2002. The testimony on whether the initial performance evaluations were completed for 2002 was confusing. The testimony reflected many years had passed since these evaluations were done, and witnesses became confused as to what happened when.

9. Mr. Lilly received training in how to do the performance evaluations after the completion of the 2002 evaluations. He decided to have the 2003 final performance evaluations completed by the crew leaders and Mr. Fisher after receiving this suggestion at this training. This change was to ensure employees got the best appraisal. Test. Lilly, Level III Hearing at 48.

10. No midpoint evaluations were conducted during 2003. The 2003 initial evaluations were performed at the end of the 2002 evaluations. 11. Some of the documents provided by DOH contain incorrect dates and should be corrected. These documents reflect that the initial, midpoint and final evaluations were all conducted on the same date. See Employee Evaluation Information for 2004.

12. The performance evaluation reflects the ratings for an employee in 23 categories as: needs improvement, meets expectations, or exceeds expectations. A score of 2.51 to 3.00 equals exceeds

expectations, a score of 1.51. to 2.50 equals meets expectations, and a score of 1.00 to 1.50 equals needs improvement. If an employee receives a rating below 1.51, the evaluation indicates a total performance level that needs improvement, and an Improvement Plan is required. An employee may be marked as needing improvement in several areas without receiving total score below a 1.51.

13. Grievant Adkins' rating on his most recent evaluations are as follows: 1999 = 2.00; 2000 = 2.00; 2001 = 2.09; 2002 = 1.96; 2003 = 1.78; and 2004 = 1.86.

14. Grievant Robinson's rating on his most recent evaluations are as follows: 1999 = 1.91; 2000 = 1.91; 2002 =1.91; 2003 = 1.73; and 2004 = 1.95. His 2001 evaluation was not included in the evidence by either of the parties, and no explanation was offered for this absence.

15. Grievant MacDonald's rating on his most recent evaluations are as follows: 1999 = 2.00; 2000 = 2.30; 2001 = 2.00; 2002 = 1.96; 2003 = 1.65; and 2004 = 2.00.

16. Grievant Zaferatos' rating on his most recent evaluations are as follows: 1999 = 2.04; 2000 = 2.17; 2001 = 2.00; 2002 = 2.00; 2003 = 2.00; and 2004 = 2.08.

17. According to the 2003 performance evaluations, out of 51 employees within Grievants' organizational unit, Grievant Zafferatos was ranked 36th to 39th, (See footnote 3) GrievantAdkins was ranked 48th, Grievant Robinson was ranked 50th, and Grievant MacDonald was ranked 51st.

18. The 2003 performance evaluations were lower for 70% of the employees than the evaluations for 2002. These evaluations were the ones conducted by the crew leaders and Mr. Fisher, with Mr. Lilly only reviewing and signing off on them.

19. Grievant MacDonald received his 2003 evaluation on February 4, 2004, and filed his second evaluation grievance on March 9, 2004; Grievant Zaferatos received his 2003 evaluation on February 19, 2004, and filed his second evaluation grievance on March 11, 2004; and Grievant Robinson received his 2003 evaluation on February 18, 2004, and filed his second evaluation grievance on February 19, 2004.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan

County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Timeliness

Respondent contends these grievances were untimely filed as they were not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). Where an employerseeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

The timeliness issue is governed by the timelines set out in W. Va. Code § 29-6A- 4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance . . . .

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

In this case, Respondent demonstrated Grievants did not file within the required ten- day time period for either set of grievances. Thus, Grievants have the burden of demonstrating a proper basis to excuse their failure to file in a timely manner.

W. Va. Code § 29-6A-4(a) provides for a "discovery rule," in that "the time in which to invoke the

grievance procedure does not begin to run until the grievant knows of thefacts giving rise to the grievance." Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1. See Adkins v. W. Va. Dep't of Educ., Docket No. 95- DOE-507 (Apr. 26, 1996) at 7. See also Gragg v. W. Va. Div. of Corrections, Docket No. 98-CORR-330 (Mar. 26, 1999); Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991); Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989). However, "it is not the discovery of a legal theory which triggers the statute, but the event." Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997) at 8.

A. 2002 performance evaluations grievance

Grievants assert they did not know initial and midpoint evaluations were required until they met with the District Engineer Bill Bennett on October 20, 2003, about their merit increase grievance. They filed this grievance within 10 days of that meeting, on November 3, 2003. Accordingly, Grievants have provided a proper excuse to explain their untimely filing for the grievance on the 2002 performance evaluations.

B. 2003 performance evaluations grievance

Grievants filed the second set of grievances on February 19, 2004, March 9, 2004, and March 11, 2004, stating the performance evaluation policies for the 2003 evaluations were not followed. First, Grievants were aware in October 2003 what the policy was, and knew they had not had midpoint evaluations for their 2003 evaluations. They did not file these grievances until after they received the 2003 evaluations in 2004. Accordingly, Grievants have not provided a proper excuse to explain their untimely filing on the failure to follow policy issue. But, Grievants Robinson and MacDonald also stated they had been harassed and retaliated against because of prior grievances. Although inartfully pled, it would appear that these assertions apply to the 2003 performance evaluations. Grievant MacDonald did not file this performance evaluation grievance until a month after he received this evaluation. Accordingly, that portion of his grievance is also untimely filed. Grievant Zafferatos waited more than three weeks to file his grievance stating the committee had not discussed his one "needs improvement." Accordingly, that portion of his grievance is also untimely filed. Grievant Robinson filed his grievance alleging harassment and retaliation one day after his performance evaluation. Accordingly, that portion of his grievance is timely filed.

II. Performance evaluations

Grievants are correct and Respondent agrees, certain portions of the 2002 and 2003 performance evaluations were not executed. Initial and midpoint evaluations were not done in 2002, and midpoint evaluations were not done in 2003. It should be noted that the filing of this grievance has resulted in the changes Grievants seek. All portions of the evaluations are now done, and the evaluations are done by a committee comprised of the general foreman, Mr. Fisher, and the crew leaders. Mr. Lilly reviews the evaluations after the committee has met and completed the evaluations.

"It is well settled that '[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.' Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dep't of Transp.,Docket No. 94-DOH-389 (Dec. 20, 1994). Moreover, an agency may not interpret its policies in a manner which is inconsistent with the common meaning of the language contained therein. See Watts v. W. Va. Dep't of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995). However, where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993)." Della Mae v. Dep't of Transp./Div. of Highways, Docket No. 98-DNR-204 (Feb. 26, 1999).

However, an agency's 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). Clearly, DOH did not comply with the directive to perform midpoint evaluations on Grievants, and this information could have been used by Grievants to change their work performance with a resulting change in the final evaluations.

The next question is whether the result requested by Grievants, to have the 2002 performance evaluations thrown out and new ones completed now in 2005, is the best orcorrect resolution to this predicament. It is certainly true that Grievants were not given formal feedback in written form through a midpoint evaluation. It is also true that Grievants are given feedback about their day-to-day performance on a regular basis. Additionally, all these Grievants have worked for DOH for quite a period of time and did receive feedback in their yearly evaluations. A review of Grievants' evaluations, as listed in Finding of Fact 12 through 14, demonstrate little change in Grievants' performance evaluation scores over the past several years. For example, Grievant MacDonald's scores on his most recent evaluations were: 1999 = 2.00; 2000 = 2.30; 2001 = 2.00; 2002 = 1.96; 2003 = 1.65; and 2004 = 2.00, and Grievant Zafferatos' rating on his most recent evaluations were: 1) 1999 = 2.04; 2000 = 2.17; 2001 = 2.00; 2002 = 2.00; 2003 = 2.00; and 2004 = 2.08. Mr. MacDonald's rating also demonstrates the decrease in scores after the crew leaders became involved in the process.

The case of Cummings v. Dep't of Transp./Division of Highways, Docket No. 95- Doh-104 (Jan. 12, 1996) is instructive. In Cummings, the grievant complained he did not receive an employee evaluation for calendar year 1992. The Administrative Law Judge in Cummings found an annual evaluation was required by DOH regulations, DOH was obligated to comply with its own rules, and cited Powell, supra. The Administrative Law Judge found the grievant's contention that his performance during calendar year 1993 would have been satisfactory, if only he had been given a proper evaluation for 1992, to be "wholly speculative and contrary to a preponderance of the evidence." He noted this grievant's earlier evaluations for 1991, 1990, and the latter part of 1989 all contain comments citing the same needs for improvement without a resulting change in performance.

The same appears to be true in this case. While it was against policy not to complete the entire evaluation, the relief requested by Grievants would not correct the problem. Further, the actions of Grievants in filing this grievance has resulted in the change they sought. It is also noted that Grievants' belief that having the performance evaluations completed by the crew leaders would improve their scores has not been born out.

Given this set of factors the undersigned Administrative Law Judge has decided to design somewhat unusual relief. Any new "needs improvement," on the 2002 evaluations must be removed. In other words, if the "needs improvement" was not marked on the 2001 evaluation it should be

removed from the 2002 evaluation. (See footnote 4) Grievants' rating should be corrected and performance evaluation final total recalculated. The sole exception for this change would be if one of the Grievants had received some type of disciplinary action, and the newly marked "needs improvement" is related to this discipline. In this case an employee would have been put on notice of the need for correction by the action taken by Respondent.

III. Harassment

Grievant Robinson has alleged harassment by his supervisors. W. Va. Code § 29- 6A-2(l) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to adegree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

Grievant Robinson's performance evaluation for 2003 was lower than the one for 2002, as were the majority of Raleigh County DOH employees, so this fact alone does not demonstrate harassment. Additionally, Mr. Lilly did not complete the 2003 performance evaluation, the committee did and Mr. Fisher was only one member of the committee. Mr. Lilly only reviewed it. The proposals submitted by Grievant Robinson's representative did not address the issue of harassment, and no evidence was presented to demonstrate the crew leaders, who did the 2003 evaluations, had harassed Grievant Robinson. No evidence was presented that revealed Mr. Lilly changed any of the ratings, let alone changed Grievant Robinson's score. Accordingly, no harassment has been proven.

IV. Retaliation

Grievant Robinson has also asserted he was subjected to reprisal. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant Robinson did demonstrate he had filed several grievances recently, along with several employees. Mr. Lilly and Mr. Fisher were aware of these actions. This data alone is insufficient. As previously discussed in the prior section, Mr. Lilly did not participate in the scoring of his 2003 performance evaluation, and Mr. Fisher was only one member of the committee. Grievant Robinson has received poor evaluations with "needs improvement" marked on them for at least several years. He has been told directly by Mr. Lilly and Mr. Fisher that his performance needs to improve for some time. His evaluationsremained steady until the committee was formed, and then his score went down, like 70% of the employees. Given this set of facts Grievant Robinson has not proven retaliation.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. "It is well settled that '[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.'" Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Della Mae v. Dep't of Transp./Div. of Highways, Docket No. 98-DNR-204 (Feb. 26, 1999); Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dep't of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

3. An agency's 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 resultwould 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).

4. DOH did not comply with the directive to perform midpoint evaluations on Grievants, and this information could have been used by Grievants to change their work performance with a resulting change in the final evaluations.

5. When mid-point evaluations have not been completed, and an employee first learns of a problem with his performance in his final yearly evaluation, the "needs improvement" rating in this section should be changed to "meets expectations," unless the rating is tied to disciplinary action. See Cummings v. Div. of Highways, Docket No. 95- DOH-104 (Jan. 12, 1996).

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. DOH is Ordered to follow the directions given in this decision.

Any party 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 29, 2005

Footnote: 1

At Level III, Grievants were represented by Grievant MacDonald. At Level IV, Grievants were represented by Richard Patrick, Union Representative from AFSCME, and Respondent DOH was represented by Barbara Baxter, Esq.

Footnote: 2

Grievants' request for discipline of their supervisors cannot be granted, as this is not within the Grievance Board's authority.

Footnote: 3

Grievant Zaferatos received a 2.00 as did four other employees.

Footnote: 4

For Grievant Robinson, the performance evaluation to be consulted would be the 2000 evaluation, if the 2001 evaluation cannot be found.