THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

VICTORIA LYNCH,

Grievant,

v. **Docket No. 06-DOH-019**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Victoria Lynch, is employed by the Division of Highways ("DOH") as an Accounting Technician 3. She filed this grievance on May 10, 2005. Her Statement of Grievance reads:

> I don't agree with my evaluation. I have taken on additional work, but have not gotten a merit raise, and am constantly being harassed over my leave balance. I have been passed up for a promotion due to my leave balance, even though I have brought in Dr.'s excuses, and am keeping my work up.
>
> Relief Sought: I want to be given a merit raise. I want my evaluation to be based on my work, and I want the harassment over my leave balance to stop.

This grievance was denied at all lower levels. (See footnote 1) Grievant appealed to Level IV on January 17, 2006, and a Level IV hearing was held on April 28, 2006. This case became mature for decision on May 30, 2006, the due date for the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

The issue presented by this grievance is clear cut. Grievant believes she should receive a higher rating on her performance evaluation, and Respondent believes the rating Grievant received accurately reflects her attendance and performance.

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

Findings of Fact

1. Grievant is employed by DOH as an Accounting Technician 3. She has been employed for approximately two years.

2. Throughout her employment Grievant has had severe difficulty with maintaining any annual or sick leave balance, and she has gone off payroll multiple times because she had no leave balance. For example: 1) Grievant was off work for 80.75 hours in February 2004, 41.11 hours of which was off the payroll; 2) Grievant was off work for 95 hours in March 2004, 91.11 hours of which was off the payroll; and 3) Grievant was off work for 71.5 hours in August 2004, 53.6 hours of which was off the payroll. Grievant is absent approximately 25% of the time, and from January 2004 to April of 2005, she was off payroll fourteen months out of sixteen.

3. Each time an employee goes off and then back on the payroll, the employer has to complete extensive paper work.

4. Much of Grievant's time away from work demonstrates a pattern of connecting time off with weekends and holidays. Respondent. Exh. 1. Contrary to Grievant's assertions, she has not submitted doctor excuses for all her absences. 5. Grievant has been frequently counseled by her supervisor about her leave usage, especially going off payroll.

6. Grievant received a written reprimand on January 30, 2004 for leave abuse.

7. Grievant received a three-day suspension from March 23 to 25, 2004, for leave abuse/use of unauthorized leave.

8. Grievant did not receive a midpoint evaluation, but was placed on notice of her leave abuse problem through counseling, and the two disciplinary actions.

9. Grievant's performance evaluation for 2004 was conducted on April 27, 2005. She received

five "Exceeds Expectations," fifteen "Meets Expectations," and three "Needs Improvements" for a final evaluation score of 2.09 - "Meets Expectations." This performance evaluation reflected the quality of her work when she is at work, and also reflected her severe leave abuse.

10. DOH did not have a merit increase plan for 2004, and no merit increases were given.

11. When Grievant is at work she performs her job very well and assists the other employees in her unit to complete their work.

Discussion

As this grievance does not involve a disciplinary matter, 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 (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). An employee grieving her evaluation must establish by a preponderance of the evidence that her evaluation is wrong because the evaluator abused his/her discretion in rating the grievant, or the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Wiley v. W. Va. Div. of Natural Res., Docket No. 97-DNR-397 (Mar. 26, 1998); Maxey v. W. Va. Dep't of Health & Human Serv., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); Messenger v. W. Va. Dep't of Health & Human Res., Docket No. 92- HHR-388 (Apr. 7, 1993); Hurst v. W. Va. Dep't of Transp., Docket No. 91-DOH-326 (Feb. 27, 1992); Wiley v. W. Va. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989). In order to prove a supervisor has acted in a manner that constitutes an abuse of discretion, the grievant must prove the evaluation was the result of arbitrary or capricious decision-making. Kemper v. W. Va. Dep't of Transp., Docket No. 91-DOH-325 (Mar. 2, 1992).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997).

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregardof facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

In determining whether a discretionary decision was arbitrary and capricious, an undersigned administrative law judge 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. See Bedford, supra; Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Dec. 29, 1997).

The outcome of this grievance is very simple. Employers have the right to expect employees to come to work and to come to work on time. Ruckle v. Dep't of Health and Human Res., Docket No. 04-HHR-367 (Dec. 22, 2005); English v. Div. of Corr., Docket No. 98-CORR-082 (June 29, 1998); Hatfield v. Dep't of Corr., Docket 98-CORR-020 (Apr. 30, 1998); See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dep't of Corr., Docket No. 93- CORR-538 (May 17, 1994). When employees do not follow this requirement, the employer is required to put the employee on notice that this behavior is not acceptable. Here, Grievant was counseled, and given a written reprimand and a three-day suspension. She was aware change was needed and since she did not correct her behavior, her failure was assessed in her next performance evaluation. Even though Grievant did not receive a mid-point evaluation, she was put on notice of her leave abuse though these disciplinary actions and documented counseling sessions. See McDonald v. Div. of Highways, Docket No. 05-DOH-069 (July 29, 2005). It is certainly positive Grievant is a great worker when she is there, and this fact was noted on her evaluation. But this fact alone is insufficient to result in a good evaluation. A worker is evaluated on her entire performance, and this includes following all the rulesand regulations governing attendance. Grievant's performance evaluation reveals she was given credit for her quality work, but it was not arbitrary and capricious for DOH to take into account Grievant's very unsatisfactory attendance on her performance evaluation.

Grievant also asserts she has been harassed about her unauthorized use of leave. 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 a degree 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 has not demonstrated she has been subjected to harassment. She has not shown a pattern of repeated and continual mistreatment, or that she has been treated in a manner that is contrary to law. While it is true Grievant received numerous counseling sessions and two disciplinary actions for her leave abuse; these actions by Respondent do not constitute harassment. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback. This feedback may not always be positive. Just because Grievant did not like the information she received, does not mean it was inappropriate or constitutes harassment. Rider v. Bd. of Trustees/Marshall Univer., Docket No. 99-BOT-348 (Apr. 7, 2000). Grievant has failed to meet her burden of proof and demonstrate her evaluation was arbitrary and capricious, an abuse of discretion, or indicated a misinterpretation or misapplication of established policy or law.

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, 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 (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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his or her burden. Id.

2. An employee grieving her evaluation must establish by a preponderance of the evidence that her evaluation is wrong because the evaluator abused his/her discretion in rating the grievant,

Messenger v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-388 (Apr. 7, 1993); Wiley v. W. Va. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989); or the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Wiley v. W. Va. Div. of Natural Res., Docket No. 97-DNR-397 (Mar. 26, 1998);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). In order to prove a supervisor has acted in a manner that constitutes an abuse of discretion, the grievant must prove the evaluation was the result of arbitrary or capricious decision-making. Kemper v. W. Va. Dep't of Transp., Docket No. 91-DOH-325 (Mar. 2, 1992).

3. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

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. Bedford, supra; Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Dec. 29, 1997). 5. Grievant failed to meet her burden of proof and establish her performance evaluation was inaccurate, arbitrary and capricious, or a misinterpretation or misapplication of policy. Grievant's supervisor properly considered Grievant's frequent leave abuse/absences, as well as the quality work she performs when is present at work when he evaluated Grievant.

6. 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."

7. "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree 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).

8. Grievant has not met her burden of proof and demonstrated she has been subjected to harassment. Rider v. Bd. of Trustees/Marshall Univer., Docket No. 99-BOT-348 (Apr. 7, 2000).

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 StateEmployees 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

SENIOR ADMINISTRATIVE LAW JUDGE

Date: June 30, 2006

Footnote: 1

A Level III the recommended decision granted this grievance in part, but this decision was not accepted by Respondent.