THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DIANE HOLLEY, et al.,

Grievants,

v. **Docket No. 06-HE-425**

Janis I. Reynolds

Senior Administrative Law Judge

FAIRMONT STATE UNIVERSITY,

Respondent.

D E C I S I O N

Grievants, Diane Holley, Donna Thomaschek, David Glasscock, Yvonne Lepock, and Charlotte Rohrbaugh are employed by Fairmont State University ("FSU"). Their Statement of Grievance reads:

> Grievants were evaluated by an individual who was and is not an employee of Fairmont State University. Said evaluation was in violation of laws and policies regarding the annual evaluation of higher education classified staff/state employees.
>
> Relief sought: Grievants want their annual evaluations which were signed by a person who is not an employee of the university, then or now, to be expunged from their records and replaced with a document explaining the absence of any and all evaluations so expunged; for all future annual evaluations to be assessed and signed by a university employee who is their immediate supervisor and any other relief that the hearing examiner deems appropriate.

This grievance was filed on June 27, 2006, and denied at Levels I, II, and III. Grievants appealed to Level IV on November 14, 2006. Grievants were represented Chris Barr of the West Virginia

Federation of Teachers at Level IV, and FSU was represented by Elaine Skorich, Assistant Attorney General. The parties agreed to submit this case on the record developed below. This case became mature for decision on January 16, 2007, the date for the submission of proposed findings of fact and conclusions of law.

Synopsis

Grievants assertions have changed over time, but no amendment of the Statement of Grievance has been agreed to by Respondent. Grievants originally asserted they were evaluated by a non-employee, and this is a violation of laws and policies. Later, Grievants asserted that because this non-employee is in charge of contracted employees, this evaluation demonstrated a conflict of interest because the agenda of FSU was to replace Grievants with these contracted employees. (See footnote 1)

Respondent continues to object to any amendment of the grievance. In terms of the original grievance, Respondent asserts the grievance is untimely filed. In the alternative, Respondent makes three arguments: 1) Grievants did not identify any statute, policy, rule, or regulation that was violated by the actions of FSU; 2) all evaluations were completed by both an employee of FSU, as well as the contracted supervisor; and 3) this grievance is basically a disagreement with a management decision and does not rise to the level of an arbitrary and capricious decision.

Respondent did not demonstrate this grievance was untimely filed. Grievants did not meet their burden of proof and demonstrate any identified law or policy was violated by this set of facts, or that the decision by the administration of FSU to have Ms. Smith actively participate in their evaluations was arbitrary and capricious.

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 employed as Campus Service Workers at FSU, and all have been employed there for a number of years.

2. FSU has employed workers from the West Virginia Association of Rehabilitation Facilities to provide janitorial services for several years pursuant to a contract and state law. The name for this

contract is commonly referred to as "The Op Shop" contract. As FSU's Campus Service Workers have retired or resigned, Op Shop workers have filled these positions.

3. On July 1, 2005, the responsibilities identified in the Op Shop contract were expanded to include the supervision/management of FSU's Campus Service Workers for all campus buildings.

4. By memo dated May 10, 2005, Rick Porto, Vice President for Administrative and Fiscal Affairs informed all Campus Service Workers

> Please be aware that effective July 1, 2005, The Op Shop building services contract will be expanded to cover the supervision of all buildings on the main campus and the Merchant Street facility. . . .
>
> This in no way changes your status as a Fairmont State employee and your benefits as a state employee. . . .
>
> The intent of this change is to introduce The Op Shop team-cleaning approach to our employees and to expand this cleaning approach to all buildings that will now fall under the supervision of The Op Shop.
>
> Over the next month and a half, Jan Smith, the Director of The Op Shop will be meeting with all Fairmont State Campus Service Workers to discuss job assignments and possible shift work changes that will begin the integration of our workforces.
>
> While all work assignments will be made through the new team- cleaning approach in coordination with Jan Smith under The Op Shop contract, all work performance appraisals and Human Resources matters forcurrent Fairmont State employees will continue to be managed by the Fairmont State Human Resources Department.

Respt. No. 13 at Level III.

5. Ms. Smith is the Executive Director of The Op Shop, and she is an employee of West Virginia Association of Rehabilitation Facilities.

6. Ms. Smith routinely checks the areas that Grievants clean, but she does not usually conduct her inspections while Grievants are present.

7. Tom Tucker is FSU's Assistant Director of Facilities, and he also routinely inspects the

buildings.

8. During June of 2006, Ms. Smith and Mr. Tucker met, discussed, and scored Grievants' evaluations. All Grievants received a score of "Meets Expectations", but their scores were not as high as they had been with a prior FSU supervisor. Ms. Smith and Mr. Tucker then got together with each FSU's employee and discussed his/her evaluation.

9. Grievants did not identify any statute, policy, rule, or regulation violated by the process followed in conducting the June 2006 evaluations.

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 reasonableperson 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

FSU contends this grievance was untimely filed as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). Respondent notes Grievants received notice that Ms. Smith would be their supervisor on May 10, 2005, and did not file this grievance until June 27, 2006, when they received evaluations they did not like.

Where an employer seeks 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).

While Grievants were informed Ms. Smith would supervise them, they were also told, "all work performance appraisals and Human Resources matters for current Fairmont State employees will continue to be managed by the Fairmont State Human Resources Department." This statement did not clearly inform Grievants that Ms. Smith would take a major role in evaluating their performance. Accordingly, Grievants were not fully aware of her role until they received their evaluations. Respondent's Motion to Dismiss is DENIED.

II. Merits

A. Policy violation

Grievants' main assertion in their Statement of Grievance is that it was a "violation of laws and policies" for them to be evaluated by a non-employee. As Grievants did not identify any statute, policy, rule, or regulation that required their evaluations to be performed solely by an FSU employee, they have not met their burden of proof on this issue. Additionally, an FSU employee, Mr. Tucker, actively participated in the evaluation process.

B. Management Decision Grievants disagree with Ms. Smith actively participating in this evaluation process, and wish to mandate who evaluates them. This issue is a management decision, and this type of decisions are judged by the arbitrary and capricious standard.

"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, 196 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Additionally, the West Virginia Supreme Court of Appeals has noted this Grievance Board's jurisdiction to resolve grievances, as defined in W. Va. Code § 29-6A-2(i), does not provide authority for an Administrative Law Judge to substitute her management philosophy for that of the employer. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997); See Settle v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 00- PEDTA-031 (May 23, 2000); Bennett v. Dep't of Health and Human Res., Docket No. 99- HHR-517 (Apr. 26, 2000); Terry v. Dep't of Transp./Div. of Personnel, Docket No. 99-DOH-207 (Mar. 17, 2000). "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000)(citing Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997))." Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (Nov. 20, 2002).

This Grievance Board has frequently ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997). See W. Va. Code § 29-6A-2(i); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). Here, Grievants did not meet that burden of proof. Again, Grievants did not establish a violation of any rule, regulation, or statute, and they also did not demonstrate the decision to have Ms. Smith actively participate in their evaluations was arbitrary and capricious.

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 reasonableperson 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. Respondent did not prove this grievance was untimely filed.

3. Grievants did not meet their burden of proof and establish that Ms. Smith's participation in their evaluative process was a violation of any statute, policy, rule, or regulation.

4. An Administrative Law Judge may not substitute her management philosophy for that of the employer. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997); See Settle v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 00-PEDTA-031 (May 23, 2000); Bennett v. Dep't of Health and Human Res., Docket No. 99-HHR-517 (Apr. 26, 2000); Terry v. Dep't of Transp./Div. of Personnel, Docket No. 99-DOH-207 (Mar. 17, 2000).

5. "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000)(citing Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997))." Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (Nov. 20, 2002).

6. This Grievance Board has frequently ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." Ball v. Dep't ofHighways, Docket No. 96-DOH-141 (July 31, 1997). See W. Va. Code § 29-6A-2(i); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997).

7. Management decisions are judged by the arbitrary and capricious standard.

8. "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, 196 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

9. Grievants did not meet their burden of proof and establish that Ms. Smith's participation in their evaluations was an arbitrary and capricious act.

Accordingly, this grievance is **DENIED**.

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 itsAdministrative 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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Janis I. Reynolds

Senior Administrative Law Judge

Date: March 30, 2007

Footnote: 1

Because Respondent objected to the amending of the Statement of Grievance, this issue will not be addressed further.