# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MICHAEL KOCH,**

**Grievant,**

**v. Docket No. 06-HHR-477**

**DEPARTMENT OF HEALTH & HUMAN RESOURCES/**

**BUREAU FOR PUBLIC HEALTH,**

**Respondent.**

## D E C I S I O N

Michael Koch ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as an Engineer-in-Training, filed a level one grievance on September 28, 2006, after receiving two "needs improvement" ratings on his 2005-2006 Employee Performance Appraisal. Grievant asserts that the "appraisal is untrue and unfair and a mark upon my good name and reputation." For relief, Grievant requests that the form be amended to reflect at least a "meets expectations" in the two areas. J.D. Douglas, P.E., Engineering Supervisor in the St. Albans District Office, denied the grievance at level one. Following a level two conference, Barbara S. Taylor, Director of the Office of Environmental Health Services, granted the grievance in part, finding that the rating for the standard "Addresses conflicts and problems with patience and tact" should be modified to "meets expectations." Ms. Taylor denied the grievance relating to the performance standard "Adapts to new situations in a positive manner." The grievance was denied following an evidentiary hearing at level three, and appeal to level four was made on December 21, 2006. Grievant, appearing *pro se,* and DHHR counsel, Assistant Attorney General Jennifer K. Akers, agreed to submit the grievance for decision based upon the lower-level record, supplemented with proposed findings of fact and conclusions of law filed on or before May10, 2007. The grievance was reassigned to the undersigned on August 14, 2007, following the resignation of Administrative Law Judge Wendy A. Campbell.

### Synopsis

Grievant challenged a "needs improvement" rating in the area of "Adopts to new situations in a

positive manner," claiming that it was only one incident which had not been previously brought to his attention. DHHR established that Grievant's supervisor was required to speak with Grievant multiple times, and finally to advise him that no further reports completed using the old system would be accepted, before he actually began using the new software. Grievant failed to prove that the rating was clearly wrong or arbitrary and capricious. Grievance DENIED.

The following facts have been derived from a preponderance of the credible evidence made part of the level three record.

Findings of Fact

1. Grievant has been employed by DHHR for approximately nine years and has held the position of District Engineer-in-Training II in the Bureau for Public Health St. Albans District Office of the Environmental Engineering Department at all times pertinent to this decision.

2. On September 8, 2006, James D. Douglas, P.E., presented Grievant with an Employee Performance Appraisal for the period September 1, 2005, through August 31, 2006. Although Grievant was rated overall as "meets expectations," he received a "needs improvement" in the area of "Adapts to new situations in a positive manner."

3. The "needs improvement" rating was supported by the following comment:
Michael was very hesitant to begin using the new GEC - Swift software. Even after requesting he use the software verbally and written in his EPA - 2, and after providing all staff with a memo declaring that all future sanitary surveys were to be done with the new software, Michael still produced his sanitary survey's in the old format, including one that was written after my memo to the entire staff. He even went further to contact other district offices to see if they were using the software in an apparent attempt to circumvent, or at least object to my directions.

4. Mr. Douglas had advised Grievant on his interim performance appraisal, dated February 20, 2006, that "[s]ometime in the near future I anticipate this office to receive direction to have all sanitary surveys and annual inspections completed on the SWIFT software, so go ahead and start planning on making the switch in the way you do your reports."

5. Grievant completed two Sanitary Surveys on March 20, 2006, using the old format. Mr. Douglas approved the reports but spoke with Grievant about doing future reports in the SWIFT program. Grievant responded that he "didn't see the point," opined there was a loss of quality, and noted his lack of confidence using the program. Mr. Douglas advised Grievant that he would assist

him as needed.

6. On May 4, 2006, Mr. Douglas notified his staff, including Grievant, by e-mail of certain changes in office procedures, including

If you haven't used the SWIFT program yet, I guess there will be some growing pains associated with that but it is actually very easy and we have had 2 years to practice.

Please adhere to this immediately. If you have conducted a survey or inspection prior to this date and have already started writing it then finish it in whatever version you have started it in but do save it as I have instructed above. All other surveys/inspections from this date forward need to be created in SWIFT so we have the text files.

7. On May 4, 2006, Mr. Douglas placed the following memorandum in Grievant's personnel file.In an attempt to get Michael to use SWIFT, I sent an email to require all reports be done with SWIFT from this day forward. I just finished sending the email at about 9:20 am and Michael is still here on the phone. I just previously had discussions with the staff that we were going to be using SWIFT from now on . . . . This email is to document the informal meeting. This memo is being placed in Michael's file for documentation since he has not started using SWIFT yet and he is doing one today and it should be done with SWIFT after our discussions and the email. His written report is due within two weeks.

8. By the same date, Grievant forwarded Mr. Douglas's e-mail to four individuals whose positions are not identified, and asked

[i]s the central office now 'forcing' all the districts to use SWIFT? See J.D.'s note attached. I thought this was left to individual discretion. Personally, I think we are losing a measure of quality in our reports by being coerced into using a program that still has a lot of bugs. I'd appreciate any comments. Thanks!

9. Grievant completed a report for the Mason County Public Service District - Lakin, dated May 10, 2006, using the old format. Mr. Douglas refused to accept the report, again reminded Grievant that all reports and cover letters are to be generated using the SWIFT program, and referred him to the May 4, 2006, email.

10. On May 19, 2006, Mr. Douglas added the following memorandum to Grievant's file:

On this date Michael resubmitted to me his Lakin survey in the old format even after he received an

email from me on the 4th that said that all surveys were to be done in SWIFT. I just gave him the survey back and told him I would accept it since it has already been over two weeks since the survey was started but I reinforced that this was absolutely the last one I would ever accept.

___11. Grievant began using the SWIFT program on May 23, 2006.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 footnote 1) *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 his evaluation must establish by a preponderance of the evidence that the 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 capriciousdecision-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 disregard of 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).

Grievant argues that “needs improvement” is defined by the evaluation document to mean “overall performance that is unacceptable due to the employees own lack of effort or skills,” and that one isolated incident does not constitute overall performance. Grievant also denies that he contacted other offices to circumvent Mr. Douglas's instructions, butrather was to determine whether others' thoughts on the program were consistent with his own. Finally, Grievant asserts that he had not had any discussion with Mr. Douglas regarding unsatisfactory performance prior to the evaluation. DHHR argues that the time line of events establishes Grievant's failure to adopt the new program as directed by his supervisor, and in fact his delay in using the new system after a mandate was given could be viewed as insubordination. Given the evidence, DHHR argues that the “needs improvement” rating in the category of “Adapts to new situations in a positive manner” was neither clearly wrong nor arbitrary and capricious.

Grievant's characterization of this matter as only one incident may be correct; however, there is no evidence that he was asked to adapt to any other new situations during the same period. Further, it was necessary for Mr. Douglas to speak with Grievant on multiple occasions, and finally notify him that he would simply no longer accept reports filed under the old system, before Grievant actually began using the SWIFT program. Although Grievant may not have intended to circumvent Mr. Douglas's authority by checking with other districts regarding the use of the SWIFT program, he clearly expressed his displeasure with the program and the need to use it. This could hardly be seen as a positive reaction. Grievant is entitled to disagree with his evaluation based on his perception of events, but Mr. Douglas has documented the events very well, and the evidence does not establish that the evaluation was clearly wrong or arbitrary and capricious.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following

conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.

2. An employee grieving his evaluation must establish by a preponderance of the evidence that the 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). 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 his burden of proof to establish that his performance evaluation was

inaccurate, arbitrary and capricious, or a misinterpretation or misapplication of policy.

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)(repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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 alsoprovide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

**DATE: OCTOBER 22, 2007**

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**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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Footnote: 1

*.In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.*