THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MAUREEN L. CLEMONS,
Grievant,

v. **Docket No. 2010-0018-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

On July 6, 2009, Grievant, Maureen L. Clemons, filed a grievance against Respondent asserting "unfair and impartial treatment", as well as retaliation. As relief, Grievant seeks removal of her Employee Performance Appraisal dated July 2, 2009, and for all unfair treatment to cease. A level one hearing was held on October 22, 2009. The grievance was denied at that level. A level two mediation was held on August 9, 2010. A level three hearing was held on April 20, 2011, before Administrative Law Judge William McGinley at the Grievance Board's office in Charleston, WV.[1] Grievant was represented by Fred Tucker, West Virginia Union Mine Workers of America. Respondent was represented by in-house counsel, Kristin A. Boggs. This matter became mature for decision on May 20, 2011, upon final receipt of both parties' proposed findings of fact and conclusions of law.

[1]For administrative purposes, the grievance was reassigned to the undersigned on September 12, 2011.

Synopsis

Grievant is an Office Assistant III for Respondent. Grievant's supervisor performed the mid-year Employee Performance Appraisal (EPA) and rated Grievant as "fair, but needs improvement." Grievant asserts that the rating was an act of retaliation. Grievant argues that she was treated unfairly. Respondent argues that Grievant's mid-year EPA was not inaccurate, arbitrary and capricious, or a misinterpretation or misapplication of policy.

Grievant failed to establish a claim of favoritism or discrimination. Grievant failed to establish that Respondent's mid-year EPA rating of her was an act of retaliation. Grievant presented no evidence that the performance evaluation prepared by her supervisor was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Likewise, Grievant was unable to prove that the evaluation document or process was arbitrary and capricious. Accordingly, the grievance is DENIED.

Findings of Fact

1. Grievant was hired by Respondent on July 1, 1993. Since October 16, 1993, she has held the position of Office Assistant III (OA3) in Respondent's Office of Homeland Security and Emergency Response (OHS).

2. In January 2008, Rusty Joins became Grievant's immediate supervisor. Mr. Joins is the Environmental Resources Program Manager for OHS.

3. As an OA3, Grievant's duties include answering the telephone; typing and doing data entry; developing and maintaining filing systems, databases, lists and forms;

handling incoming and outgoing mail; handling general office duties; and coding invoices and forwarding them for payment.[2]

4. Respondent uses the Division of Personnel's (DOP) Employee Performance Appraisal (EPA) policy and forms to evaluate its employees. Mr. Joins received DOP's EPA training upon becoming a supervisor.

5. Under DOP Policy[3], the West Virginia Employee Appraisal System is designed to be an information gathering and reporting system. An EPA mid-year review consists of a supervisor meeting individually with each subordinate employee to conduct a formal, mid-year review of the employee's performance. During the mid-year review, the supervisor must provide feedback to the employee concerning the employee's strengths, weaknesses (if any), and performance during the primary performance period. If appropriate, the supervisor may develop a performance improvement plan which describes the action(s) the employee must take to improve his or her performance to the "meets expectations" level. Within 30 days following the end of the performance rating period, supervisors are required to meet individually with each of their subordinate employees to review and rate the performance of each employee during the entire performance rating period; this is referred to as the final review session. The purpose of the final review session is to provide employees with a formal rating of their overall job performance throughout the entire rating period and to generate information to be used as the basis for

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[2]*See* Level one hearing, Grievant's Exhibit No. 2: Grievant's EPA 1 from initial planning session

[3]Level three hearing, Respondent's Exhibit No. 1: DOP's Employee Performance Appraisal Policy

future performance planning.

6. On July 2, 2009, Mr. Joins conducted a mid-year EPA of Grievant. He rated Grievant "fair, but needs improvement," and listed under "performance development needs" that "Maureen needs to improve the accuracy of her typing and data entry."[4]

7. This evaluation was based on observations Mr. Joins made with regard to inaccuracies in Grievant's typing and data entry relative to bid packages and an OHS chemical database.

8. It is important that bid packages be typed accurately, because failure to solicit bids correctly could result in the agency being in violation of State purchasing laws and subject it to sanctions.

9. It is important that entries into the database be made accurately, because failure to do so could result in mishandling of the chemical or material, causing serious injury to either Respondent personnel or the general public. It could result in environmental damage or improper waste disposal that could subject OHS to regulatory sanctions by the United States Department of Transportation, the United States Environmental Protection Agency or another division or office of the Department of Environmental Protection.

10. On two occasions, Grievant incompletely addressed certified mail for a hazardous waste disposal bid to Matt Coulter with Clean Harbors Environmental Services. On January 9, 2009, Mr. Joins directed Grievant to prepare a letter and envelope to multiple recipients for a hazardous waste disposal bid request. The certified mail envelope addressed to Mr. Coulter contained only 4 out of 5 digits of the zip code. The incomplete

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[4] *See* Level one hearing, Grievant's Exhibit No. 1: Grievant's mid-year EPA

zip code on the certified mail envelope was noticed by a postal worker at the post office. After the first occurrence on January 9, 2009, Mr. Joins directed Grievant to correct the incomplete zip code in the computer database to prevent the mistake from happening again in the future. On January 14, 2009, Mr. Joins directed Grievant to prepare a letter for an additional hazardous waste disposal bid request. Again, Mr. Coulter's zip code was incomplete on the certified mail envelope for the hazardous waste disposal bid.[5]

11. The January 9, 2009, certified mail receipts and return receipts for a hazardous waste disposal bid incorrectly stated the bid due date as December 19, 2008. The letter given to Grievant by Mr. Joins when he directed her to prepare and address the hazardous waste disposal bids to multiple persons, included a bid due date of January 27, 2009.[6]

12. On April 7, 2009, Mr. Joins directed Grievant to copy invoices for payment for a school lab chemical disposal and a non-school chemical disposal. The copies provided by Grievant contained an incorrect number of sheets and the pages were not in order.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of*

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[5] *See* Level three hearing, Respondent's Exhibit No. 2: address labels on certified mail

[6] *See Id*: certified mail receipts and January 9, 2009, letter with correct bid due date

Educ., Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

_____An employee grieving his or her evaluation must establish by a preponderance of the evidence that his or her evaluator abused his or her discretion in rating the grievant. *Wiley v. W.Va. Workers' Comp. Fund*, Docket No. WCF-89-015 (July 31, 1989). In the present grievance, Grievant received a grade of "fair, but needs improvement" on her mid-year EPA, dated July 2, 2009. Grievant asserts that as to the charge that she erroneously entered information into a database, Respondent could not have known for certain that Grievant entered the data because all employees who work at the facility have access to the database. Respondent argues that Grievant's mid-year EPA was not inaccurate, arbitrary and capricious, or a misinterpretation or misapplication of policy.

In a situation where an employee challenges his or her performance evaluation, that employee must prove by a preponderance of the evidence that the evaluation was prepared as a result of the supervisor's misinterpretation or misapplication of established policy or law addressing the evaluation process or that the supervisor abused his discretion. *Kemper v. West Virginia Department of Transportation*, Docket No. 91-DOH-325 (March 2, 2992). *See*, *Davidman v. W.Va. Div. of Rehab. Serv.*, Docket No. 90-RS-485 (April 11, 1991); *Willison v. W.Va. Div. of Human Serv.*, Docket No. 90-DHS-089 (June 25, 1990); *Wiley v. Workers' Compensation Fund*, Docket No. WCF-89-015 (July 31,

1989). In order to prove that a supervisor has acted in a manner that constitutes abuse of discretion, a grievant may prove that the evaluation was the result of some arbitrary or capricious decision-making. *See generally*, *Davidsman*, *supra*.

"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)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Respondent asserts the mid-year EPA rating of "fair, but needs improvement" was due to instances when Grievant: (a) incompletely addressed certified mail envelopes for

hazardous waste disposal bids; (b) included an incorrect due date on the bids; (c) improperly copied invoices for payment of chemical disposal; and, (d) incorrectly entered data into a chemical database. Evidence was introduced at the level three hearing to demonstrate specific instances in which Grievant had committed actions (a), (b) and (c) described above.

As to instance (d) above, Respondent asserts that Grievant erroneously entered data into a database catalog of chemical materials retrieved by Respondent. A description and amount for each item is entered into the database which is later relied upon for disposal of the waste. Grievant was not the only employee with access to Respondent's database catalog of chemical materials. Sufficient evidence was not introduced to convince the undersigned that Grievant was the sole cause of the incorrect entries into the database catalog of materials retrieved by Respondent. However, Respondent demonstrated specific instances in which Grievant incompletely typed certified mail addresses and labels, and incorrectly stated a bid's due date. Respondent also detailed a specific instance in which Grievant provided incorrect copies of an invoice.

Grievant asserts that Respondent's mid-year EPA rating was retaliation against her for previously filing a grievance before this Grievance Board. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative 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, the Grievant must establish by a preponderance of the evidence the following elements:

(1) That he engaged in protected activity (i.e., filing a grievance);

> (2) That he 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; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *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).

Grievant has previously filed grievances against Respondent before this Grievance Board. Grievant asserts that her mid-year EPA rating of "fair, but needs improvement" was adverse treatment.[7] Respondent demonstrated instances when Grievant committed incorrect or incomplete typographical errors, which were the basis for her EPA rating. Retaliatory motive cannot be inferred when Respondent's EPA rating of "fair, but needs improvement" was not arbitrary or capricious.

Grievant asserts that she is being treated unfairly. Favoritism is defined by W.VA. CODE § 6C-2-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee." 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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[7]Grievant has not been reprimanded in any way as a result of her mid-year EPA. Grievant has not been denied a salary increase as a result of her mid-year EPA. Grievant has not been denied a promotion to which she was otherwise entitled as a result of her mid-year EPA.

(a) that he or she has been treated differently from one or more similarly-situated employee(s);
(b) that the different treatment is not related to the actual job responsibilities of the employees; and,
(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant asserts that she was treated unfairly because she was the only staff person who received a "fair, but needs improvement" on her mid-year EPA performed by Supervisor Joins. Grievant did not demonstrate that the other employees were similarly situated in that they also committed typographical errors but did not receive the same EPA rating. Grievant has failed to establish a claim of favoritism or discrimination.

The mid-year EPA addressed Respondent's evaluation of Grievant's performance as needing improvement. Not only did the mid-year EPA suggest that Grievant improve the accuracy of her data entry, but also the accuracy of her typing. Respondent demonstrated specific instances when Grievant committed typographical errors. Grievant presented no evidence that the performance evaluation prepared by Mr. Joins was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Likewise, Grievant was unable to prove that the evaluation document or process was arbitrary and capricious. Consequently, the grievance is DENIED.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

_____2. An employee grieving his or her evaluation must establish by a preponderance of the evidence that his or her evaluator abused his or her discretion in rating the grievant. *Wiley v. W.Va. Workers' Comp. Fund*, Docket No. WCF-89-015 (July 31, 1989).

3. In a situation where an employee challenges his or her performance evaluation, that employee must prove by a preponderance of the evidence that the evaluation was prepared as a result of the supervisor's misinterpretation or misapplication of established policy or law addressing the evaluation process or that the supervisor abused his discretion. *Kemper v. West Virginia Department of Transportation*, Docket No. 91-DOH-325 (March 2, 2992). *See*, *Davidman v. W.Va. Div. of Rehab. Serv.*, Docket No. 90-RS-485 (April 11, 1991); *Willison v. W.Va. Div. of Human Serv.*, Docket No. 90-DHS-089 (June 25, 1990); *Wiley v. Workers' Compensation Fund*, Docket No. WCF-89-015 (July 31, 1989). In order to prove that a supervisor has acted in a manner that constitutes abuse of discretion, a grievant may prove that the evaluation was the result of some arbitrary or capricious decision-making. *See generally*, *Davidsman*, *supra*.

4. “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).

5. 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)).

6. Respondent demonstrated instances when Grievant committed incorrect or incomplete typographical errors.

7. Grievant presented no evidence that the performance evaluation prepared by Mr. Joins was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Likewise, Grievant was unable to prove that the evaluation document or process was arbitrary and capricious.

8. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as “the retaliation of an employer toward a grievant, witness, representative 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, the Grievant must establish by a preponderance of the evidence the following elements:

(1) That he engaged in protected activity (i.e., filing a grievance);

> (2) That he 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; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *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).

9. Retaliatory motive cannot be inferred when Respondent's EPA rating of "fair, but needs improvement" was not arbitrary or capricious.

10. Favoritism is defined by W.VA. CODE § 6C-2-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee."

11. 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 he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

12. Grievant failed to establish a claim of favoritism or discrimination.

Accordingly, this grievance must be DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: October 5, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge