THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LENA BOWMAN, et al.,
Grievants,

v. **Docket No. 2011-0422-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Lena Bowman, Carolyn Frame, and Carolyn Blake, Grievants, filed this grievance against their employer on September 22, 2010. The Statements of Grievance read, "inaccurate EPA," and the Relief Sought is "to be made whole." A level one hearing was held on October 21, 2010. The grievance was denied by Decision dated December 22, 2010, and authored by Respondent's designee, Janis I. Reynolds, Esquire. A level two mediation session was conducted on June 1, 2011. Appeal to level three was timely perfected on June 3, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on December 19, 2011, in the Grievance Board's Westover office location. Grievants appeared in person and by their representative, Gordon Simmons, UE Local 170. Respondent appeared by its attorney, Anne B. Ellison, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on January 20, 2012.

Synopsis

Grievants contend that their Employee Performance Appraisal ratings as they relate to work place treatment of a co-worker was not supported by their work performance.

Grievants were not able to demonstrate, by a preponderance of the evidence, that the evaluations were an abuse of discretion or an arbitrary or capricious action. The grievance is denied.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievants are employed as housekeepers at the William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources.

2. In September 2010, Grievants were given their yearly performance evaluations.

3. They all received two "Needs Improvement" in the Customer Service Section in two categories: 1) "Treats all customers with respect," and 2) "Addresses conflicts and problem situations with patience and tact."

4. The rest of Grievant Bowman's and Grievant Blake's evaluations consisted of fourteen "Meets Expectations" and seven "Exceeds Expectations."

5. The rest of Grievant Frame's evaluation consisted of fourteen "Meets Expectations," four "Exceeds Expectations," and three additional "Needs Improvement" noting problems with leave abuse and attendance.

6. Grievants' overall scores were all "Meets Expectations."

7. The notes attached to the evaluations stated that Grievants were treating one of their co-workers with disrespect and coldness bordering on creating a hostile work environment.

8. The co-worker, Eva “Chris” Smith, began working as a housekeeper for the hospital on April 1, 2010. When she first began working at the hospital she tried to fit in with the Grievants. However, things began to change in their work environment. The tone of voice used by the Grievants changed, they would bark answers at her when she asked questions. Ms. Smith indicated that she felt as though she was shunned and put down by the Grievants. Ms. Smith asked Grievant Bowman to help her work out whatever issue that Grievant Blake had with her, as she didn’t know why Grievant Blake was ignoring her. Grievant Bowman, a lead worker, refused to assist in this effort, and told Ms. Smith she would have to deal with that on her own.

9. Grievants generally avoided Ms. Smith and sent her off to work somewhere other than where they were working. Grievant Blake cursed at her over cleaning a floor, and immediately after this incident, Ms. Smith asked her supervisor to move her to another unit.

10. The record of this case demonstrated that the agency posted a vacant position, and Grievants were vocal about whom they wanted in the position. They were vocal to the point where they were not allowed to participate in the selection process.

Discussion

Because evaluations are not disciplinary in nature, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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). In other words, "[t]he 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).

Employees grieving their evaluations must establish by a preponderance of the evidence that their evaluations are wrong because the evaluator abused his discretion in rating the employees. *Gibson v. W. Va. Dep't of Health and Human Res.*, Docket No. 2009-0700-DHHR (Jan. 19, 2010); *Messenger v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-388 (April 7, 1993). Employees can also allege that performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. *Gibson*, *supra*; *Wiley v. Div. of Natural Res.*, Docket No. 97-DNR-397 (Mar. 26, 1998). In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, grievants must prove that the evaluations were the result of arbitrary or capricious decision-making. *Gibson*, *supra; Kemper v. W. Va. Dep't of Transp.*, Docket No. 91-DOH-325 (Mar. 2, 1992).

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483

(1996)). “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 [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

The issue in this grievance is whether Grievant’s supervisor, Jack Atchison, abused his discretion in evaluating the Grievants. The record demonstrated that the agency posted a vacant position, and Grievants were vocal about whom they wanted in the position. As lead workers, they were customarily asked about their choice of applicants; however, they were so vocal and biased that they were not allowed to participate in the selection process. When Chris Smith was selected to fill the position, Grievants exhibited certain behaviors toward Ms. Smith, including ignoring her and not speaking. When Ms. Smith came into a room where Grievants were talking, they would roll their eyes, stop talking, and leave the room within a few seconds.

Grievants did not view their behavior as hostile, but frequently told Mr. Atchison that they hated her, did not want to work with her, and would not take breaks or eat lunch with her. Mr. Atchison frequently told Grievants this behavior was inappropriate when he talked to them informally. Mr. Atchison spent several months hearing the Grievants make negative comments regarding Ms. Smith, observing their obvious exclusion of and disdain for her, and hearing complaints from Ms. Smith about the work environment.

Mr. Atchison told the Grievants that their behavior toward Ms. Smith was inappropriate, especially for lead workers Ms. Bowman and Ms. Frame. This behavior occurred from April until the end of July 2010, when Ms. Smith informed Mr. Atchison that

the treatment was so intolerable that she could no longer work with the Grievants. Mr. Atchison had reason to conclude that Ms. Smith had been subject to mistreatment and an inappropriate work environment by Grievants.

A review of the evidence demonstrates that Grievants have failed to meet their burden of proof. Their overall rating was "Meets Expectations," and they had been frequently asked to change their collective behavior toward Ms. Smith without results. Grievants did not establish that receiving a rating of "Needs Improvement" in two areas was arbitrary and capricious, an abuse of discretion, or indicated a misinterpretation or misapplication of established policy or law.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Because evaluations are not disciplinary in nature, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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).

2. Employees grieving their evaluations must establish by a preponderance of the evidence that their evaluations are wrong because the evaluator abused his discretion in rating the employees. *Gibson v. W. Va. Dep't of Health and Human Res.*, Docket No. 2009-0700-DHHR (Jan. 19, 2010); *Messenger v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-388 (April 7, 1993). Employees can also allege that performance evaluation was the result of some misinterpretation or misapplication of established policies

or rules governing the evaluation process. *Gibson*, *supra*; *Wiley v. Div. of Natural Res.*, Docket No. 97-DNR-397 (Mar. 26, 1998). In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, Grievants must prove that the evaluations were the result of arbitrary or capricious decision-making. *Gibson*, *supra; Kemper v. W. Va. Dep't of Transp.*, Docket No. 91-DOH-325 (Mar. 2, 1992).

3. Grievants did not prove by a preponderance of the evidence that their evaluations were the result of a misinterpretation or misapplication of the rules governing such evaluations. Likewise, Grievants did not prove that the evaluations were arbitrary and capricious.

Accordingly, the grievance is **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 (eff. July 7, 2008).

Date: March 6, 2012

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Ronald L. Reece
Administrative Law Judge