WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID K. PARSONS,
Grievant,

v. **DOCKET NO. 2012-0867-DOA**

GENERAL SERVICES DIVISION,
Respondent.

DECISION

Grievant, David K. Parsons, filed this grievance on February 22, 2012, against Respondent, General Services Division ("GSD"), challenging the Employee Performance Appraisal he received for the rating period covering October 1, 2010 through September 30, 2011. His statement of grievance reads:

> Division Director fails to follow DOP guidelines for the completion of annual EPA's as to guidelines for timeliness, content validity, approvals and reviews. Are not timely, correctly documented, substantiated with facts, are vague as to content all in contrast to published guidelines[.] Director has sought to lower all evaluations as not to raise expectations rather than to review performance. (see EPA)

As relief sought, Grievant requested:

> Agency must follow published guidelines for completion, must substantiate with facts and examples any future comments. Agency will delete comments objected to in employees (*sic*.) comments section and complete revised/amended EPA-3 per employees (*sic*.) noted request and response.

Following a Level One grievance hearing on March 16, 2012, Respondent GSD denied the grievance on April 4, 2012.

Grievant appealed to Level Two of the grievance procedure on April 9, 2012. After mediation was completed at Level Two on August 6, 2012, Grievant appealed to Level Three on August 15, 2012. A Level Three hearing was held before the undersigned

Administrative Law Judge on March 6, 2013, in Charleston, West Virginia. Grievant was represented at the hearing by Fred Tucker with the United Mine Workers of America. GSD was represented by Assistant Attorney General Katherine A. Campbell. This matter became mature for decision on April 10, 2013, upon receipt of the last of the parties' post-hearing arguments.

Synopsis

Grievant is employed by Respondent GSD as its Operations and Maintenance Manager. Grievant's 2011 employee performance evaluation covering the period from October 1, 2010 through September 30, 2011 included two elements which were rated as "needs improvement" by David Oliverio, Director of GSD and Grievant's immediate supervisor. Although Grievant established that the evaluation was untimely because it was not discussed with him until December 9, 2011, rather than sometime before the end of October, there was no evidence that this delay affected the substantive ratings which Grievant received. Likewise, Director Oliverio's failure to submit the evaluation to his supervisor, the Secretary of Administration, before discussing the ratings with Grievant, while inconsistent with the procedures established by the Division of Personnel, was not shown to have affected the particular ratings issued. However, Grievant established that Director Oliverio's failure to set measurable goals at the beginning of the rating period, conduct a proper mid-term evaluation at the six-month point of the rating period, or otherwise document the ratings rendered, resulted in ratings that were not rendered in accordance with specific procedures established in West Virginia Division of Personnel

Policy DOP-17 governing the employee performance appraisal process. Accordingly, this grievance will be granted.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievant is employed by the General Services Division of the West Virginia Department of Administration as its Operations and Maintenance Manager. Grievant has worked in that capacity for six years.

2. Grievant manages six subordinate supervisors who report directly to him. Grievant also has one non-supervisory employee who reports directly to him. Grievant indirectly supervises approximately 50 employees who are supervised by the six subordinate supervisors.

3. Grievant's immediate supervisor is David Oliverio, Director of the General Services Division, within the West Virginia Department of Administration. Director Oliverio is responsible for evaluating Grievant's performance annually using the employee performance evaluation forms prescribed by the West Virginia Division of Personnel.

4. On December 9, 2011, Director Oliverio discussed an Employee Performance Appraisal (DOP Form EPA-3), covering the period from October 1, 2010 through September 30, 2011, with Grievant. *See* G Ex 1.

5. Grievant elected to make a written response which he submitted to Director Oliverio. *See* G Ex 1.

6. After receiving Grievant's written comments, Director Oliverio added handwritten notes to Grievant's typed response to his evaluation and submitted the evaluation to Secretary of Administration Robert Ferguson for review and approval. *See* G Ex 1.

7. The West Virginia Division of Personnel has issued a written policy (Policy Number DOP-17) governing the employee performance appraisal process. *See* G Ex 4.

8. Within thirty days following the end of the performance rating period, Supervisors are required to meet with their subordinates and rate each employee's performance for the entire rating period. *See* ¶ II.C.2.e. of DOP Policy No. DOP-17 (G Ex 4).

9. The reviewing manager (Secretary Ferguson) is required to review and approve an employee's evaluation before the supervisor (Director Oliverio) meets with the employee being rated to discuss his ratings. *See* ¶ II.C.2.f. of DOP Policy No. DOP-17 (G Ex 4).

10. Director Oliverio rated Grievant as "needs improvement" under the elements of "[a]ddresses conflicts and problem situations with patience and tact" within the category of "Customer Service" and [b]uilds a team that reflects high morale, clear focus, and group identity" within the category of "Work Environment." *See* G Ex 1.

11. Director Oliverio received unsolicited complaints from GSD customers that Grievant would summarily deny requests for work to be done with a one-word response of "no" with no further explanation provided or volunteered.

12. Director Oliverio received unsolicited comments from employees working under Grievant's supervision stating that Grievant was difficult to work for, indicating that their morale was low because of Grievant's supervisory approach.

13. DOP Policy DOP-17 states: "During the first 30 days of each performance rating period, supervisors/raters are required to meet individually with each subordinate employee to identify, define and describe performance expectations (*e.g.*, responsibilities, duties, and standards). *See* ¶ II.C.2.a. of DOP Policy No. DOP-17 (G Ex 4).

14. Director Oliverio did not meet with Grievant at any time after the beginning of the rating period to define or describe his performance expectations for Grievant. Grievant was never issued a DOP Form EPA-1 identifying his supervisor's performance expectations.

15. In response to his evaluation discussion with Director Oliverio, Grievant submitted a written response which included: "EPA-2 Mid-year review forms were not completed (though not required any expectation which may be falling short should have been reviewed.[)]" G Ex 1.

16. Before the EPA-3 was forwarded to the reviewing authority, Secretary Ferguson, Director Oliverio inserted this hand-written response to Grievant's statement quoted above in Finding of Fact Number 15: "7/29/11 Discussed & Counseled Dave [Grievant] with Dep. Director present. DMO 12-15-11."

17. Director Oliverio did not conduct a meaningful mid-year review of Grievant's duty performance, nor did he generate a DOP Form EPA-2 to document any failure by Grievant to meet expectations as of the mid-year point of the rating period.

Discussion

Because employee evaluations are not disciplinary in nature, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, Grievant has not met his burden. *Id*.

An employee who grieves his evaluation may prevail where he establishes by a preponderance of the evidence that the evaluator abused his discretion in rating the employee. *Bowman v. Dep't of Health & Human Res*., Docket No. 2011-0422-CONS (Mar. 6, 2012); *Gibson v. W. Va. Dep't of Health & Human Res*., Docket No. 2009-0700-DHHR (Jan. 19, 2010); *Messenger v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-388 (Apr. 7, 1993). An employee may also allege that his 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); *Kemper v. W. Va. Dep't of Transp*., Docket No. 91-DOH-325 (Mar. 2, 1992); *Hurst v. W. Va. Dep't of Transp*., Docket No. 91-DOH-326 (Feb. 27, 1992).

In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, a grievant must prove that the evaluation was the result of arbitrary or capricious decision making. *Bowman*, *supra*; *Kemper*, *supra*. The arbitrary and capricious standard of review is a deferential one which presumes 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); *In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

Grievant's quarrel with his evaluation is focused on the "needs improvement" ratings he received from Director Oliverio in two rating elements: (1) "Addresses conflicts and problem situations with patience and tact" within the category of "Customer Service;" and (2) "Builds a team that reflects high morale, clear focus, and group identity" within the category of "Work Environment." *See* G Ex 1. In regard to the first element, Director Oliverio commented as follows: "You have gained a reputation of not listening to customers and not providing customers with an adequate explanation as to why we sometimes cannot fulfill their requests. Customers inform me that you simply say 'no' with little or no explanation." *See* G Ex 1. In regard to the second element, Director Oliverio included the following comment: "Many of your supervisors believe you do not possess acceptable 'people' skills. Whether factual or perceived, this is an issue of concern between you and your direct reports." *See* G Ex 1.

Although Grievant disagreed with these ratings, his concerns were primarily directed toward Director Oliverio's failure to establish meaningful and measurable performance goals for these elements on the rating form at the beginning of the rating period, as well as Director Oliverio's failure to conduct a mid-point evaluation around six months into the evaluation period. DOP's policy encourages supervisors to meet with subordinates who are not performing up to expectations and place them on notice as to what improvements are expected in their work performance. Director Oliverio testified that he and his Deputy Director met with Grievant to discuss an issue they were having with one of Grievant's subordinate employees, and that he "counseled" Grievant on his performance at that time.

However, Director Oliverio had difficulty recalling what specific topics were covered during this purported counseling, or any details of their conversation as it related to these performance elements. This lack of recall sharply contrasted with Director Oliverio's clear and straightforward testimony regarding the various events that caused him to arrive at the ratings he ultimately awarded to Grievant. Moreover, despite testimony from Director Oliverio that he made a written record regarding this event, Respondent failed to offer a copy at the Level Three hearing, or produce a copy in response to a request for supporting documentation which Grievant submitted via electronic mail prior to the hearing. *See* G Ex 2.

Grievant recalled this same meeting in July 2011, but stated that the conversation was focused on the actions of a particular employee, and the appropriate response to that employee's actions. Although Grievant believed that Director Oliverio was not

pleased with his support for the employee, he was not informed that he was being counseled during the meeting, and he never received anything in writing to suggest that counseling had transpired. Indeed, he only learned of this alleged "counseling" when he found an annotation on the rebuttal statement he provided to his performance appraisal wherein Director Oliverio stated: "7/29/11 discussed and counseled Dave [Grievant] with Dep. Director present." *See* G Ex 1.

Exactly what took place during this July 2011 meeting involving Grievant, Director Oliverio, and the Deputy Director of the General Services Division, is uncertain. However, the absence of documentation for this purported "counseling," combined with Director Oliverio's lack of recall, suggests that no meaningful counseling took place. Further, a preponderance of the credible evidence indicates that this meeting did not equate to a "Mid-Year Review" as contemplated by ¶ II.C.2.c. of DOP Policy No. 17. *See* G Ex 4. Nonetheless, the inquiry does not end here. Grievant must show how this failure to follow DOP's procedures generated the evaluation ratings of which he complains. *See Maxey*, *supra*; *Kemper*, *supra*.

Director Oliverio testified credibly that he had received feedback from multiple customers that Grievant responded to requests for support negatively, and without any explanation as to why the request could not be supported. Director Oliverio agreed that in most cases, Grievant's response was technically correct, but he failed to make any effort to maintain reasonable cordiality with his customers. Generally, these "customers" involve other state agencies for which GSD provides maintenance support. Director Oliverio also testified credibly that Grievant's subordinates would informally complain

during casual conversations in the workplace that Grievant was difficult to work with and otherwise intimated that his leadership style was making their work life unsatisfactory.

Director Oliverio also rated Grievant as "exceeds expectations" on three performance elements, supporting these ratings with positive comments regarding Grievant's work performance during the applicable rating period. Grievant received an overall numerical rating of 2.03, a number which equates to "meets expectations" under DOP's current evaluation system.

Thus, there was credible evidence that Grievant's performance during the rating period warranted the scores and comments which Director Oliverio assigned. Grievant did not produce evidence to establish that these comments were not based on actual events. Instead, Grievant focused on Director Oliverio's failure to follow DOP guidance in administering the evaluation process. Although public agencies are obligated to follow the rules and policies they establish, unless the employee shows that the result would have been different, an evaluation will not be overturned for purely procedural errors. *See Shaffer v. W. Va. Dep't of Health & Human Res*., Docket No. 02-HHR-109 (July 1, 2002); *Farley v. Dep't of Health & Human Res*., Docket No. 02-HHR-088D (May 8, 2002). *See also McFadden v. W. Va. Dep't of Health & Human Res*., Docket No. 94-HHR-428 (Feb. 17, 1995). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980).

Grievant established that his employee evaluation was not completed within the time limit specified by the West Virginia Division of Personnel. Evaluations are supposed to be completed within thirty days after the end of the annual evaluation period. *See* G Ex

4 (DOP Policy No. 17) at ¶ C.2.e. Grievant's annual evaluation covered the period from October 1, 2010 through September 30, 2011. *See* G Ex 1. Thus, Grievant's supervisor should have discussed his evaluation with Grievant, at the latest, by October 31, 2011. This meeting did not take place until December 9, 2011.

Respondent presented no reason for this delay. Indeed, Respondent conceded in its Level One response to this grievance that the challenged evaluation was not completed within thirty days after the end of the annual evaluation period. However, Respondent contends that the failure to complete the evaluation in a timely manner had no impact on the content of the evaluation.

Grievant presented no evidence that the delay in completing his evaluation had any impact on the ratings he received. For example, there was no evidence that the evaluator considered events which took place after the end of the rating period in rendering this evaluation. *See Wiley*, *supra*. Therefore, Grievant failed to establish that the substantive ratings he received resulted from any misapplication or misinterpretation of established policies affecting the evaluation process, in regard to the delay in issuing the ratings.[1] *See McFadden*, *supra*; *Walker v. Dep't of Pub. Safety*, Docket No. 98-DPS-056 (Sept. 11, 1998).

Grievant also complained that Director Oliverio did not submit his evaluation for signature by the reviewing manager, Secretary of Administration Ferguson, before meeting with him to discuss the evaluation. This procedure is prescribed in DOP Policy No. 17 at ¶ II.B.5. *See* G Ex 4. Respondent also conceded that correct procedure was

[1] Grievant likewise presented no evidence that Respondent's failure to comply with the applicable timelines resulted in any loss of opportunity for a merit raise or any other benefit. Had there been evidence of some adverse consequence from this delay, the result on this issue might have been different.

not followed in this regard, and agreed to follow the proper procedure in the future. Despite this admission, Grievant failed to demonstrate how this failure to follow the DOP requirements generated any substantive change in the particular ratings he received. *Id*.

Grievant further complained that his Division Director sought to lower all evaluations generally, so as not to raise expectations, rather than to review the performance of each subordinate on its merits. However, Grievant presented no evidence to substantiate this aspect of his complaint, other than the fact that he received "needs improvement" ratings which he had not received on prior evaluations. Thus, this element of Grievant's complaint is not supported by a preponderance of the evidence.

Finally, Grievant objected to his evaluation because he was given "needs improvement" ratings in two categories without the benefit of an initial planning session creating an EPA-1 form to establish his supervisor's performance expectations during this rating period, and because he was not provided meaningful feedback, such as an EPA-2 form, noting his deficiencies at or about the midpoint of this rating period, thereby giving him an opportunity to improve his performance to at least acceptable standards. These allegations are found to have merit.

The West Virginia Division of Personnel's Policy Number DOP-17 on Employee Performance Appraisal (G Ex 4) states: "It is the policy of the State of West Virginia to: Tell employees what is expected of them during the first 30 days of each rating period." This communication is accomplished by using DOP Form EPA-1 for the Initial Planning Session. *See* DOP Policy No. 17 at ¶ II.B.1.a. More particularly, the Policy says:

> During the first 30 days of **each performance rating period**, supervisors/raters are required to meet individually with each subordinate employee to identify, define, and describe performance expectations (e.g.,

> responsibilities, duties, and standards). The purpose of this meeting is to ensure that the employee understands and is committed to established performance expectations of his or her job.

DOP Policy No. 17 at ¶ II.C.2.a. (emphasis added).

Director Oliverio suggested that he had substantially complied with this requirement by creating a set of expectations for Grievant at the time he was hired, and that those expectations somehow carried forward to the 2011 rating period. However, Director Oliverio conceded that no EPA-1 was created for Grievant's 2011 rating period. Further, no EPA-1 covering an earlier rating period was produced. Thus, a preponderance of the evidence indicates that Grievant was performing his job with no defined performance expectations in place.

Grievant concedes that use of DOP Form EPA-2 for an interim or mid-year review of an employee's performance is optional, but contends that such a form should have been used in this case where his performance was allegedly failing to meet expectations. (In other words, if the employee is performing at or above the "meets expectations" level at the mid-year point, the supervisor is not required to complete a DOP Form EPA-2 to document satisfactory performance. However, in accordance with DOP Policy No. 17, this form "shall be used . . . for special situations involving performance that fails to meet expectations." DOP Policy No. 17 at ¶ II.B.1.b.) Director Oliverio admitted that a DOP Form EPA-2 was not generated for Grievant at the mid-year point, contending that the counseling session which he and the Deputy Director conducted with Grievant in July substantially complied with this requirement.

As previously noted, Respondent failed to produce credible evidence demonstrating the scope and content of this purported counseling. There was evidence that a discussion took place which Director Oliverio described as a "counseling session" but which he did not consider to contain information used in preparing the DOP Form EPA-3 at issue in this grievance. Respondent's position on this issue is simply untenable. If Grievant's performance was sufficiently deficient at or before the mid-year point, it warranted a mid-year review. It appears that the supervisor here did not meaningfully discuss this issue with Grievant, using the DOP Form EPA-2, just as he did not conduct an initial planning session to set performance expectations for Grievant using DOP Form EPA-1, or hold a timely meeting with Grievant to review his performance during the 2011 rating period.

While some failures to adhere to established procedure may generate nothing more than harmless error, the undersigned Administrative Law Judge finds that Respondent's failure to follow the Division of Personnel's policy on performance evaluation, as previously discussed, deprived Grievant of a reasonable opportunity to conform his performance to Director Oliverio's reasonable expectations. This is particularly true where, as here, Grievant was rated "meets expectations" on these same performance elements during the previous rating period by the same supervisor. *See* R Ex 1. Grievant was not given any meaningful opportunity to meet these subjective standards. Managers have considerable discretion in identifying goals and performance standards for their subordinate supervisors, but DOP Policy 17 contemplates these standards being adopted at the beginning of the evaluation cycle, not the end.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, Grievant has not met his burden. *Id*.

2. An employee grieving his evaluation must establish by a preponderance of the evidence that the evaluation is wrong because the evaluator abused his 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. *Gibson v. W. Va. Dep't of Health & Human Res*., Docket No. 2009-0700-DHHR (Jan. 19, 2010); *Wiley v. W. Va. Div. of Natural Res*., Docket No. 97-DNR-397 (Mar. 26, 1998). 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. *Spence v. Div. of Natural Res*., Docket No.

2008-1112-DOC (Jan. 30, 2009); *Kemper v. W. Va. Dep't of Transp*., Docket No. 91-DOH-325 (Mar. 2, 1992).

3. The "arbitrary and capricious" standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantial evidence or a rational basis. *See* Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). 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 & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985).

4. Grievant failed to establish by a preponderance of the evidence that his 2011 performance evaluation was the result of arbitrary and capricious decision making by his supervisor. *See Hurst v. W. Va. Dep't of Transp*., Docket No. 91-DOH-326 (Feb. 27, 1992).

5. Grievant established by a preponderance of the evidence that his 2011 performance evaluation was rendered without the benefit of a DOP Form EPA-1 defining his supervisor's performance expectations during that rating period, that no meaningful mid-year review was conducted or documented using a DOP Form EPA-2, or some other comparable record of counseling, to make Grievant aware of any purported deficiencies, and that these deviations from the policy on administering the performance appraisal process established by the West Virginia Division of Personnel resulted in lower ratings on his annual performance evaluation. *See McFadden v. W. Va. Dep't of Health &*

Human Res., Docket No. 94-HHR-428 (Feb. 17, 1995); *Maxey v. W. Va. Dep't of Health & Human Res*., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993).

Accordingly, this grievance is **GRANTED.** Respondent GSD is hereby **ORDERED** to rescind Grievant's 2011 evaluation and replace it with an evaluation which rates Grievant as "meets expectations" under the elements of "addresses conflicts and problem situations with patience and tact" within the category of "Customer Service," and "builds a team that reflects high morale, clear focus, and group identity" within the category of "Work Environment." Further, Respondent shall delete all comments associated with the "needs improvement" ratings Grievant received on these two elements, and recalculate Grievant's Overall Rating Score to reflect the numeric change resulting from these revisions. Otherwise, Grievant's 2011 evaluation scores and comments shall remain unchanged. This replacement evaluation will be signed by the supervisor and reviewing manager, or their successors. Finally, no reference to this grievance or its outcome will be contained or referenced in any of Grievant's personnel files maintained by Respondent or its agents.

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 appealing party must also provide the

Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: April 17, 2013

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LEWIS G. BREWER
Administrative Law Judge