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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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PAMELA WILEY

v.

Docket No. WCF-89-015

**WEST VIRGINIA WORKERS'
COMPENSATION FUND**

DECISION

Grievant Pamela Wiley, employed by Respondent West Virginia Workers' Compensation Fund (the Fund) as an Audit Clerk II, filed a grievance on October 31, 1988, alleging that her employee evaluation of November 19, 1988, was unfairly low.¹ Her grievance was denied at Levels I, II, and III on November 3, 1988, December 2, 1988, and January 9, 1989,² respectively. She filed her appeal at Level

¹Grievant requests that the evaluation be removed from her files and a new evaluation prepared "in an unbiased manner."

²A hearing was held at Level III on December 19, 1989. At Level IV Respondent requested that the testimony of Tom Sweeney at Level III be considered and Grievant objected on the grounds that she was unrepresented at Level III. The parties were advised that arguments on their positions included in their proposed findings of fact and conclusions of law would be considered. Neither party has addressed the issue in the proposals submitted. Since W.Va. Code §29-6A-6 provides that any transcript provided the hearing examiner shall be made part of the record and Grievant has provided

(Footnote Continued)

IV on December 8, 1988, and a hearing was held June 13, 1989.³ Proposed findings of fact and conclusions of law were received from the parties on and before July 14, 1989.

The evaluation grieved in this matter was for the evaluation period of October 1, 1987, to October 1, 1988, and was prepared by Diana Parsons, Chief of the Self-Insurance Section, who supervised Grievant from December 1987 to Grievant's transfer from the section in November 1988. The evaluation form provided for ratings in five categories, and Grievant was given the following points in the categories: Attendance--4; Quality/Quantity of Work--5; Interpersonal Relationships--4; Interest and Enthusiasm--4; and Problem Solving--4. Grievant's total points were 21. With division of those points by 5, the number of categories, Grievant was given an overall rating of 4.2, a "fair" rating.⁴ Ms. Parsons testified that she arrived at the points in each category by giving individual points in each of the subcategories, adding those points, and dividing by the number of

(Footnote Continued)

no argument as to why the testimony of Mr. Sweeney should be excluded therefrom and not considered, his testimony is considered.

³A hearing scheduled for February 9, 1989, was continued on the grounds that the parties thought they could resolve the matter. However, upon the parties' inability to do so, the hearing was rescheduled.

⁴The form provided for ratings of 1-2, unsatisfactory; 3-4, fair; 5-6, good; 7-8, very good; 9-10, exceptional.

subcategories in each category.⁵ Ms. Parsons also provided on the evaluation form comments regarding each rating category.

Since Grievant does not protest the rating of 4 on Attendance, only the remaining four categories are in issue. Moreover, Grievant stipulated that she had no problem with Ms. Parsons' system for formulating the ratings.

Ms. Parsons explained that Grievant's job involves auditing of three types--preaudits, postaudits, and bankruptcy audits. Preaudits, which are conducted before employers can become self-insured, determine whether the employers have paid excesses of premiums over claims paid or excesses of claims paid over premiums paid. Postaudits, conducted after employers have become self-insured, are to determine if the Fund has paid claims that were the liability of the employers, so that the Fund can recover from the employers moneys improperly paid. Finally, where self-insured employers have filed for bankruptcy, audits are also conducted. Ms. Parsons testified that she was very

⁵Submitted into the record was a copy of Grievant's evaluation wherein Ms. Parsons had supplied the points she rated Grievant in each subcategory (Respondent's Exhibit 2). While Grievant's evaluation did not include the points Grievant was rated in the subcategories and Respondent's Exhibit 2 was prepared for the grievance hearings, Ms. Parsons testified that she prepared that exhibit by copying the numbers from her notes made at the time she evaluated Grievant.

knowledgeable of Grievant's job since she had done the same job prior to becoming a manager.

Ms. Parsons gave points of 7 on "Completeness" and "Neatness" in the category of "Quality/Quantity of Work," and Grievant accepts those ratings. However, Ms. Parsons gave ratings of 6 on the subcategory of "Accuracy," 4's on "Timeliness" and "Volume," and 2's on "Follows instructions" and "Uses time wisely." She commented on the evaluation,

Pam's work is generally complete, neat & accurate, but [she] needs to make better use of her time. She is resistant to change & will spend much of her time justifying why something should be done the way she "always did it" and has refused to follow instructions.

Regarding the category of "Interpersonal Relationships," Ms. Parsons rated Grievant with a 2 in the subcategory of "Responsive to Management," and a 3 in "Self-controlled in stressful situations," and Grievant was given 6's in "Cooperative and helpful to other employees" and "Cooperative and helpful to public." The comments were,

Pam does not often show a favorable response to management. She is quick to criticize to her co-workers and outside personnel the decisions or methods of management within the Fund. She does cooperate with other employees and is helpful to the public.

In the category of "Interest and Enthusiasm" Ms. Parsons rated Grievant with a 7 on the subcategory of "Appropriate appearance," which Grievant does not protest. However, Grievant was rated with 3's in the other two subcategories, "Demonstrates a desire for additional job knowledge" and "Willing to accept new responsibilities." The comments were in pertinent part,

Pam does not demonstrate a desire to obtain additional job knowledge. She does often comment that she feels she is working outside her classification. Any additional responsibility would probably compound that attitude....

In the final category, "Problem Solving," Grievant was given a 7 in the subcategory of "Identifies potential problems," which she does not protest, a 4 in the subcategory of "Obtains and analyzes facts," and 3's in the subcategories of "Shares creative ideas and solutions with management," "Initiates new procedures," and "Applies sound judgment." The comments were,

Pam does tend to identify problems & will share them, but doesn't share solutions. I don't feel she uses good judgment when she calls service companies with advance knowledge or criticism of the Fund's actions.

Ms. Parsons testified that Grievant has a problem using her time wisely. She stated that Grievant does not make a habit of putting in eight hours of work a day, as required, and that Grievant's failure to put in eight hours of work affects the timeliness of her work and her productivity. She testified that Grievant comes in tardy, reads the paper during the day, makes personal phone calls, and tends her plants. Ms. Parsons testified that Grievant has 15 to 20 plants in her work area and that she estimated that Grievant spent two hours per week watering, trimming, and otherwise caring for them. As an example of Grievant's using worktime on private pursuits, she stated that during the presidential campaign Grievant had spent time during work hours calling other volunteers.

Ms. Parsons stated that a slight backlog of Grievant's work that existed at the beginning of the evaluation period grew during that period. She stated that, while there was no backlog on preaudits, Grievant had not performed a bankruptcy audit since September 1987 and there was an ongoing backlog of postaudits. Finally, Ms. Parsons testified that during the evaluation period Grievant did eleven audits while she herself, in addition to her supervisory responsibilities, did ten.

Ms. Parsons also testified that she scored Grievant low on "Following instructions,"⁶ and gave the following example: As a time-saving technique, she suggested that Grievant use a method of sorting, grouping the medical bills, the disability checks, the pensions, etc. She stated Grievant failed to follow the suggestion. Further, while Grievant was required to file weekly reports, she completed only three. She said Grievant also refused to fill out annual leave slips for the time she spent as union steward.⁷ Ms. Parsons testified that she had written a number of memos

⁶While "Follows instructions" is a subcategory of the category "Quality/Quantity of Work," it is apparent from Ms. Parsons' testimony that she also considered whether Grievant followed instructions when rating her on "Interpersonal Relationships."

⁷Ms. Parsons stated that the slips were not to be used to dock Grievant annual leave but merely to show how much time Grievant was spending on her union activity.

to Grievant with requests for responses and in most instances she had received none.⁸

Ms. Parsons explained the low marks she gave Grievant in the subcategory of "Responsive to management" of the category of "Interpersonal Relationships" as follows:

To me being responsive to management means that oftentimes you may not necessarily agree with your manager or your employer or your agency. But to be responsive to management means that, whatever the agency desires you to do, that is what you should do as an employee. I certainly think we all have the right to express our opinions if we disagree but to criticize the Fund or the management's practices and policies I do not find as being a favorable response to management.

She also stated,

I think that when you're criticizing your manager or your employer you cannot be said to be responsive to management, if that's the position that you take. Think of the Vietnam veterans, the antiwar protesters. They certainly had a right to feel that way but they would not be considered responsive to the United States army or morale of the country if they are in disagreement with what the country is doing.

She also stated with regard to her comment that Grievant is quick to criticize her coworkers, "Pam is a very opinionated person and often her opinions may differ with the Fund and its practices. Pam is real [sic] eager to criticize both people and practice." When asked if

⁸She stated that she particularly remembered one instance when she had given Grievant a memo prioritizing the audits, setting a time schedule for projected completion, and asking Grievant to let her know if she had a problem with the projections. It is noted that no response to the memo would be necessary if Grievant had no problem with the projections.

Grievant's criticism has adversely affected the Fund, she replied,

It's my understanding that an evaluation does more than determine how criticism affects the Fund. It's a matter of attitude. It's not good for morale. People should strike for a positive attitude about their work even if they may disagree.

She also explained the rating on "Interest and Enthusiasm." Regarding the subcategories, "Demonstrates a desire for additional job knowledge" and "Willing to accept new responsibilities," Ms. Parsons stated that Grievant did not request training but instead expressed that she may be working out of classification and that learning something new might add duties outside her job classification. She stated that she had suggested to Grievant that she use an electronic system for performing preaudits rather than the manual way Grievant had used of extracting the information from computer printouts and handwritten entry books. She testified that the electronic system had been in place for two or three years and, although it would save Grievant much time to use it, Grievant refused to on the grounds that the system was not accurate. Ms. Parsons stated that after Grievant completed the audits she paralleled them on the computer and found no errors with the electronic system. She commented that it did allow her to find errors in the manual system.

Regarding the rating on "Problem Solving," Ms. Parsons testified consistently with her comments that Grievant, while identifying problems, does not share solutions or

suggestions. She also elaborated on the comment that Grievant had not shown good judgment when calling service companies with advance knowledge. She testified that the practice had been that when an employer elected to become self-insured an audit would determine whether it had excess deposits with its regular subscriber account, and, if so, the Fund would reimburse such moneys; that when a postaudit showed the employer owed the Fund, the employer would be billed. She stated that the new procedure was to hold the excess deposits revealed on preaudit until a postaudit was performed and only if no money was found on postaudit to be owed would the employer's excess deposit be released. She stated that Grievant told an employer's service company of the change in policy before it was announced and the action showed Grievant's poor judgment since she had no authority to make the announcement.

Grievant, like Ms. Parsons, testified at length. She stated that she has been employed by Respondent since 1975 and has had the position of Audit Clerk and the duties described since 1981. She stated that the last administration initiated policies or suggested changes in the way the Fund had operated for a number of years that were contrary to the rules and regulations. She elaborated, stating that they formulated a change in the way liabilities were assessed; that she told her supervisors, including Ms. Parsons and Mr. Tom Sweeney, Director of the Fund, that the change was not legal and explained to them how the change violated

certain rules and regulations. Meeting resistance, she followed the requirements of the changed method for three months, after which it was determined that the procedure was improper, and the former method was reinstituted. She testified, "We went back to the way we originally did it and every bit of work I had done for a three-month period of time had to be redone the way I would have done it originally." She testified that she is not resistant to constructive criticism and stated that her resistance to change is not personal but she feels it is her duty to point out problems when problems exist. She stated that when she is told to do something, she does it.

In disagreement with Ms. Parsons' definition of responsiveness to management, Grievant testified,

I feel that an employee has a responsibility to management as a whole and that, if management is making decisions that could possibly harm the stability of the organization or the agency as a whole, it is our duty to call it to someone's attention. The former administration was a stickler for the chain of command....Parsons felt that if she was told to do something, she would do it. I felt compelled to show where the errors lie or what we needed to do to correct a situation that was harming our ability to collect on these audits and our overall financial stability.

Later she explained further:

I have criticized the method followed in doing something but it's only because I know what I'm doing, and have tried to explain. The past administration was especially sensitive to criticism. They looked at employees as serfs and they were royalty. You were not allowed independent thought. I was told by Parsons one time that I was not paid to think.

She complained that Ms. Parsons was a "yes person." She stated that the management was not informed and that she was not being nonresponsive; she was being concerned.

Grievant testified that she was very helpful to the public, that she gives companies data they need. She stated that the rating on "Accuracy" of 6 is too low, for she is a stickler for accuracy, explaining that if something done wrong is relied on for years, the losses are great and the damage perhaps irremediable because legal action may be barred by statutes of limitations. While Grievant admitted she could do audits faster, she testified that, if audits are done properly, further audits are not as necessary.

She asserted that she was not required to submit leave slips for time spent as a union steward preparing for grievances and that conferences and grievance hearings are not chargeable. She also testified that she goes out of her way to do anything for the public that is reasonable and she is able to do. She considered herself self-controlled in stressful situations, that she handles a volume of work under "less than favorable circumstances."

Grievant's testimony, directly counter to Ms. Parsons' regarding further training, was that she asked Parsons for training on the ESS-trax and that she requested training in word processing, ESS-letters, also. Grievant conceded that she was not willing to accept new responsibilities when she already had more than she could complete within the deadlines. She stated that she is a stickler on research and,

because she will not put her name on erroneous material, she does research that Ms. Parsons does not do. She stated that she does share creative ideas, but the response has been that when she shares an idea, "either it's no good or it's not my idea."

Grievant also testified that she has used all along the method of sorting testified to by Ms. Parsons. She also denied that the method of not releasing the moneys due an employer on preaudit until the postaudit was completed was a new method, declaring that the Fund had never released the money until the postaudit was finished. She submitted a letter from the Director of the Accounting Division of the Fund from 1987 that showed the procedure of not releasing the moneys to the employers until the postaudits were completed was followed at that time.

She also testified in response to Ms. Parsons' testimony on the number of audits each performed, stating that, while Parsons may have done ten audits, they probably involved few records. She stated that she knew Parsons had done small audits while her own audits often involved extensive records. She also stated that she knew that, where Parsons had done some small audits involving thirteen items, nine were in error.

Regarding her use of time, she stated that she does read the newspaper occasionally, but that she does so while waiting for the computer to provide data, which can take fifteen minutes, and that if she has busy work to do, she

does it. She stated she has only nine plants in her office, and denied she makes an excess of phone calls.

Finally, she testified at length regarding her refusal to use the electronic system Ms. Parsons supported. She stated that the program was not used during the two years but was rather experimental and defective. She stated she had had input on the program when it was created and that old records in ledgers four feet long and seven inches thick had to be transferred to the computer, requiring recopying of all the information. The records were never verified and many errors were made, notably that the decimal points were misplaced, making pennies become dollars. Because of the unreliability of the program she continued to use the manual program. She denied the statement of Ms. Parsons that the manual job took three months, declaring that she could do an audit thereby in three weeks. She testified that she rechecked the electronic program this year and found it still defective.

Betty Caldwell, employed by the Employer Service Corporation, testified that she is familiar with the procedures of the Fund, for Employer Service Corporation represents its client employers in matters of the Fund. She corroborated Grievant's testimony in saying that at least for the last eight years it has been the practice of the Fund not to release moneys due employers on preaudit until a postaudit is completed.

Mr. Sweeney testified at Level III regarding Ms. Parsons, "She is very competent, very able, one of my more intelligent supervisors. I didn't see anything indicative either in her evaluation or my discussions with her that provided a basis for me to overrule her evaluation."

This record reveals that Grievant and her supervisor Ms. Parsons, neither of whom were impartial witnesses, have highly conflicting views of how the work should be done and how well Grievant does it. It is important that Grievant's testimony that it had been the practice of the Fund not to release moneys to employers on preaudit until postaudits were complete was corroborated by the letter from the Fund's Director of the Accounting Division and by the testimony of Ms. Caldwell, who, unlike Ms. Parsons and Grievant, had no vested interest in the outcome of this matter and therefore was a credible witness. That Grievant's version was well corroborated lends credence to her testimony otherwise and tends both to lessen Ms. Parsons' credibility and to lend support to Grievant's view that Ms. Parsons simply was not as knowledgeable as Grievant of what was required for Grievant to do her job well. For this reason, Grievant is accepted as being more expert on the workings of the Fund and also her testimony is accepted over Ms. Parsons' where their testimony directly conflicts and the record supplies no otherwise sound basis for accepting one witness's testimony over the other's. The testimony is analyzed with this factor in mind.

While Ms. Parsons rated Grievant at 6 for "Accuracy," her testimony was simply that Grievant was accurate. Grievant's testimony that the rating was too low, for she is a stickler for accuracy, was therefore uncontradicted and is accepted. Contrarily, Grievant's testimony did not directly contradict Ms. Parsons' support for her conclusion that Grievant did fail to use her time wisely. Grievant did not deny she watered plants, read the newspapers and made personal calls, but only argued that she did not spend an inordinate amount of time on these pursuits. She did not deny the truth of Ms. Parsons' statement that she had called volunteers for the presidential campaign during the workday or that the backlog grew. Accordingly, Grievant did not establish any abuse of Ms. Parsons' discretion in rating her low on "Uses time wisely." Moreover, Grievant's testimony does not establish an abuse of Ms. Parsons' discretion in rating her at 4 in "Volume" and "Timeliness." While Grievant may be correct in her surmise that Ms. Parsons completed audits requiring less work than the audits Grievant performed, since her evidence did not establish that she was unable to complete more audits, the "Fair" rating on "Volume" and "Timeliness" will not be disturbed.

Grievant's testimony does establish an abuse of discretion, however, in the ratings of 2 in "Follows instructions" of the "Quality/Quantity of Work" category and the "Responsive to management" in "Interpersonal Relationships," which were clearly related in this case. While Grievant did not

refute Ms. Parsons' general statements regarding her failure to respond to memos and failing to complete weekly work reports,⁹ she directly contradicted Ms. Parsons' that she failed to follow the suggested method of sorting since she had been doing it all along.

Further, the only two examples regarding Grievant's alleged resistance to change were her alleged failure to use the sorting method, which was refuted, and her refusal to use the electronic system for preaudits. Due to Grievant's greater expertise both generally of her job and of the electronic system, her failure to use the system is well justified on this record and does not support Ms. Parsons' finding her resistant to change.

It is clear from this record that Grievant was rated low on "Responsive to management" because Ms. Parsons' definition thereof differed considerably from Grievant's. At best, Grievant could not have known what actions would be considered unresponsive to management prior to the evaluation; at worst, Ms. Parsons' definition of "responsiveness" is too limited to promote a high caliber of work. It cannot be accepted that mute acceptance of policies of management is required in order to be responsive to management and

⁹The dispute about Grievant's failure to submit leave slips apparently resulted from confusion as to the use of the slips. Ms. Parsons testified that the slips were to be used just to keep tab of the times Grievant was doing union work while Grievant's testimony tends to indicate that she thought she could be docked for annual leave.

Grievant's view that the needs of the agency must be paramount to the views of supervisors who may not understand the effects of their policies is not unreasonable.¹⁰

While Grievant did not specifically accede to Ms. Parsons' ratings of 6's in "Cooperative and helpful to other employees" and "Cooperative and helpful to public," the record does not establish any abuse of discretion regarding those ratings. However, Grievant did directly refute the rating of 3 given her on "Self-controlled in stressful situations," which Ms. Parsons neither explained nor justified in her testimony.

The testimony was directly contradictory also regarding whether Grievant "Demonstrates a desire for additional job knowledge," for Grievant testified she wanted further training on the ESS-trax (and also ESS-letters), while Ms. Parsons testified she refused further training. Also, as discussed above, Grievant's refusal to use the electronic system was justified.

The low rating on "Willing to accept new responsibilities" has not been shown to be unjustified, however. Grievant's written response to the evaluation of October 31, 1988, supports Ms. Parsons' statements that Grievant was sensitive to the possibility she would be working out of

¹⁰It must be noted that there was no indication that Grievant was insubordinate and, if so, that issue would have been covered by the subcategory of "Follows instructions" rather than "Responsive to management."

classification if she took on new responsibilities, for it states, "I do feel that several functions of my position are already outside the scope of my classification and have requested a job audit for this determination." While of course an employee cannot be expected to work outside his or her classification, without any evidence supporting that by taking on further responsibility Grievant would be working out of classification, there is no showing of abuse of discretion. Moreover, in her testimony Grievant conceded that she has been unwilling to take on new responsibilities, although she considered that unwillingness justified.

The rating of 4 on the category "Problem Solving" cannot be left undisturbed, although there was no showing of abuse of discretion regarding the first three subcategories thereof. While Grievant did not concede the propriety of the 4 on the subcategory, "Obtains and analyzes fact," or the 3 on "Initiates new procedures," no abuse of discretion in being so rated has been shown. Further, Grievant's simple statement that she does share solutions but is not given credit for them is not strong enough evidence to show an abuse of discretion with regard to that rating. However, the rating of 3 in the final subcategory, "Applies sound judgment," cannot be accepted because the evidence readily refutes Ms. Parsons' opinion that Grievant improperly announced a change in procedure, for, as found supra, the evidence establishes no change occurred.

In addition to the findings of fact contained in the foregoing discussion, the following conclusions of law are appropriate:

Conclusions of Law

1. Grievant established by a preponderance of the evidence that Ms. Parsons abused her discretion in rating Grievant in the following subcategories, here listed in their categories, when evaluating her for the time period October 1, 1987, to October 1, 1988:

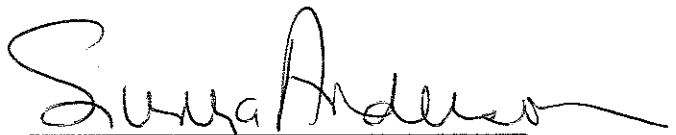
- Quality/Quantity of Work
- Accuracy
- Follows instructions
- Interpersonal Relationships
- Responsive to management
- Self-controlled in stressful situations
- Interest and Enthusiasm
- Demonstrates a desire for additional job knowledge
- Problem Solving
- Applies sound judgement.

Since Ms. Parsons abused her discretion in evaluating Grievant in the listed subcategories, her ratings of Grievant in the listed categories also may have involved abuse of discretion.

2. Where an abuse of discretion in evaluating an employee has been established, the evaluation may be ordered removed from the employee's personnel file. See Kinder v. Berkeley Cy. Bd. of Ed., Docket No. 02-87-199 (June 16, 1988); Thomas v. Greenbrier Cy. Bd. of Ed. 13-87-313-4 (Feb. 22, 1988).

The grievance is accordingly **GRANTED**. Respondent is hereby **ORDERED** to remove from Grievant's personnel file her evaluation for October 1, 1987, to October 1, 1988. If the parties are able to agree on an evaluation in replacement of the expunged evaluation based on points higher than those of the expunged evaluation in the subcategories specified in Conclusion of Law 1, that evaluation should be placed in Grievant's personnel file.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.


SUNYA ANDERSON
HEARING EXAMINER

Dated: July 31, 1989