

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**JUDY MATTHEWS,  
Grievant,**

**v.**

**Docket No. 2016-1657-DHHR**

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

**DECISION**

Grievant, Judy Matthews, filed this action on May 18, 2016, in which she asserts that an "EPA3 was ordered to be re-done to reflect her actual job duties for the rating period, but was done by a person with no accurate knowledge of her job performance." Grievant seeks to be made whole in every way including accurate evaluation. This grievance was denied at Level One by Decision dated June 30, 2016. A Level Two mediation session was conducted on October 12, 2016. The grievance was placed in abeyance until November 14, 2016. This matter was set for a Level Three hearing on April 28, 2017, before the undersigned; however, the parties requested the case be submitted on the lower level record and proposals. This request was granted and the parties were given until June 26, 2017, to provide fact/law proposals. Grievant appeared by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on June 27, 2017.

## **Synopsis**

Grievant filed a prior grievance challenging her Employee Performance Evaluation dated September 24, 2014. The undersigned granted that grievance and ordered that evaluation be rescinded and replaced with an evaluation which rates Grievant for her overall job performance throughout the entire rating period. This revised evaluation was done by Respondent's Chief Financial Officer familiar with the expectations for the position Grievant was working in for the reporting period. In the instant matter, Grievant failed to prove by a preponderance of the evidence that her evaluation was a result of an abuse of discretion or was the result of some misinterpretation or misapplication of policies or rules governing the evaluation process.

The following Findings of Fact are base upon the record of this case.

### **Findings of Fact**

1. Grievant has been employed for thirty years at the William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources.
2. On May 1, 2014, Grievant was upgraded from an Accounting Tech 3 to the position of Interim Business Manager which involved the performance of additional duties.
3. On September 24, 2014, Robert Kimble, Chief Financial Officer, issued Grievant an annual Employee Performance Appraisal (EPA3) for the rating period of September 1, 2013, to August 31, 2014. Mr. Kimble had been Grievant's immediate supervisor after her upgrade to Interim Business Manager.

4. Grievant received no evaluation on the supervisory duties she performed during the five months that she was working as Interim Business Manager.

5. The undersigned granted Grievant's previous challenge to this evaluation and ordered that the evaluation reflect the entire rating period, not just a partial amount of that period.

6. Grievant currently works as an Accounting Technician 3. During the rating period in question, Grievant worked as the Interim Billing Manager for a period of approximately six months. Grievant's prior evaluation failed to take into consideration the supervisory duties involved with serving as Interim Billing Manager.

7. The revised Employee Performance Appraisal rated Grievant on those additional duties performed as Interim Billing Manager.

8. Robert Kimble, former Chief Financial Officer for Sharpe Hospital, issued Grievant's original evaluation dated September 24, 2014. Mr. Kimble is no longer employed at Sharpe Hospital, so Brian Gustke, the new Chief Financial Officer, issued the revised evaluation.

9. Respondent assigned Mr. Gustke the task of completing a revised evaluation because of his access to Grievant's personnel file and previous evaluations. Mr. Gustke was also familiar with the expectations for the position Grievant was working in for the time period in question.

10. 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 future performance planning. See ¶ II.C.2.e. of Division of Personnel Policy No. DOP-17.

## 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 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 & 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. *Bowman v. Dep't of Health & Human Res.*, Docket No. 2011-0422-CONS (Mar. 6, 2012); *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).

Because the former Chief Financial Officer, Mr. Kimble, was no longer employed at Sharpe Hospital, it was reasonable for Respondent to ask Mr. Gustke, the current Chief Financial Officer, to conduct the revised evaluation. Mr. Gustke had access to Grievant's personnel file and previous evaluations. In addition, Mr. Gustke was familiar with the expectations for the position Grievant was working in for the time period in question.

Grievant's revised evaluation performance rating increased slightly, and Grievant received a rating of "Exceeds Expectations" on six additional areas. The record reflects that when Grievant was asked what employee at Sharpe Hospital would have sufficient knowledge of her performance in order to issue her evaluation for the time period in question, Grievant responded that no one would have sufficient knowledge. The Level

One Grievance Evaluator was correct in noting that “[J]ust because Grievant did not like the feedback she received on the EPA-3, does not mean it was inappropriate or unreasonable.” The limited record of this case failed to demonstrate that Grievant’s evaluation was a result of an abuse of discretion or was the result of a misapplication of policies or rules governing the evaluation process.

The following Conclusions of Law support the decision reached.

### **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. 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. *Bowman v. Dep’t of Health & Human Res.*, Docket No. 2011-0422-CONS (Mar. 6, 2012); *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. 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).

4. Grievant failed to prove by a preponderance of the evidence that her revised evaluation was a result of an abuse of discretion or the result of a misapplication of established policies or rules governing the evaluation process.

Accordingly, this 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 *a/so* 156 C.S.R. 1 § 6.20 (2008).

**Date: July 11, 2017**

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**Ronald L. Reece**  
**Administrative Law Judge**