THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CINDY S. SCOTT,
Grievant,

v.

Docket No. 2019-0508-WVU

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Cindy S. Scott, employed by West Virginia University as a Senior Investigator, filed this action on October 19, 2018, in which she alleged the improper application of WVU-HR-9 (Disciplinary Policy) resulted in her disqualification for a "market rate" pay increase. Grievant further asserted that reference to the letter of warning on her performance evaluation is a permanent record of disciplinary action contrary to WVU-HR-9 which requires disciplinary documentation to be removed from the employee's file after twelve months of continuous employment. For relief, Grievant requests the removal of the letter of warning from her personnel file, the reference of the letter of warning be deleted from her 2017 performance evaluation, and a three percent (3%) pay increase.

Respondent filed a Motion to Dismiss and asserted that the grievance was untimely, in that the warning letter was issued on June 4, 2018, and the grievance was not filed until October 19, 2018. Sue Keller, West Virginia University's Hearing Examiner, issued a Decision ruling that the grievance was not timely filed. A Level Two mediation session was conducted on March 22, 2019. The matter was placed in

abeyance to allow the parties additional time to explore a possible settlement. Grievant perfected her appeal to Level Three on April 29, 2019. The undersigned notified the parties that the Motion to Dismiss would be taken under advisement and an evidentiary hearing would be scheduled. A Level Three evidentiary hearing was conducted before the undersigned on September 13, 2019, at the Westover office of the Grievance Board. Grievant appeared *pro se*. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on October 18, 2019.

Synopsis

Grievant was employed as a Senior Investigator, under an annual contract, at the time this grievance was filed. Grievant seeks to have a reference to a letter of warning redacted from her 2017 performance evaluation. Grievant seeks this removal on the allegation that to not do so by Respondent would be arbitrary and capricious. Grievant also seeks removal of this reference on the theory that it might damage her future employment opportunities. The record did not support a finding that Respondent's actions were arbitrary and capricious. Any type of relief regarding potential future employment opportunities would be speculative and would merely be an advisory opinion from the undersigned. This grievance is denied.

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

Findings of Fact

1. Grievant was employed by West Virginia University as a Senior Investigator in the Office of Equity Assurance in the Division of Diversity, Equity and Inclusion at the time she filed this grievance.

2. Grievant is employed pursuant to an annual contract and her position is non-classified.

3. Grievant filed the instant case on October 19, 2018, after receipt of a June 4, 2018, Letter of Warning. The letter of warning was active for one year and disqualified her from receiving a "market rate" pay increase.

4. The Letter of Warning was removed from Grievant's personnel file after one year.

5. West Virginia University's annual performance evaluations are confidential. Performance evaluations cannot be changed or altered after filed.

6. West Virginia University's HR-9 Disciplinary Policy states that only "classified employees at WVU are covered by these disciplinary policies." Grievant is a non-classified employee.

7. West Virginia University's FY 2019 Compensation Program states that for employees to be eligible for merit pay raises, "Employees must not be on active discipline (i.e., at second letter of warning or higher)."

8. Grievant's position is non-classified and is not subject to progressive discipline pursuant to West Virginia University's HR-9 Disciplinary Policy and would not be administered first or second letters of warning.

9. The fact that Grievant had a warning letter in her file at the time merit raises were administered precluded Grievant from consideration of a potential raise.

10. The record established that it was the warning letter, and not any language in Grievant's 2017 performance evaluation, that precluded Grievant from receiving a merit raise.

11. James Goins, Director of Equity Assurance and the Title IX Coordinator in the Division of Diversity, Equity and Inclusion, indicated that in February 2019 Grievant received a promotion to Assistant Director of Prevention Education and a raise in salary.

12. Grievant argues that the language in her 2017 performance evaluation relating to a letter of warning for a performance issue is arbitrary and capricious and may have a prejudicial effect on her future employment matters.

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 Bd. 156 C.S.R. 1 § 3 (2018); *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).

Grievant argues that it was arbitrary and capricious for Respondent to not rescind or delete the language in her 2017 Performance Evaluation that she had received a letter of warning concerning a performance issue. "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 Resources*, 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." *Id.* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

The record established that West Virginia University does not rescind or delete language of an annual performance evaluation. Nevertheless, it is undisputed that the above referenced Letter of Warning was removed from Grievant's personnel file after one year. Grievant has been treated in the same fashion as any other employee. The record also established that Grievant received a raise and promotion in 2019 which would tend to indicate that she was not prejudiced by the language in the 2017 Performance Evaluation. Given the limited record of this case, the undersigned cannot make a finding that Respondent's actions were arbitrary and capricious.

Grievant also argues that the language in her 2017 Performance Evaluation that she had received a letter of warning concerning a performance issue could prejudice her in future employment matters. In instances where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue

advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd.of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002). Grievant's 2017 Performance evaluation was a one-year evalution for the year 2017, any consideration on whether or not that had any bearing or relevance to employment decisions regarding Grievant would be based on speculation given the limited record. The record does establish that in February 2019, Grievant did receive a raise and a promotion to Assistant Director of Prevention Education. The relief sought based upon prospective damage to Grievant's employment in the future is unavailable and any ruling on the speculative damage done by the reference in the evaluation would merely be an advisory opinion.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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).

2. "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 Resources*, 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." *Id.* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

3. Respondent's failure to rescind or alter the language of Grievant's annual performance evaluation cannot be viewed as arbitrary and capricious based upon the record of this case.

4. In instances where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd.of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

5. The relief sought based upon prospective damage to Grievant employment in the future is unavailable and any ruling on the speculative damage done by the reference in the evaluation would merely be an advisory opinion.

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 also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

Date: November 20, 2019

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Ronald L. Reece
Administrative Law Judge