THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL URBAN,
Grievant,

v. **Docket No. 2019-0570-DOA**

GENERAL SERVICES DIVISION,
Respondent.

DECISION

Grievant, Michael Urban, is employed by Respondent, General Services Division. On November 2, 2018, Grievant filed this grievance against Respondent stating, "Employee performance appraisal incorrect." For relief, Grievant seeks "[t]o be made whole in every way including revision of EPA3."

Following the November 30, 2018 level one hearing, a level one decision was rendered on December 3, 2018, denying the grievance. Grievant appealed to level two on December 5, 2018. Following mediation, Grievant appealed to level three of the grievance process on March 29, 2019. A level three hearing was held on July 11, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on August 8, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Facilities Equipment Maintenance Technician. Grievant protests his employee performance appraisal. Grievant had attended webinar trainings and held a licensure he asserts should have entitled him to

being rated as exceeds expectations in several categories. Grievant failed to prove Respondent abused its discretion in rating Grievant as only meeting expectations in his employee performance appraisal. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Facilities Equipment Maintenance Technician ("FEMT") and has been so employed for ten years.

2. On November 7, 2017, Grievant's supervisor, Joey Campbell, discussed with Grievant and provided a copy to Grievant of his Form EPA-1, which communicated the objectives to be accomplished during the rating period. Of relevance was the expectation that Grievant complete two "training classes selected by supervisor."

3. On October 25, 2018, Mr. Campbell, completed Grievant's annual Employee Performance Appraisal ("EPA"). Mr. Campbell rated Grievant overall as "Meets Expectations" with a score of 2.04. Mr. Campbell rated Grievant as "Meets Expectations" in twenty-two categories and as "Exceeds Expectations" in one category.

4. Mr. Campbell rated Grievant as "Exceeds Expectations" in the category "performs work according to current guidelines and directives" because Grievant maintains a commercial driver's license he uses for the benefit of Respondent even though Grievant is not required to maintain a commercial driver's license for his position.

5. Although the evaluation specifically states that the employee certification of the document is simply an acknowledgement of the review "and does not imply my

agreement or my disagreement with the form's contents" Grievant refused to sign the evaluation and failed to complete the "Employee Response" section of the document to state the nature of his disagreement with the appraisal.

6. Grievant regularly completes webinars offered by RSES, a "non-profit educational association dedicated to providing opportunities for enhanced technical competence by offering comprehensive, cutting-edge education and certification to its member and the HVACR Industry."

7. During the rating period, Grievant attended ten webinars.

8. Grievant was not directed to attend these webinars by Respondent and Grievant had been told by both his direct and next-level supervisors consistently in the past that the training would not count towards his EPA.

9. Grievant holds an HVAC Technician license, which is not a requirement to hold his position. Grievant obtained the license prior to the rating period.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *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) . . . 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*. *Parsons v. Gen. Serv. Div*., Docket No. 2012-0867-DOA (Apr. 17, 2013).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 Res.*, Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

Grievant argues Respondent's refusal to acknowledge in Grievant's EPA Grievant's webinar training and utilization of the acquired skills in his work assignments was arbitrary and capricious. Respondent asserts Grievant failed to prove the EPA was

arbitrary and capricious as Grievant had been previously told that the training would not be taken into consideration on his EPAs and Grievant failed to otherwise present sufficient evidence to prove his work performance should have been rated higher.

Specifically, Grievant argues in his PFFCL that the following categories should have been rated as "Exceeds Expectations": "willingly accepts a variety of responsibilities," "adapts to new situations in a positive manner," "displays openness to learning and applying new skills," "works well with others to achieve organization's goals," "is resourceful and generally seeks work process improvements," "work output matches expectations established," "employee completes all assignments," and "work results satisfy organization's goals." Grievant provided no specific argument related to each category, instead asserting only that Respondent offered no explanation why Grievant's possession of a CDL would raise his score on "performs work according to current guidelines and directives" but that his other licenses and training did not raise his score on any other category.

As proof of his assertions, Grievant provided only proof of his webinar training, copies of his licenses and a certification, and his own testimony. Of the two licenses and one certification Grievant entered into evidence, the electrician license was acquired after the rating period and there was no explanation of how the "esco institute" "universal technician" certification relates to Grievant's job duties. Therefore, only Grievant's HVAC Technician license is relevant. However, Grievant obtained the license prior to the rating period so it cannot be considered as "displays openness to learning and applying new skills." It is unclear how the possession of the license applies to any of the categories Grievant asserts should have been higher.

Grievant did not offer specific testimony to explain how his webinar training and licensure should result in an "Exeeds Expectations" in any of the categories listed although Grievant's webinar training would appear to apply to the category "displays openness to learning and applying new skills." Grievant asserts that the webinars satisfied and exceeded his EPA-1 expectation to complete two training classes. However, the EPA-1 specifically stated the training classes would be selected by Grievant's supervisor. Grievant's supervisor did not instruct Grievant to attend the webinars or tell Grievant that the webinars would count towards this requirement. Instead, Grievant's supervisor had selected trainings through the Division of Personnel. Therefore, the webinars clearly did not satisfy the training requirement in the EPA-1.

Further, Grievant had been consistently told that the webinar training would not count towards his EPA and "didn't mean anything." While Grievant's duties clearly include HVAC work, and the webinars are offered by an HVAC training company, the specific topics must be connected to the actual work Grievant is expected to perform in order to be considered regarding evaluation of his work objectives. This is particularly important in this case when both Grievant's direct and next-level supervisors had told him the training would not be considered. Beyond stating that his training helped him get a specific piece of equipment "running several times," Grievant provided no specific evidence that the webinars taught new skills relevant to his duties or how he applied those new skills to his work. While Grievant clearly values this training, Grievant's employer clearly does not. Grievant presented no evidence why this was more than a difference of opinion. Therefore, Grievant failed to prove the decision not to count the webinars was unreasonable.

Grievant provided very little testimony regarding his actual work performance as would relate to the other rating categories. Grievant testified that he had periodically filled in for an HVAC Technician who had been off on sick leave for "three to four years." Although Grievant testified that the FEMT was more of a "helper" to the HVAC technicians, the FEMT classification does include the maintenance and repair of heating and cooling equipment. Without specific examples, Grievant cannot prove that the work he did exceeded the expectations of an FEMT's duties.

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 his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "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) . . . 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*. *Parsons v. Gen. Serv. Div*., Docket No. 2012-0867-DOA (Apr. 17, 2013).

3. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. Grievant failed to prove Respondent abused its discretion in rating Grievant as only meeting expectations in his employee performance appraisal.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 16, 2019

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Billie Thacker Catlett
Chief Administrative Law Judge