

STEVE J. CUMMINGS, .

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Grievant, .

.

v. . Docket No. 95-DOH-104

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION, DIVISION OF .

HIGHWAYS, . .

Respondent. .

DECISION

Steve J. Cummings (Grievant) initiated grievances on April 7 and June 28, 1994, challenging employee evaluations he received from his immediate supervisor, Donald L. Williams, on March 3 and June 10, 1994, respectively. These grievances were denied at Levels I and II and appealed to Level III where the grievances were consolidated at a hearing on January 10, 1995. On March 6, 1995, Fred VanKirk, Division of Highways (DOH) Commissioner issued a decision denying the consolidated grievance at Level III. Grievant appealed to Level IV on March 13, 1995, and after a series of continuances, each of which was granted for good cause, evidentiary hearings were conducted in the DOH District Seven office in Weston, West Virginia, on May 18 and July 19, 1995. Thereafter, the parties filed timely post-hearing submissions, and this matter became mature for decision on September 12, 1995.

BACKGROUND

Donald Williams is the Office Planning and Design Engineer for DOH District Seven. Grievant is employed in District Seven as a NICET (National Institute for Certification in Engineering Technologies) Enrollee II, working in District Seven's Design Department. As Grievant's immediate supervisor, Mr. Williams rendered an annual Department of

Transportation Employee Evaluation on Grievant on March 1, 1994, covering calendar year 1993. The evaluation form contains eight separate categories in which all employees (See footnote 1) are rated, as well as an overall evaluation. Ratings in each category are limited to three choices: (1) Exceeds Expectations; (2) Satisfactory; or (3) Needs Improvement. Grievant received "Satisfactory" ratings in two areas, Safety and Workplace Presentability. He was given a "Needs Improvement" rating covering each of the remaining six categories, as well as his overall rating. Comments are required to support a "needs improvement" rating and were stated on the evaluation form as follows:

Dependability - Requires constant supervision to do the simplest [sic] tasks.

Adaptability - Needs to be willing to tackle any job by any means outlined by his supervisor. Doing drafting work with or without a CADD is an example.

Attendance - Carries the bare min. of sick and annual leave. Often calls to determine amount of annual leave, then takes most of it.

Cooperation - Needs to work on relationships with other employees.

Quantity of Work - Needs to learn to do things quicker. Projects that should only take hours often takes [sic] weeks. Needs to learn that once project finished, look for other work.

Quality of Work - Most of work produced either requires redoing or very careful checking. Have very little confidence in quality of work.

Immediate Supervisor's Overall Rating - Needs to produce more quality work in less time. Often times refuses to give answers about work production, and blames other things (not having CADD etc.). Needs to work on "abuse" of leave time. Steve needs to focus on his work and getting it done verse [sic] other distracting areas.

Plan for Improvement

1. Write directions on how to do things when explained, especially computer related.

2. Really listen when instructions are given. Ask questions if you don't understand.

3. Work on building up annual and sick leave.

4. Learn to work better with other co-workers.

G Ex 1 at L III.

Consistent with the "plan for improvement" contained in Grievant's annual evaluation, a follow-up evaluation was accomplished by Mr. Williams on June 10, 1994. This evaluation indicated some slight improvement in that Grievant was rated "Satisfactory" in the "Quantity of Work" category but still received a "Needs Improvement" rating in five categories and in his overall rating, with comments as follows:

Dependability - Constantly wants direct instructions on how to do every task. Needs to write down instructions.

Adaptability - Constantly requesting more detailed description of tasks. Does not like new tasks or assignments.

Attendance - Had a period of significant occurrence [sic] about turning in sick leave slips with incorrect times of time called in. (April 15, 1994). Far too much use of phone and long lunch breaks.

**Cooperation - Often seems upset when asked to do additional tasks. He seems unwilling to communicate/
discuss work with supervisor.**

Quality of Work - Does adequate work on CADD. Needs to improve in "hand" work. Must realize that handwork is as important as CADD work.

Immediate Supervisor's Overall Rating - Needs to work within the environment he has been placed by doing the tasks asked of him. Steve needs to focus more on his work and less on non-work related issues.

Plan for Improvement

1. Write down instructions.

2. Focus more on job assignments and less on non-work related areas.

3. Learn to communicate with supervisor. Be honest.

4. Work on building up sick and annual leave. Has done better.

G Ex 2 at L III.

Grievant took exception to these ratings, contending they did not properly reflect his performance during the periods covered and asserting a variety of reasons why the ratings were not valid.

DISCUSSION

Because evaluations are not disciplinary in nature, Grievant has the burden of proof in regard to the allegations made in his grievance. W. Va. Educ. & State Employees Grievance Bd. Procedural Rules, 156 C.S.R. 1 § 4.17 (1989); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). Further, an employee grieving his evaluation must establish by a preponderance of the evidence that his evaluation is wrong because his evaluator abused his discretion in rating the grievant, Messenger v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993); Wiley v. W. Va. Workers'

Compensation Fund, Docket No. WCF-89-015 (July 31, 1989); or the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Maxey v. W. Va. Dept. of Health & Human Services, Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); Hurst v. W. Va. Dept. of Transp., Docket No. 91-DOH-326 (Feb. 27, 1992).

In adjudicating this grievance at Level IV, the undersigned administrative law judge is constrained by W. Va. Code § 29-6A-3(j) from ruling on matters not properly raised and included in the grievance at the lower levels. W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993). In that regard, this grievance is limited to the evaluations rendered by Mr. Williams on March 1, 1994, and June 10, 1994, covering calendar year 1993 and March through May 1994, respectively. [\(See footnote 2\)](#)

After due consideration of the extensive testimony rendered at Levels III and IV, as well as the voluminous documentary evidence produced at both levels, the undersigned is not persuaded that Grievant's challenged evaluations were improper in any significant regard. Indeed, a preponderance of the credible evidence indicates that Grievant's employer was engaged in a good-faith effort to improve Grievant's performance to an acceptable level. Grievant presented numerous grounds to support his contention that his evaluations were flawed. However, only a few of those contentions merit comment as the remainder relate to issues which are either barred from consideration under Hess, supra, or are wholly without merit.

Grievant complained that he did not receive an employee evaluation for calendar year 1992. It appears that an annual evaluation is required by DOH regulations. Moreover, Grievant correctly notes that DOH is obligated to comply with its own rules. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). However, Grievant's contention that his performance during calendar year 1993 would have been satisfactory, if only he had been given a proper evaluation for 1992, is wholly speculative and contrary to a preponderance of the evidence. Grievant's earlier evaluations for 1991, 1990, and the latter part of 1989 all contain comments citing a need for improvement. For example, on Grievant's annual evaluation for 1991, Gene Weaver, then Grievant's immediate supervisor, stated under "areas where improvement is needed:"

Enthusiasm for job and willingness to work excess hours is marginal. The ability to adapt to changing situations is satisfactory. Proper use of leave time and proper use of time on job needs improvement.

A Ex 3 at L III.

Similarly, Mr. Weaver listed "all areas of design" and "calculations and all areas of design" as areas where Grievant needed improvement in his evaluations for 1990 and 1989, respectively. A Ex 3 at L III. An earlier evaluation by Charles Morrison, Construction Office Manager, covering a period from September through November of 1989, when Grievant was working as a Construction Office Technician, noted:

This employee could not perform as an Inspector or Office Technician for the Construction Department. On October 26, 1989 and October 30, 1989, was given a verbal and written reprimand. Refused to listen and do what I requested of him. (insubordination)

A Ex 3 at L III.

Grievant's overall rating for the period discussed immediately above was 0.89 on a scale wherein 0 to 1.08 is "unsatisfactory." Under the forgoing circumstances, Grievant failed to demonstrate prejudice from his employer's failure to render an employee evaluation covering calendar year 1992. In particular, there was no meaningful evidence that, had Grievant been properly evaluated for 1992 by his previous supervisor, his 1993 performance would have been substantially better than observed by Mr. Williams. Indeed, the credible testimony of Marvin Murphy, District Engineer for DOH District Seven, indicated that Grievant was placed under Mr. Williams' supervision because Mr. Weaver had effectively "given up" on Grievant attaining an acceptable level of performance. In addition, Mr. Murphy considered Mr. Williams to have better supervisory skills, allowing him to provide appropriate guidance and direction to Grievant while assuring that Grievant complied with DOH standards.

Grievant similarly complained that he was prejudiced by Mr. Williams' failure or refusal to assign him any work to perform on numerous occasions during this evaluation period. Grievant's testimony that he sought work from Mr. Williams and was repeatedly rebuffed contradicts Mr. Williams' recollection that Grievant repeatedly failed to report back when he

had completed a project or to provide information on his progress on an assigned project. In assessing the evidence on this point, it appears that Grievant did experience periods when he had no work to do. However, it was not credibly established that he properly communicated this situation to Mr. Williams, or that Mr. Williams had any work to assign that was within Grievant's capabilities. On the other hand, the testimony of Mr. Williams, Mr. Murphy and Mr. Weaver credibly demonstrated that Grievant did not complete assigned projects on time or perform the full range of design work expected from an employee in his position. Thus, Grievant did not refute the specific "needs improvement" comments on his 1993 evaluation. Grievant presented numerous graphic examples of his work prepared during the 1989- 92 time frame, as well as similar work completed during the relevant 1993-94 time periods covered by the challenged evaluations. Grievant contended that comparison of these documents would reveal that the quality of his work was as good during the latter period as during the former period when he was rated at a satisfactory level. The employer's witnesses, particularly Mr. Murphy, agreed that the quality of Grievant's work generally remained constant. He further explained that Grievant's examples of work represented little more than basic drafting skills, and Grievant had failed to advance in capability to the level expected for an employee in his classification. According to the weight of the evidence, more advanced work should be within Grievant's capabilities, given his overall education, training and experience. Grievant presented no credible evidence that the more advanced design work Mr. Williams and Mr. Murphy expected him to perform was outside the scope of his classification.

Grievant devoted a considerable portion of his presentation to a single incident involving a sick leave form provided by Dr. Thomas Herrmann. Indeed, Grievant called Dr. Herrmann and a nurse employed in his practice as witnesses at Level IV. Ultimately, Grievant demonstrated that Dr. Herrmann, through miscommunication with Grievant, entered the wrong dates on the sick leave form, causing Grievant's supervisor to question the authenticity of the form and make further inquiries to the doctor's office. However, these facts had no significant bearing on Grievant's evaluation.

Mr. Williams credibly explained that Grievant's less than satisfactory rating on "attendance" resulted primarily from Grievant's failure to call in sick in a timely fashion orto provide timely written medical excuses as required by DOH regulations. Thus, although

Grievant demonstrated that the error contained in the sick leave form executed by Dr. Herrmann resulted from an unfortunate miscommunication between Grievant and his physician, this does not refute Mr. Williams' statements of a general problem relating to failure to request and take leave in accordance with established procedures.

Grievant also produced evidence to indicate that another sick leave form in the Employer's file was a forgery. Dr. Herrmann testified that the signature of "Thomas A. Herrmann, M.D.," on a sick leave form purporting to excuse Grievant for March 26, 1993, (G Ex 1 at 180) was not his signature. However, he could not explain why the form contained a rubber stamp imprint indicating that it was issued by his office. (See footnote 3) See G Ex 1 at 180. In any event, Grievant's evidence failed to demonstrate that this form was somehow manufactured by his supervisor, Mr. Williams, or any logical motive Mr. Williams might have for creating such a document. Ultimately, this document appears to be nothing more than the product of the confusion Grievant generated by failing to obtain his sick leave excuse at the time he visited the doctor, another matter primarily within Grievant's control.

Grievant complained that Mr. Williams took away his assigned CADD (Computer Aided Design Drawing) system. Mr. Williams agreed that Grievant had a CADD system on his desk during the approximate period of Fall and Winter 1992 until February 1993 and again from April through July 1993. He explained that this CADD system was "surplus" and had to be transferred to another agency. However, Grievant failed to show that his Employer's failure to provide him a CADD unit for his exclusive use or to arrange regular access to a shared CADD unit significantly contributed to his negative evaluations. Indeed, the weight of credible evidence suggests that Grievant lacked the ability to use the CADD system proficiently and his stated desire for additional CADD training was contrived. (See footnote 4) With regard to the quality of Grievant's work, Zane Lowther, an Engineering Technician with DOH, called as a witness by Grievant at Level III, testified that Grievant's work was "adequate." L III HT at 21-22. On occasion, Grievant was required to go back and revise his work, even though most of the work involved drafting from an existing drawing, rather than preparing original documents from field notes. L III HT at 22-24. Another Engineering Technician, Gary Warner, testified that, most of the time, Grievant did a "pretty good job" in regard to the drawings he prepared for him. L III HT at 25-27. Mr. Williams testified at Level III that Grievant did not perform assigned

design work at an acceptable level of competence. L III HT at 66-68. Gene Weaver, Grievant's immediate supervisor prior to Mr. Williams, testified at Level IV that Grievant's work performance deteriorated between 1990 and 1992. Mr. Weaver stated that other employees, including college students employed in a cooperative program, were readily able to master skills which Grievant was unable to perform, despite repeated on-the-job instruction.

Mr. Williams also explained that Grievant was told to write down instructions because assignments were turned in that were incomplete, and Grievant would indicate that he had forgotten some portion of the instructions. He noted that Grievant would be given one-on-one instruction on how to perform a particular task, such as accessing a particular application or function on a computer, only to require similar assistance the next time the same task was assigned. Mr. Williams also related how Grievant frequently sought assistance from other employees on questions involving basic mathematical conversions that a proficient employee in Grievant's position should have previously mastered. See L III HT at 68-70. Mr. Williams testified at Level IV that none of the employees in District Seven would accept any computational work performed by Grievant without checking it for accuracy. Grievant has also lost data, accidentally erased data from a calculator or computer and blamed incomplete work assignments on the janitors throwing his work in the trash. L III HT at 71-72.

DOH introduced evidence at Level III that Grievant received a verbal warning for failure to call and request sick leave properly on March 30 and 31, and April 4 and 5, 1994. A Ex 6 at L III. On January 13, 1994, Grievant was issued a written reprimand for insubordination based upon his refusal to discuss his work and work assignments with his immediate supervisor on January 10, 1994. [\(See footnote 5\)](#) A Ex 7 at L III.

In summary, the Employer presented substantial evidence that Grievant's shortcomings as an employee were properly stated in the contested evaluations. On the other hand, Grievant attempted to shift the blame for his deficiencies to a variety of other causes, none of which served to establish that Grievant's evaluations resulted from an abuse of discretion or a failure to comply with any established policies or rules controlling the evaluation process. See Messenger, supra; Maxey, supra.

The remainder of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant has been employed by West Virginia Division of Highways District Seven since August 1989.

2. In April or May of 1993, Donald Williams, Office Planning and Design Engineer, was assigned as Grievant's immediate supervisor.

3. On March 1, 1994, Mr. Williams issued Grievant's employee evaluation for calendar year 1993, rating Grievant as "Satisfactory" in two categories and "Needs Improvement" in the remaining six categories.

4. Consistent with a "plan for improvement" contained in the employee evaluation discussed in Finding of Fact Number Three, Mr. Williams issued a follow-up evaluation on June 10, 1994, rating Grievant as "Satisfactory" in three categories and "Needs Improvement" in the remaining five categories.

5. At the time of the employee evaluations discussed in Findings of Fact Numbers Three and Four, Grievant was employed as a NICET (National Institute for Certification in Engineering Technologies) Enrollee II in the District Seven Design Department.

CONCLUSIONS OF LAW

1. An employee grieving his evaluation may obtain relief by establishing by a preponderance of the evidence that his evaluator abused his discretion in rating him. Messenger v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993).

2. An employee challenging his evaluation may also obtain relief by establishing by a preponderance of the evidence that his performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Maxey v. W. Va. Dept. of Health & Human Services, Docket Nos. 92-HHR- 088/224/362 (Aug. 16, 1993).

3. Grievant failed to establish by a preponderance of the evidence that his evaluator abused his discretion, misinterpreted or misapplied any established policies or rules regarding the evaluation process, or otherwise acted contrary to any law, rule, regulation, or written agreement in regard to the evaluations contested by this grievance. See Messenger, supra; Maxey, supra.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: January 12, 1996

Footnote: 1

One other evaluation category is applicable to "supervisory personnel only." As Grievant was not working in a supervisory capacity, that section was properly noted as "not applicable." G Ex 1 at L III.

Footnote: 2

For example, Grievant initiated a separate grievance on March 21, 1994, regarding "fumes" in his work area. G Ex 1 at 231. Consistent with Hess, this complaint will not be addressed on its merits.

Footnote: 3

Both Dr. Herrmann and Mary McGee, a nurse employed in Dr. Herrmann's office, recognized the rubber stamp address as being from their office.

Footnote: 4

When actually offered training, Grievant proffered various excuses for not attending, including lacking pertinent experience, a claim inconsistent with his prior education and training.

Footnote: 5

Such prior disciplinary actions, properly documented in the employee's record and not timely grieved, may ordinarily be relied upon by an employer in support of a subsequent action, without litigating the merits of the earlier action. See *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994).