NEIL V. CREED,

Grievant,

v. **Docket No. 00-HHR-375**

WEST VIRGINIA DEPARTMENT OF
HEALTH & HUMAN RESOURCES/
SHARPE HOSPITAL,

Respondent.

DECISION

Neil Creed ("Grievant") initiated this proceeding on October 19, 2000, challenging a performance appraisal he received on October 5, 2000. Grievant seeks as relief to have his evaluation changed to conform with his immediate supervisor's original ratings and any corresponding pay raise, with interest. Grievant's immediate supervisor was without authority to grant relief, and Grievant appealed to level two on October 20, 2000. Following a level two conference, the grievance was denied at that level on October 26, 2000. A level three hearing was held on November 15, 2000, followed by a written decision, denying the grievance, dated November 22, 2000. Grievant appealed to level four on November 30, 2000. After a continuance granted for good cause shown, a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on April 11, 2001. Grievant was represented by counsel, Heather M. Weese, and Respondent was represented by counsel, Jon R. Blevins. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 11, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent Sharpe Hospital for approximately 22 years. For the past 12 years, Grievant has been serving as Staff Development Specialist, a position which

chiefly consists of coordinating and conducting continuing education and certification training courses for hospital employees, along with administration of the educational leave program.

2. Grievant's immediate supervisor is Dennis Norman, Director of Staff Development. Grievant provides direct assistance to Mr. Norman in the administration of the department and reports to Mr. Norman regarding staff training.

3. Pam Carpenter is Clinical Services Coordinator and Mr. Norman's immediate supervisor.

4. Effective November 1, 1998, Respondent began using a new performance appraisal system adopted by the Division of Personnel ("DOP"). DOP's policy requires that employees be evaluated on 23 job elements, divided into six areas of responsibility: Maintains Flexibility, Demonstrates Credibility, Customer Service, Quantity of Work, Quality of Work, and Availability for Work. In each area, employees are to be rated as "needs improvement," "meets expectations", or "exceeds expectations." Each category rating is then subjected to a formula in order to reach a mathematical score, which is then used to compute the employee's final rating. Overall ratings fall into three categories, as follows: 2.51 to 3.00 _ Exceeds Expectations, 1.51 to 2.50 _ Meets Expectations, 1.00 to 1.50 _ Needs Improvement.

5. In September of 2000, Mr. Norman completed performance evaluations on the four employees under his supervision and submitted them to Ms. Carpenter for review. 6. Ms. Carpenter returned the evaluations to Mr. Norman and instructed him to lower the scores for all four evaluations, because they were all "too high."

7. Mr. Norman altered the evaluations, lowering each employee's scores in various areas. He attempted to only lower scores in areas where he felt the altered score would still reflect his true impressions of the employee's work. Each employee's overall rating remained in the same category as it had when the evaluations were originally prepared.

8. Both times when Mr. Norman prepared Grievant's performance evaluation, Grievant's overall rating was "Exceeds Expectations." Grievant's numerical score after the second form was prepared was 2.52.

9. After the altered evaluations were turned over to Ms. Carpenter, she returned only Grievant's evaluation to Mr. Norman, stating that it was still too high. No specific reason was given for why Grievant's rating needed to be lowered.

10. When asked by Ms. Carpenter to lower Grievant's rating again, Mr. Norman told her that he

could not, in good conscience, lower Grievant's scores any further.

11. After Mr. Norman's refusal, Ms. Carpenter lowered Grievant's ratings from “exceeds expectations” to “meets expectations” in the following categories, and gave these reasons in handwritten notations:

Maintains Flexibility:

Displays an openness to learning and applying new skills.

Works well with others to achieve organization's goals.

(Reason: Not keen to any training to upgrade skills anddoes not work with departments i.e. nursing staff.)

Customer Service:

Treats all customers with respect.

(Reason: Bad mouthing “N” [nursing] dept. training credentials.)

Quality of Work:

Work results satisfy organization's goals.

(Reason: Muddies waters of goal direction _ with Hartley (See footnote 1) vs. organization and department.)

Availability for Work:

Employee's presence can be relied upon for planning purposes.

Employee is a dependable team member.

(Reason: Can't be relied upon for planning and be dependable if not here.)

12. Ms. Carpenter's changes lowered Grievant's overall rating from 2.52 to 2.26, which is in the “Meets Expectations” category.

13. Ms. Carpenter explained that she lowered Grievant's ratings in the “Availability for Work” category due to his use of numerous hours of annual and sick leave during the evaluation year, due to a chronic illness, an injury, and a death in his family.

14. To date, Ms. Carpenter has not explained her reasons for lowering Grievant'sratings in the other areas set forth above.

15. Grievant's final written evaluation form did not contain Ms. Carpenter's handwritten notations, and her comments were not incorporated into the “comments” portion of each evaluation area.

16. Neither Mr. Norman nor Ms. Carpenter formally reviewed Grievant's final evaluation with him.

17. Grievant's final overall rating entitled him to a .04% salary increase. The original 2.52 rating would have entitled him to a .05% increase.

18. Prior to 1999-2000, Grievant had received excellent evaluations.

Discussion

Because evaluations are not disciplinary in nature, Grievant has the burden of proof in regard to the allegations made in his grievance. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd.,156 C.S.R. 1 § 4.21 (2000); 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 Serv., 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).

Grievant contends that DOP's performance appraisal policy was not followed byRespondent, that his evaluation resulted from an abuse of discretion by Ms. Carpenter, and that it was discriminatory. Respondent counters that all of Ms. Carpenter's alterations of Grievant's ratings were justified, did not constitute an abuse of discretion, and that Grievant has failed to establish a prima facie case of discrimination.

This Grievance Board addressed a similar situation in Wiley v. West Virginia Division of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998). In that case, the administrative law judge determined that the grievant's second-level supervisor acted appropriately in lowering his evaluation scores, after a much more favorable evaluation had initially been prepared by his immediate supervisor. However, this ruling was based upon extensive evidence regarding a reprimand the grievant had received during the same evaluation year, which was not addressed or reflected in his initial evaluation. It was held in Wiley that it was within the second-level supervisor's authority to adjust the evaluation to accurately reflect the employee's performance during the evaluation year.

DOP's performance appraisal policy provides that, prior to final review of the evaluation with the employee, the completed form must be submitted to the “reviewing manager” for review and approval. Obviously, this provision is meant to provide the managing supervisor with some level of authority to accept or reject the initial ratings submitted by the employee's direct supervisor. After the performance appraisal has been approved by the reviewing manager, the policy states that a “final review session” is to be conducted, requiring review of the final evaluation with the employee.

In the instant case, the undersigned finds that Ms. Carpenter's changes in Grievant's evaluation constituted an abuse of discretion. Although DOP's policy does allow the reviewing manager some authority in this regard, such individuals are not permitted toarbitrarily change an employee's evaluation scores without justification. At level three, while Ms. Carpenter did explain her reasoning behind lowering Grievant's evaluation scores in the area of “Availability for Work,” she did not address the other changes she made, even though she was asked to explain her actions. In addition, Ms. Carpenter's testimony regarding the comment about Grievant's conduct vis-a-vis “Hartley” did not seem forthright. When questioned about whether the handwritten word in that particular section was, in fact, “Hartley” or “hospital”, she testified that it must be “hospital,” because she had not discussed anything related to Hartley with Mr. Norman. This testimony is simply not credible,

because the handwriting is clear, and the term used is “Hartley.” Moreover, Mr. Norman testified that Grievant has been criticized for discussing Hartley too frequently, but that it did not, in his opinion, interfere with Grievant's duties.

Unlike the situation presented in Wiley, supra, Ms. Carpenter has not provided sufficient justification or explanation for her significant alterations in Grievant's performance appraisal. Additionally, testimony at both level three and level four indicated that management had been instructed on several occasions that, under DOP's new evaluation system, virtually all employees must “fall in the middle,” because an employee who is performing his duties well is “meeting expectations.” However, this does not mean that an upper level manager can arbitrarily lower an employee's immediate supervisor's honest perceptions of an employee's performance, without justification based upon direct knowledge and/or observation of that employee's performance. With the exception of the altered ratings in the area of availability, the evidence in this case demonstrates that Grievant's evaluation scores were lowered without sufficient supporting evidence. However, Ms. Carpenter adequately explained that it did not seem appropriate to giveGrievant “exceeds expectations” ratings regarding whether his presence can be relied upon for planning and dependability as a team member when he was simply not at work on a frequent basis during the evaluation year. The undersigned agrees.

Accordingly, Respondent is directed to restore Mr. Norman's second performance appraisal ratings for Grievant, with the exception of the two ratings in the availability of work section, which were properly lowered to “meets expectations.” After recalculation, if Grievant's evaluation is within the “exceeds expectations” category, Respondent is to compensate him for the difference between the salary increase he received and the merit increase rate for that category, with interest at the statutory rate. (See footnote 2)

Consistent with the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, a grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. 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. Dep't of Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993).

3. Grievant has proven by a preponderance of the evidence that, with the exception of two categories, the alterations in his evaluation made by Pam Carpenterconstituted an abuse of discretion.

Accordingly, this grievance is **GRANTED**, and Respondent is to recalculate Grievant's overall rating, and compensate him, if necessary, in accordance with the provisions of this Decision.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 15, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Pursuant to an Order from the West Virginia Supreme Court of Appeals in the decision entitled E.H. v. Matin, 168 W. Va. 248, 284 S.E.2d 232 (1981), the Kanawha County Circuit Court issued the "Hartley Plan", Civil Action No. 81-585 (1986), which provided specific directives regarding the reorganization of West Virginia's mental health care facilities in order to provide proper care to their patients. As part of the Hartley Plan, the facilities were directed to provide educational opportunities for staff, along with training, to insure that the facilities employ competent staff members. Apparently, Grievant's position exists, at least in part, due to the Hartley Plan.

Footnote: 2

Due to the outcome of this Decision, it is not necessary to address Grievant's allegations of discrimination.