MARY OILER, et al.,

Grievants,

v.

DOCKET NO. 01-HHR-336

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/BUREAU OF CHILD

SUPPORT ENFORCEMENT,

Respondent.

D E C I S I O N

Grievants Mary Oiler, Deborah Hamner, Linda Knight and Bruce Kimmel, Accounting Technicians II with the West Virginia Department of Health and Human Resources Bureau for Child Support Enforcement ("DHHR"), filed this grievance on April 2, 2001, protesting their employee performance appraisals and performance expectations for Accounting Technicians. As relief, Grievants seek:

1) Discontinuation of Error Rate Report from Financial Services Unit (FSU).

2) Monthly total of audits completed to be factored at a rate of .2307 per actual work hour.

3) Employee Performance Appraisal to reflect the above two reliefs sought starting with rating period 9/01/00-8/31/01

4) And anything to be made whole.

The grievance was denied at levels one and two. A level three hearing was held on May 1, 2001, and the grievance was denied by decision dated May 7, 2001. Grievants appealed to level four on May

14, 2001, a hearing was held in the Grievance Board'sElkins, West Virginia, office on September 5, 2001, and this matter became mature for decision on October 9, 2001, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 1) Grievants appeared pro se, and DHHR was represented by B. Allen Campbell, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

LIII Grievants' Exhibits

Ex. 1 -

Employee Performance Appraisal for Bruce Kimmel, dated March 26, 2001.

Ex. 2 -

Performance Expectation - Accounting Technicians, revised September 1, 2000.

Ex. 3 -

Adjustment Referral Forms of Bruce Kimmel.

Ex. 4 -

Employee Performance Appraisal for Linda S. Knight, dated March 27, 2001.

Ex. 5 -

Adjustment Referral Forms of Linda Knight.

Ex. 6 -

Employee Performance Appraisal for Mary Oiler, dated March 23, 2001.

Ex. 7 -

Adjustment Referral Forms of Mary Oiler.

Ex. 8 -

Memoranda re: error rates.

Ex. 9 -

Employee Performance Appraisal of Deborah Hamner, dated March 27, 2001.

Ex. 10 -

Adjustment Referral Forms of Deborah Hamner.

Ex. 11 -

Chart showing factored rate per actual work hour.

Ex. 12 -

November 2000 Individual Attendance Report for Mary Oiler

Ex. 13 -

Employee Performance Appraisal for Mary Oiler, dated September 20, 2000.

LIII DHHR Exhibits

Ex. 1 -

March 21, 2001 letter from B. Allen Campbell to Porter Stanley; Dillon v. W. Va. Dept. of Health and Human Res., Docket No. 00_HHR-257 (Mar. 20, 2001).

Ex. 2 -

MISC 20 Checklist.

Ex. 3 -

Notes of August 31, 2000 meeting.

Ex. 4 -

June 9, 1999 memorandum from Charles F. Burgoyne to BSCE Managers, State Office Management Team re: Proposed Performance Measures for BCSE Personnel.

Ex. 5 -

Accounting Unit Report, March 2000.

Ex. 6 -

Completed Audits 9-00 thru 02-01 Region 8.

Ex. 7 -

Completed Audits 3-01 thru 08-01 Region 8.

LIV Grievants' Exhibits

Ex. 1 -

Regional error rate reports.

Ex. 2 -

Memoranda regarding error rate.

Ex. 3 -

May 9, 2001 e-mail from Susan Perry to Deborah Hamner with Special Implementation Team Meeting Agenda, dated May 18, 2001.

Ex. 4 -

Chart showing actual time worked from September 2000-August 2001 for Deborah Hamner.

Ex. 5 -

Chart showing required audits factored by actual work hours for Deborah Hamner.

LIV DHHR Exhibits

None.

Testimony

Grievants testified in their own behalf, and presented the testimony of Sharon Warick. DHHR presented the testimony of Porter Stanley, Tina Winnings, Deborah Harper, and Roger Harris.

FINDINGS OF FACT

After a careful review of all the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

1. Grievants are employed by DHHR as Accounting Technicians II. They are all housed in Region 8 of the Bureau of Child Support Enforcement (“BCSE”).

2. Grievants' duties consist mainly of auditing the financial aspects of child support cases.

These audits include reviewing the payments of non-custodial parents, determining the amount of arrears and determining if the custodial parent has received payment. Some audits are complex while others are simple.

3. Once Grievants have audited a case, it is sent to BCSE's Financial Services Unit ("FSU") in Charleston for review. The FSU is a quality control unit that reviewsGrievants' work for accuracy. If the FSU finds mistakes in Grievants' work, it may correct small errors or send the audit back to Grievants for correction.

4. The FSU is comprised of Accounting Technicians III. Some of the employees of the FSU have less tenure than Grievants.

5. The FSU generates a report of the number of errors each Accounting Technician II makes. These reports are sent to Team Leaders who function as Grievants' supervisors. These error rate reports are utilized by Team Leaders to evaluate Grievants' work performance, as well as to target specific training needs. As such, these reports are reflected in the Grievants' Employee Performance Appraisals.

6. Specifically, Grievants are evaluated on the quantity of audits they perform as well as the quality of those audits.

7. In June 1999, BCSE proposed a statewide performance standard for Accounting Technicians II. This standard included an average of sixty (60) to one hundred (100) audits per month with a maximum error rate of ten percent (10%), and an error rate goal of under five percent (5%).

8. BCSE recognized that some regions had situations that did not fit the statewide standard. Therefore, BCSE gave each region the discretion to adopt a standard that fit the situation unique to that particular region.

9. Some regions adopted the state standard.

10. Region 8 initially adopted a standard of forty (40) audits per month, but reduced the number to thirty-five (35) because of the amount of time the Accounting Technicians II spent on updating audits. This reduced standard contemplated an average of fifteen (15) annual leave days and five to six (5-6) sick leave days per year. Additionally,Region 8 considers an error rate of zero percent (0%) to five percent (5%) to be "exceeding expectations," while an error rate of five percent (5%) to ten percent (10%) is "acceptable."

11. Team Leaders try to distribute more complex case among experienced Accounting

Technicians II. The number of complex and simple cases assigned to a particular employee averages out over the course of the year.

12. Occasionally, the FSU will incorrectly assign an error to a field worker when auditing the Accounting Technicians II work. BCSE has a procedure in place to resolve such errors. Accounting Technicians II are to report such errors to their Team Leaders, who are to work out the problems with the central office. There is a chain of command to follow to resolve disputes up to the very top of the BCSE management. Sometimes this process can be time consuming.

13. Some employees of the FSU are more lenient than others when assessing errors. However, all of Grievants' work is reviewed by the same group of employees that are assigned to review Grievants' region. Audits are chosen randomly by the FSU employees and no particular FSU employee reviews any particular Accounting Technicians' II work.

14.

Sometimes an error made by an FSU employee is in the field worker's favor.

15. In April 2001, only Grievant Oiler was not able to comply with the 35 audits per month quota. In May 2001, all Grievants were able to comply with the 35 audit quota. In June 2001, only Grievant Kimmel was able to meet the 35 audits per month quota. In the first quarter of 2001, all Grievants had acceptable error rates. In the second quarter, only Grievant Oiler was outside the acceptable error rate. 16. The number of audits completed and error rates of other Accounting Technicians II throughout the State are both above and below the Grievants'. Grievants were not aware of any specific circumstances that might affect others' error rates or number of audits completed.

DISCUSSION

In non-disciplinary matters Grievants must prove all the allegations constituting their grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievants contend the method BCSE uses to calculate quota requirements and error rates is flawed, arbitrary and capricious, and that they are being discriminated against in their employee performance appraisals. Grievants argue BCSE should calculate the quota requirements based upon the actual number of hours worked rather than a lump sum for a particular period of time. DHHR denies the charges made by Grievants.

There is no dispute that mistakes are made in the FSU when reviewing Grievants' audits, and that sometimes Grievants are assigned error rates incorrectly. There is also evidence that the FSU sometimes misses errors, and that those mistakes are infrequently, if ever, brought to the attention of the FSU or Team Leaders. There is also no dispute that error rate reports are not used in the same manner in all regions when completing employees' performance appraisals, or that the quota system is used uniformly throughout all regions. However, Grievants have failed to establish that any of these managerial methods violates any law, statute, rule or regulation under which they work.

A supervisor has the inherent authority to assign tasks to an employee that the supervisor deems appropriate. Quota requirements in and of themselves do not violateany law, policy, regulation or statute. Dillon v. W. Va. Dept. of Health and Human Res., Docket No. 00-HHR-257 (Mar. 20, 2001). If a supervisor believes an employee should spend more time on a particular project, then the employee must do so. Absent a directive to do something illegal, an employee must follow a supervisor's directive or be insubordinate. Id..

An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. Trimboli v. W. Va. Dept. of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). All Accounting Technicians II within Region 8 are subject to the same quota requirements and performance expectation levels. Accounting Technicians II outside of Region 8 may have different circumstances or situations which have caused their region to adopt a different quota standard. Additionally, the same set of employees at the FSU review Grievants' work, and reviews are selected randomly. Moreover, there is a procedure in place to correct any error the FSU employees may make in their review of an audit. Therefore, Grievants have failed to prove that DHHR's procedures are arbitrary and capricious.

Grievants allege discrimination because other Regions apply different quota standards and use error reports differently with respect to performance appraisals, or do not use them at all. W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case ofdiscrimination by a preponderance of the evidence. In order to meet this burden,

the Grievants must show:

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievants have failed to establish that they are similarly situated to other employees for purposes of performance appraisal and quota requirements. Each Region Team Leader has the discretion to use these management tools in whatever way he or she chooses, provided it is not arbitrary and capricious. Grievants cannot compare themselves to employees in other Regions for this purpose. E.g., Hays v. W. Va. Empl. Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992). They are treated the same within their own Region, and have thus, failed to establish a prima facie case of discrimination.

CONCLUSIONS OF LAW

1. In non-disciplinary matters the Grievants must prove all the allegations constituting their grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. A supervisor has the inherent authority to assign tasks to an employee that the supervisor

deems appropriate. Quota requirements in and of themselves do not violate any law, policy, regulation or statute. Dillon v. W. Va. Dept. of Health and Human Res., Docket No. 00-HHR-257 (Mar. 20, 2001).

3. "An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive." White v. W. Va. Bureau of Employment Programs, Docket No. 99-BEP-496 (May 22, 2000).

4. An employee challenging his or her performance evaluation must prove that the performance evaluation was prepared as a result of the supervisor's misinterpretation or misapplication of established policy or law addressing the evaluation process, or that the evaluation was established by an abuse of discretion. Messinger v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993); Kemper v. W. Va. Dept. of Transp., Docket No. 91-DOH-325 (Mar. 2, 1992); Wiley v. W. Va. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989).

5. In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, Grievant must prove that the evaluation was the result of arbitrary or capricious decision-making. Kemper, supra.

6. In determining that a discretionary decision was arbitrary and capricious, a reviewing body applies a narrow scope of review, limited to considering whether relevantfactors were considered in reaching the decision, and whether there has been a clear error of judgment.

7. Generally, an agency's decision is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Moreover, under the arbitrary and capricious standard of review, an administrative law judge may not simply substitute his or her judgment for that of the agency decision maker. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Dec. 29, 1997); Bedford County Memorial Hosp. v. Health and Human Services, 769 F.2d 1017 (4th Cir. 1985).

8. Grievants have failed to prove their Region's application of quota and error rates is arbitrary and capricious.

9. W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of

employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

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10. Grievants have failed to establish DHHR has violated any law, statute, rule or regulation in establishing quota requirements or use of error reports in performance appraisals.

Accordingly, this grievance is **DENIED**.

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. Any 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 8, 2001

Footnote: 1

This grievance was reassigned to the undersigned Administrative Law Judge on August 7, 2001.