CHARLES HUSS,

Grievant,

v v.

Docket No. 02-RS-017B

WEST VIRGINIA DIVISION OF

REHABILITATION SERVICES,

Respondent.

D E C I S I O N

Grievant, Charles Huss, is employed by the West Virginia Division of Rehabilitation Services ("DRS") as a teacher. He filed this grievance on November 14, 2001. His Statement of Grievance reads:

> No consideration by my immediate supervisor of my past 15 months of accomplishments (7/1/00-9/30/01) in area of Low Vision Driving when she formulated ratings on my Employee Performances Appraisal.

For Relief Sought, Grievant asked to have seven of the subcategories of his performance evaluation changed from "Meets Expectations" to "Exceeds Expectations." At Level I, Grievant's supervisor changed two of the subcategories from "Meets Expectations" to "Exceeds Expectations." No additional changes were made at Level II. The Level III Decision denying the grievance was issued by Hearing Examiner, Kathryn Dooley, and then adopted by the Interim Executive Director, Janice Holland, on December 14, 2001. Grievant appealed to Level IV on January 24, 2002, and a Level IV hearing was held on February 25, 2002. This case became mature for decision at that time as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

The issue presented by this grievance is clear cut. Grievant believes he should have received a much higher rating, and Respondent believes the rating Grievant received accurately reflects his performance.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by DRS for many years, and he is currently employed as a teacher at DRS in the Life Skills Training Unit.

2. Grievant's area of specialization is working with blind and visually impaired students to improve their orientation and mobility.

3. Grievant is very interested in the area of low vision driving, and he is recognized as a national expert in this area.

4. DRS used to have a Low Vision Driving Program, but ceased this program several years ago. (See footnote 2)

5. For the rating period in question, Grievant was to spend 5 percent of his time "provid[ing] educational services" such as workshop and conference presentations. Grievant presented many programs on low vision driving. He used some of his own time and money on these endeavors. For others, his expenses were paid by the group putting on the program.

6. For the rating period in question, Grievant spent a great deal of time on the presentation and dissemination of information on low vision driving. He also respondedto numerous written requests from professional colleagues for information in the area of low vision driving. The majority of these responses were accomplished during work time.

7. Contrary to Grievant's assertions, his supervisor, Ms. Lynn Harris, was aware of his activities in the area of low vision driving, as well as his other activities, when she assigned Grievant his ratings on his performance evaluation.

8. Because presentations and other educational services were only to account for 5 percent of Grievant's time, his excellent work in this area cannot be used to "boost" other ratings which do not address low vision driving or the dissemination of information.

9. The majority of the people Grievant assisted through his presentations were not "customers" of DRS, but professional colleagues. Test., Harris, at Level IV.

10. If an employee is meeting the duties outlined in a subcategory, the employee is to receive a "Meets Expectations" in the area. Test., Harris at Level IV.

11. In the 23 evaluated categories, Grievant received six, "Exceeds Expectations," and seventeen, "Meets Expectations," on his performance evaluation.

12. The five subcategories Grievant wished to see changed from "Exceeds Expectations" are: 1)" Works well with others to achieve organization's goals"; 2)"Responds to customer needs within agreed time frames"; 3) Work output matches the expectations established"; 4) "Employee completes all assignments"; and 5) Employee consistently meets deadlines."

Discussion

As this grievance does not involve a disciplinary matter, 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); Howell v. W. Va.Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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).

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. Dep't 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. Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Maxey v. W. Va. Dep't of Health & Human Serv., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); Hurst v. W. Va. Dep't of Transp., Docket No. 91-DOH-326 (Feb. 27, 1992). In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, the grievant must prove that the evaluation was the result of arbitrary or capricious decision-making. Kemper v. W. Va. Dep't of Transp., Docket No. 91-DOH-325 (Mar. 2, 1992).

"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 Healthand 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, 198 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." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

In determining that a discretionary decision was arbitrary and capricious, a reviewing body applies a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. See Bedford, supra; Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Dec. 29, 1997).

Grievant argued at Level IV that he should have received a rating of "Exceeds Expectations" in the five, additional areas noted in Finding of Fact 11. It should be noted, a review of the record revealed Grievant received a good evaluation, but Grievant did not feel this was true. Additionally, the parties agreed Grievant was an experienced and competent employee.

Grievant presented multiple documents to demonstrate the type and quality of work he routinely performs. Grievant's supervisor, Ms. Harris, noted these examples of work were similar to what all other DRS employees are expected to complete in the ususal performance of their duties. She explained Grievant's work in these areas was similar tothe accomplishments of his coworkers. Grievant's supervisor also testified that when she received training on the evaluation tool, she was instructed that an employee who performed the required duties of the position should be rated as "Meets Expectations." Ms. Harris testified Grievant was performing the duties of his position. It is also noted that where Grievant's work product excelled, it was recognized, as Grievant received "Exceeds Expectations" in six categories.

It is clear Grievant believes the time he spent working in the field of low vision driving should receive more credit and should result in an increase in his evaluation ratings. He believed the colleagues he served through dissemination of these materials were customers. (See footnote 3) Since the amount of time allotted to presentations can only account for 5 percent of his total work

time, these activities cannot be used to change or increase Grievant's evaluation. (See footnote 4) This is especially true in the subcategories relating to customer service, as the vast majority of this work was not for the clients DRS serves. He did receive credit for these activities, but his supervisor's decision to limit the amount of credit Grievant could receive for this area was not arbitrary and capricious.

In conclusion, while Grievant's work in the area of low vision driving is commendable, and clearly important to Grievant, he received the appropriate amount of credit for this activity. Additionally, Grievant failed to meet his burden of proof anddemonstrate Ms. Harris' evaluation of his work performance in other areas was arbitrary and capricious, an abuse of discretion, or indicated a misinterpretation or misapplication of established policy or law.

The above-discussion will be supplemented by the following Conclusions of Law.

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. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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).

2. 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. Dep't 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. Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Maxey v. W. Va. Dep't of Health & Human Serv., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); Hurst v. W. Va. Dep't of Transp., Docket No. 91-DOH-326 (Feb. 27, 1992). In order to prove a supervisor has acted in a manner that constitutes an abuse of discretion, the grievant must prove the evaluation was the result of arbitrary orcapricious decision-making. Kemper v. W. Va. Dep't of Transp., Docket No. 91-DOH-325 (Mar. 2, 1992).

3. "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, 198 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." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

4. In determining that a discretionary decision was arbitrary and capricious, a reviewing body applies a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. Bedford, supra; Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Dec. 29, 1997). 5. Grievant failed to meet his burden of proof and establish his performance evaluation was inaccurate, arbitrary and capricious, or a misinterpretation or misapplication of policy.

6. Grievant's supervisor did not abuse her discretion in not rating Grievant's performance as "Exceeds Expectations" in the five areas identified by Grievant.

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. Theappealing 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 26, 2002

Footnote: 1

Grievant represented himself, and Respondent was represented by Attorney Warren Morford.

Footnote: 2

From the record, it appears there are still clients who receive this assistance, on a limited basis, from time to time, even though the program no longer exists.

Footnote: 3

DRS customers are clients who receive assistance through an identified program, and DRS usually receives compensation for these services through state or federal programs or grants. Clearly, providing information to colleagues, while important, cannot be seen as customer service for the clients of DRS.

Footnote: 4

It could also be noted that if Grievant spends greater than 5 per cent of his time in low vision driving activities, then the other 95 per cent of his activities would receive less than their allotted time.