CHARLES ADKINS, JR.,

Grievant,

v. Docket No. 06-DOH-006

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Charles Adkins, Jr., employed by the Division of Highways ("DOH") as a Technician, filed a level one grievance on April 13, 2005, stating:

In my evaluation, I was forced to sign it. Steve harassed fired [sic] me. Then made me go back in the office and continued to threaten me over and over. Thought there was going to be a problem. So, I signed it to get out of the office.

For relief, Grievant requests that DOH to "[r]emove the lies on my evaluation and no one will ever put me in a closed office again."

The grievance was granted in part at level one by Assistant District Engineer Robert L. Pennington who advised Grievant that he could have a third party present for any future conversations with his supervisors. The request to have the evaluation amended was denied. District Engineer J. Wilson Braley issued a level two decision with the same conclusions. Following an evidentiary hearing at level three, DOH Commissioner Paul A. Mattox denied the grievance. An appeal was filed at level four on January 6, 2006. Grievant proceeding *pro se*, and DOH counsel Barbara Baxter, Esq., agreed to submit the grievance for decision based upon the record. The grievance became mature for decision upon receipt of DOH's proposed findings of fact and conclusions of law on June 6, 2006. Grievant declined the opportunity to file any submissions at level four. The case was subsequently transferred to the undersigned for administrative reasons on July 6, 2006. The following facts are derived from a preponderance of the credible evidence made part of the record below.

Findings of Fact

1. Grievant has been employed by DOH assigned to District Two as a Transportation Engineering Technician in the Materials Division of the Construction Department, at all times pertinent to this grievance.

2. On March 15, 2005, James (Steve) McNeely completed Grievant's Employee Performance Appraisal for the calendar year 2004. Grievant received an overall rating of 1.87, which falls within the "Meets Expectation" category. Grievant was rated as meeting expectations in all but two areas.

3. Under "Customer Service" Grievant was rated as "Needs Improvement" in "Addresses conflicts and problem situations with patience and tact." Mr. McNeely's comment was "[e]mployee can be very impatient which disrupts the project."

4. In the category of "Quality of Work" Grievant received a rating of "Needs Improvement" in "[w]ork results satisfy organization's goals." The comment for this was "[w]hile working in the Utility Dept., the employee has not adjusted to the requirements of the Unity Department including the Accomadations [sic] Manual."

5. Although rated as meeting expectations in all areas of the category "Demonstrates Credibility," Mr. McNeely included the comment, "[e]mployee has used video recorders and tape recorders on the project without prior approval of his supervisor. This at times makes co-workers and contractor personnel uneasy." 6. The "Summary Comments" section was completed as follows: "Charlie is a very knowledgeable inspector but needs to apply himself more to the issues at hand (Construction or Utilities)."

7. Under Section B, Improvement and/or Developmental Plan, Mr. McNeely wrote: "Study Plans, Specifications, Standard Details, Contract Documents, and become more familiar with the PRS system. Pursue training opportunities. Continue to improve his skills in exercising patience when dealing with co-workers and contractors [sic] personnel. Seek guidance from supervisor on appropriate project documentation."

8. Grievant took issue with the evaluation, and refused to sign the document. A heated argument with Mr. McNeely ensued, and Grievant eventually agreed to sign the evaluation.

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 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, 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). Although it appears that Grievant's complaint is that he was forced to sign his evaluation, presumably his reluctance was based on a disagreement with the rating. An employee grieving his evaluation must establish by a preponderance of the evidence that the evaluation is wrong because the evaluator abused his/her discretion in rating the grievant, or the performance evaluation was the result of some misinterpretation ormisapplication of established policies or rules governing the evaluation process. *Wiley v. W. Va. Div. of Natural Res.*, 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); *Messenger v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-388 (Apr. 7, 1993); *Hurst v. W. Va. Dep't of Transp.*, Docket No. 91-DOH-326 (Feb. 27, 1992); *Wiley v. W. Va. Workers' Compensation Fund*, Docket No. WCF-89-015 (July 31, 1989). 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 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 Health and Human Res.*, 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)). In determining whether a discretionary decision was arbitrary and capricious, an undersigned administrative law judge 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 has not specifically addressed any of the categories in which he was rated as "Needs Improvement." Instead, he asserted that for the past five years he has been under "kind of an attack" and has been "set up" for firing many times. DOH submitted two "Records of Significant Occurrence" documenting incidents in which Grievant performed below expectations during the rating period, and Mr. McNeely addressed additional incidents in his testimony at level three. Grievant failed to prove the evaluation was arbitrary and capricious.

As to Grievant's concern regarding signing the evaluation, the form itself specifically states above the signature line, " I certify that I have reviewed this Performance Appraisal Form. My signature on this page implies neither my agreement nor my disagreement with the form's contents." Grievant's apparent concern that his signature indicated an agreement with the content was mistaken. In any case, Grievant's overall rating was an acceptable "Meets Requirements."

Grievant also asserts that he has been subject to harassment. *W. Va. Code* § 29- 6A-2(l) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to adegree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)."

Grievant cites no incident other than the review of his performance appraisal to support the claim of harassment. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback and evaluations. This feedback may not always be positive. Just because Grievant did not like the information he received, does not mean it was inappropriate or constitutes harassment. *Rider v. Bd. of Trustees/Marshall Univ*., Docket No. 99-BOT-348 (Apr. 7, 2000).

In addition to the foregoing findings of fact and discussion, it is appropriate to make 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 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6.

2. An employee grieving his evaluation must establish by a preponderance of the evidence that the evaluation is wrong because the evaluator abused his/her discretion in rating the grievant, *Messenger v. W. Va. Dep't of Health & Human Res*., 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 somemisinterpretation or misapplication of established policies or rules governing the evaluation process. *Wiley v. W. Va. Div. of Natural Res*., 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 or capricious 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 Res*., 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)).

4. 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. *Bedford, supra; Bradley v. Bd. of Directors*, Docket No. 96-BOD-030 (Dec. 29, 1997).

5. Grievant failed to meet his burden of proof to establish that his performance evaluation was inaccurate, arbitrary and capricious, or a misinterpretation or misapplication of policy.

6.. *W. Va. Code* § 29-6A-2(l) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

7. "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ*., Docket No. 98-22-495 (Jan. 29, 1999).

8. Grievant failed to prove that he has been subject to harassment. *Rider v. Bd. of Trustees/Marshall Univ*., Docket No. 99-BOT-348 (Apr. 7, 2000).

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 thegrievance 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.

DATE: JULY 25, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE