THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SANDRA LEE GIBSON,

Grievant,

v. **Docket No. 2009-0700-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT,

Respondent.

DECISION

Sandra Lee Gibson ("Grievant") filed a grievance on November 13, 2008, contesting an Annual Employee Performance Appraisal in which she received an overall rating of "Needs Improvement." As her "Statement of Grievance" Ms. Gibson wrote:

> Evaluation does not reflect work according to monthly reports, monthly statistic reports, other.

For her "Relief Sought" Grievant wrote:

> Fair and non-biased evaluation based on actual work/data reports/other, and otherwise be made whole.

A hearing was held on July 9, 2009, and a level one decision denying the grievance was issued on July 14, 2009. A level two mediation was scheduled for September 8, 2009; however, the parties agreed to submit this case to level three for a hearing in conjunction with a grievance that had been previously filed and mediated regarding the mid-point evaluation of Grievant's performance.[1] The level three hearing was conducted at the

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[1] *Gibson v. Dep't of Health & Human Res.,* Docket No. 2008-1469-DHHR (Jan. 12, 2010)

Charleston office of the West Virginia Public Employees Grievance Board on August 8, 2009. Following the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received on October 16, 2009. This grievance became mature for decision on that date.

Synopsis

Grievant contends that her Annual Employment Performance rating was not supported by her performance record and requests that she receive a fair evaluation. Grievant was not able to demonstrate, by a preponderance of the evidence, that the evaluation rating was arbitrary or capricious. The grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant, Sandra Lee Gibson, is employed by the DHHR Bureau for Child Support Enforcement as a Child Support Specialist 2 ("CSS 2"). She has served continuously in that position for eight years in the Sutton Area office.

2. Holly Dennison is a supervisor at the DHHR Sutton Area office and has been Grievant's supervisor for the past five or six years.

3. Charlotte Stalnaker is a Regional Manager for the DHHR Bureau for Child Support Enforcement. She manages the region that contains the Sutton Area office and in Holly Dennison's direct supervisor.

4. On October 21, 2008, Supervisor Dennison met with Grievant Gibson to discuss Grievant's Annual Employee Performance Appraisal for the period of September

1, 2007, through August 31, 2008. At that meeting, Grievant was presented with a written evaluation of her job performance for the year on a form proscribed by the West Virginia Division of Personnel ("DOP"). The form is titled "Employee Performance Appraisal" and is routinely referred to as an "EPA-3." Respondent's Exhibit 1.

5. The EPA-3 was prepared by Supervisor Dennison with input from the attorney working in the Sutton Area office, Jennifer Grindo, and Manager Stalnaker.[2] Manager Stalnaker reviewed and signed the EPA-3 on October 16, 2008.

6. Utilizing the EPA-3 form, Supervisor Dennison rated Grievant's job performance according to 23 separate indicators, in six areas. Each indicator was rated as "Needs Improvement," "Meets Expectations" or "Exceeds Expectations." At the end of each area, Supervisor Dennison made written comments concerning Grievant's performance in that area. For the relevant rating period, Grievant received no ratings of "Exceeds Expectations," ratings of "Meets Expectations" on six indicators, and ratings of "Needs Improvement" on 17 indicators. Grievant's overall rating was "Needs Improvement."

7. Supervisor Dennison noted that Grievant Gibson produced a large quantity of work but it was of poor quality and often needed to be corrected. As a result, Grievant would get behind on assignments, communications and responses. Ms. Dennison included the following comments on the EPA-3:

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[2] Prior to receiving the EPA-3, Grievant received a mid-term evaluation on an EPA-2 form dated March 26, 2008, for the first half of the same employment term. Her performance on that form was rated as "Does Not Meet Expectations" and was the subject of a prior grievance and decision. *Gibson v. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 2008-1469-DHHR (Jan. 12, 2009).

- Sandra needs to improve her work product; she continues to make the same fundamental mental errors in her work product.
- Sandra fails to keep the BCSE Atty [Attorney Grindo] advised of relevant case preparation and case management. She needs to be more careful and thorough in her case evaluations.
- Sandra needs to return her calls in a timely manner as well as answer her e-mails as to case processing in a more timely manner to ensure customers' needs are met properly.
- Sandra needs to complete her work in a more timely manner without being e-mailed a 2nd/3rd/4th request to do so.
- BCSE Atty continues to return cases to her because: ISSF formulas are run incorrectly, ARTM's updated for court incorrectly, abilities to pay ran incorrectly and incomplete and court papers are not prepared for filing.[3]

The testimony of Supervisor Dennison, Attorney Grindo and Manager Stalnaker support these comments.

8. Grievant made a number of errors in processing information and preparing files for Attorney Grindo who presents the claims for enforcement to the circuit courts in the region represented by the Sutton Area office.

9. Grievant was regularly late in returning telephone calls and e-mails. Charlotte Stalnaker, the Regional Manager for the region containing the Sutton Area office, received complaints regarding Grievant's failure to return communications in a timely manner. At least once, Ms. Stalnaker copied all of Grievant's telephone messages and returned the calls herself to help Grievant get caught up.

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[3] Respondent's Exhibit 1. The acronyms for these reports were not explained, but it was apparent from the testimony that all of these documents contain data related to the income of the parents of dependant, child support payments paid and due, and other information relevant to establishing the obligation to provide child support in particular cases.

10. Supervisor Dennison was not concerned with the quantity of work Grievant was performing but rather the quality of the work product.

11. At the end of the EPA-3 form, Grievant wrote "I do not agree with the above as it does not match data." Grievant signed the EPA-3 form, indicating that she had received a copy of it, on October 21, 2008.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). An employee grieving her 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 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); *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). *Spence v. Div. of Natural Res*., Docket No. 2008-1112-DOC (Jan. 30, 2009).

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*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Grievant argued that the DHHR case reporting system demonstrated that she was processing as many cases as other Child Service Specialists and therefore her work was up to standard. She also generally disagreed with the assessment of her job performance but did not produce specific evidence to refute the testimony of Manager Stalnaker, Supervisor Dennison or Attorney Grindo. Each of the supervisors was able to point to specific instances where Grievant had made errors in processing information, in preparing cases and that Grievant was not responsive to communications from clients and management.

The EPA-3 reflected problems with Grievant's performance in identified areas of performance expectations and was not based upon matters outside the scope of Grievant's duties. Grievant presented no evidence that the performance evaluation prepared by Ms. Dennison was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Likewise, Grievant was unable to prove that the evaluation document or process was arbitrary and capricious. Consequently, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. An employee grieving her 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 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). 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). *Spence v. Div. of Natural Res.*, Docket No. 2008-1112-DOC (Jan. 30, 2009).

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).

4. Grievant did not prove by a preponderance of the evidence that her evaluation was the result of a misinterpretation or misapplication of the rules governing such evaluations. Likewise, Grievant did not prove that the evaluation was arbitrary and capricious.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: JANUARY 19, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE