THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SANDRA LEE GIBSON,
Grievant,

v. **Docket No. 2008-1469-DHHR**

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

DECISION

Sandra Lee Gibson ("Grievant") filed a grievance on March 27, 2008, contesting a Mid-Point Employment Performance Appraisal she received from her supervisor the previous day. As her Statement of Grievance, Ms. Gibson wrote:

> Evaluation does not match performance as reflected on monthly statistic reports. Evaluation is a misapplication of the facts.

As relief Grievant seeks a "fair evaluation based on facts in the monthly reports."

After a hearing, the grievance was denied at level one in a written decision dated May 28, 2008. A level two mediation was held on June 30, 2009, and Grievant subsequently appealed to level three. The level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on August 25, 2009. Grievant Gibson appeared at the hearing and was represented by Gordon Simmons, UE Local 170, WVPWU.[1] Respondent was represented by B. Allen Campbell, Senior Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law

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[1] West Virginia Public Workers Union.

proposals, the last of which was received on October 16, 2009. This grievance became mature for decision on that date.

Synopsis

Grievant contends that her mid-year evaluations 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. On March 26, 2008 Grievant met with Supervisor Dennison for a mid-point review of Grievant's job performance for that employment year. At that meeting, Grievant was given a copy of a completed Employee Performance Appraisal Form 2 ("EPA 2") that had been prepared by Ms. Dennison. Grievant's performance was rated "Does Not Meet Expectations." The rating period for this review was September 2007 through February 2008. Respondent's Exhibit 1.

4. The EPA 2 form is used by supervisors in state agencies in the evaluation process. The EPA 2 is a mid-point review that should be conducted near the middle of the performance period to provide feedback to the employee concerning her strength, weaknesses and general performance to that point in the year. Division of Personnel's *Supervisor's Guide to the Performance and Appraisal Process*, (revised July 2005), Grievant's Exhibit 1.

5. Grievant had not previously received a rating of "Does Not Meet Expectations" but had been placed on an Improvement Plan to address identified shortcomings in her performance.

6. Supervisor Dennison's usual evaluation practice for Child Support Specialists ("CSS") is to list eight basic expectations for the job in the "Performance Development Needs" section of the EPA 2 and highlight the expectations that she felt the employee needed to improve. The two areas she highlighted for Grievant were:

> 4. Continue to keep abreast of the Program's changing policies and procedures to better assist the customers' needs; and,
>
> 8. Be mindful of deadlines and time frames.[2]

7. In the EPA 2 section titled "General Comments" Supervisor Dennison wrote:

> Sandra needs to be more watchful of actions that need completed in cases and review them carefully for the next step that needs to be taken, and following thru on those actions. She needs to return her phone calls in a more timely manner. BCSE Atty states case worker errors are due to her lack of review of information or reviewing the information incorrectly. She needs to review her e-mails more closely and timely for response and actions that need taken. She needs to update returned files from the BCSE Atty in a more timely manner, so actions are not delayed. Sandra is currently on a corrective action plan, and her work is currently not up to the standard of a CSS III.

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[2] Respondent's Exhibit 1.

Note: Current % of cases under lien is 48.98 % this is an increase from 24.63% from 9-07.[3]

8. Grievant made a number of errors in processing information and preparing files for the DHHR attorney 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.

10. Grievant refused to sign and return the EPA 2 and when pressed on the issue she wrote "whatever" in the signature section and returned the form to her supervisor.

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

[3] Respondent's Exhibit 1.

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 points to the eight performance areas listed by Supervisor Dennison in the “Performance Development Needs” section of the EPA 2 and notes that five of the eight

areas begin with the word "continue". For instance, an area highlighted as needing improvement for Grievant was "Continue to keep abreast of the Program's changing policies and procedures to better assist the customer needs."[4] Grievant opines that the use of the word "continue" denotes that Grievant is keeping abreast of the Program changes and therefore she is not deficient in that area. This interpretation is not supported by the evidence. Instead of only listing areas in which her CSS employees are deficient, Supervisor Dennison lists eight basic areas of expectations in this section of the EPA 2. She then highlights in bold type the specific areas that the individual CSS is not successfully performing. While it is true that the five of the basic expectations begin with the word "continue," when Supervisor Dennison discussed the document with Grievant, she made it clear that the highlighted expectations were not being met. Additionally, Supervisor Dennison specified performance areas Grievant needed to improve in the General Comment section of the EPA 2.

Grievant also argues that Dennison's practice of listing the eight basic expectations in the Performance Development Needs section of the EPA 2 and highlighting areas that need improvement is not consistent with the Division of Personnel's *Supervisor's Guide to the Performance and Appraisal Process*, (revised July 2005) ("Guide").[5] Grievant avers that the Guide requires a supervisor to list specific areas of deficiencies in this area to let the employee know what she needs to improve to meet expectations. The Guide anticipates that the Supervisor will use this section of the EPA 2 to give the employee

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[4] Respondent's Exhibit 1

[5] Grievant's Exhibit 1

notice of areas she needs to work on, but it does not specify how those deficient areas must be listed. The method utilized by Supervisor Dennison may be somewhat unorthodox, but in conjunction with the specific comments in the next section and the meeting with Grievant to discuss the EPA 2, Grievant was clearly notified of the areas she was not performing to standards.

Grievant was not able to prove that the evaluation was the result of arbitrary and capricious actions or decisions. The performance deficiencies cited by Supervisor Dennison for the evaluation rating were supported by the evidence. Additionally, it was not proven that the evaluation process was conducted in a manner that was inconsistent with policy. 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 12, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE