WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES RATCLIFF,
Grievant,

v. **Docket No. 2011-1787-DEP**

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Grievant, James Ratcliff, is employed by Respondent, Department of Environmental Protection ("DEP"), in the Office of Explosives and Blasting. Grievant's position is classified as an Environmental Resource Program Manager 1. Mr. Ratcliff filed a level one grievance form on June 14, 2011, claiming that he had received an improper EPA.[1] As relief, Grievant seeks a "Corrected EPA."

A level one hearing was conducted on two days, November 7, 2011, and November 29, 2011. A recommended decision denying the grievance was issued on March 21, 2012, and an Order adopting the recommended decision was entered on March 22, 2012. Grievant appealed to level two and a mediation was conducted on June 14, 2012. Grievant perfected his appeal to level three on June 27, 2012.

A level three hearing was conducted by the undersigned Administrative Law Judge ("ALJ") at the Charleston office of the West Virginia Public Employees Grievance Board on January 30, 2013.[2] Grievant appeared at the hearing with his representative, Steve Thompson, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Gregory G. Skinner, Senior Assistant Attorney General. Following the

[1] EPA is an abbreviation of Employee Performance Appraisal.
[2] The hearing was originally scheduled to be heard before ALJ Billie Catlett. ALJ Catlett was unable to conduct the hearing on that day and, with the consent of the parties, the undersigned was assigned to hear the case.

hearing, the parties submitted Proposed Findings of Fact and Conclusions of Law, the last of which was received by the West Virginia Public Employees Grievance Board on April 26, 2013. This matter became mature for decision on that date.

Synopsis

Grievant received an Employee Performance Appraisal 3 Form ("EPA-3") at the end of the 2010 performance period. Grievant received an overall rating of "Meets Expectations" for the rating period. However, he also received a rating of "Needs Improvement" in some individual rating areas. Grievant argues that Respondent did not comply with the Division of Personnel's ("DOP") policy related to Employee Performance Appraisals. Grievant also argued that the "Needs Improvement" ratings were inaccurate and not supported by his performance. Grievant proved that his supervisor's failure to set measurable goals at the beginning of the rating period, conduct a proper mid-term evaluation, or otherwise document the rendered ratings, resulted in ratings that were not rendered in accordance with the specific procedures required by the Division of Personnel Policy DOP-17 governing the employee performance appraisal process. The grievance is GRANTED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, James Ratcliff, is employed by Respondent, DEP, in the Office of Explosives and Blasting. Grievant's position is classified as an Environmental Resource Program Manager 1.

2. Grievant's duties include providing technical expertise on blasting as required for training and the development of policy; rules or law; supervising the blasting certification program; supervising the pre-blast surveyors training and certification program; supervising research projects conducted by the Office of Explosives and Blasting; auditing the blasting fee collection; supervising and reviewing administrative functions of the office; and assisting the Inspection and Enforcement Section in training inspectors as needed. Grievant's Exhibit 2.

3. Grievant's immediate supervisor is David Vande Linde, Chief of the Office of Explosives and Blasting.

4. Division of Personnel Policy DOP-17 establishes a standardized performance appraisal system for State employees that is characterized by clearly-defined performance goals and objectives and increased employee involvement. Respondent uses the DOP's Employee Performance Appraisal Policy to evaluate its employees.

5. "During the first 30 days of each performance rating period, supervisors/raters are required to meet individually with each subordinate employee to identify, define, and describe performance expectations." Policy DOP-17 § II.C.2.a. Those expectations must be set out by the supervisor in the DOP form EPA-1. Policy DOP-17 § II.B.1.a.

6. "Near the middle of the performance period (toward the end of the first six months of performance), supervisors/raters are required to meet individually with each subordinate employee to conduct a formal, mid-year review of the employee's performance. During this meeting, the supervisor/rater must provide feedback to the

employee concerning the employee's strengths, weaknesses (if any), and performance during the primary performance period." Policy DOP-17 § II.C.2.c. The supervisor is required to fill out a DOP Form EPA-2 identifying areas in which the employee needs improvement. Policy DOP-17 § II.B.1.b.

7. "Within 30 days following the end of the performance rating period, supervisors are required to meet individually with each of their subordinate employees to review and rate the performance of each employee during the entire performance rating period." Policy DOP-17 § II.C.2.e. The supervisor must complete a DOP Form EPA-3 containing a final review of the entire performance period and an overall rating of the employee's performance. Policy DOP-17 § II.B.1.c.

8. The 2010 rating period ran from January 1, 2010, through December 31, 2010. Supervisor Vande Linde did not meet with Grievant during the first 30 days of grievance performance rating period for the year 2010, nor did he complete a DOP Form EPA-1 setting out expectation for Grievant's performance during that rating period.

9. Supervisor Vande Linde did not hold a mid-year review with Grievant during the 2010 rating period to point out any strengths and weaknesses in Grievant's performance or any areas in which Grievant needed improvement. No DOP Form EPA-2 was completed to give Grievant notice that there were areas in which he needed to improve his performance prior to his final rating for the period.

10. For the 2010 end of year review, Supervisor Vande Linde met with Grievant on April 24, 2011, to discuss the year-end performance evaluation and rating. To accommodate a scheduled vacation for Grievant, Supervisor Vande Linde again met

with Grievant on May 24, 2011, to conclude the 2010 year-end performance appraisal and rating. Neither of these meetings occurred within 30 days of the December 31, 2010, which was the end of the 2010 rating period, as required by Policy DOP-17 § II.C.2.e.

11. Supervisor Vande Linde developed a DOP Form EPA-3 to evaluate and rate Grievant's job performance for the 2010 rating period. The form was signed by Grievant and Supervisor Vande Linde on May 24, 2011. Grievant received an overall score of 1.62 which equates to an overall performance rating of "Meets Expectations."

12. Grievant received a rating of "Needs Improvement" in a number of specific performance areas including: Adapts to new situations in a positive manner; Shares information with others when appropriate; Acts independently while keeping supervisor informed; Performs work according to current guidelines and directives; Exhibits ability to secure and evaluate facts before taking action; Work output matches and meets expectations established; Employee completes all assignments; Employee consistently meets deadlines; Work results satisfy organization's goals; Employees presence can be relied upon for planning purposes; and Employee is a dependable team member. Grievant's Exhibit 5.

13. Grievant disagreed with Supervisor Vande Linde's assessment of those rating areas, and asserted that he was meeting expectations in all areas.

14. By the time of the level three hearing, Grievant had improved in all of these areas to the extent that he was meeting expectations. [3]

Discussion

[3] Level three testimony of Supervisor Vande Linde.

Because employee evaluations are not disciplinary in nature, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *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 may challenge his 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); *Kemper v. W. Va. Dep't of Transp*., Docket No. 91-DOH-325 (Mar. 2, 1992); *Hurst v. W. Va. Dep't of Transp*., Docket No. 91-DOH-326 (Feb. 27, 1992). Grievant argues that Respondent violated the DOP Employee Performance Appraisal Policy (DOP Policy 17) by failing to establish performance expectations in an EPA-1, and failing to complete an EPA-2 in the middle of the rating period to give Grievant notice of any areas in which he might not be meeting expectations.

In the recent Grievance Board decision of *Parsons v. General Ser. Div.,* Docket No. 2012-0867-DOA (Apr. 17, 2012) it was noted that:

> "It is the policy of the State of West Virginia to: Tell employees what is expected of them during the first 30 days of each rating period.". . . More particularly, the Policy [DOP Policy 17] says: During the first 30 days of **each performance rating period**, supervisors/raters are required to meet individually with each subordinate employee to

> identify, define, and describe performance expectations (e.g., 13 responsibilities, duties, and standards). The purpose of this meeting is to ensure that the employee understands and is committed to established performance expectations of his or her job. DOP Policy No. 17 at ¶ II.C.2.a. (emphasis added).

Id. Supervisor Vande Linde did not meet this policy requirement.

Additionally, an EPA-2 must be completed near the midpoint of the performance rating period to give the employee notice of areas in which he is failing to meet performance expectations, so that he has an opportunity to improve his performance before the final evaluation at the end of the rating period. *Parsons, supra.* There was no mid-year evaluation of Grievant's performance which naturally led led him to believe that he was meeting expectations in all areas. If Grievant's performance was sufficiently deficient at or before the mid-year point, it warranted a mid-year review. Grievant's supervisor did not discuss these issues with Grievant, using the EPA-2, just as he did not conduct an initial planning session to set performance expectations for Grievant using an EPA-1. Grievant was not given any opportunity to address alleged deficiency in his performance so that he might meet expectations in the final review.

Finally, Mr. Vande Linde did not meet with Grievant about his overall evaluation for the 2010 rating period until March 2011; at least sixty days beyond GOP Policy 17's thirty-day requirement.

Grievant proved by a preponderance of the evidence that Respondent failed to meet nearly all of the requirements set forth in DOP's Employee Performance Appraisal Policy in developing Grievant's evaluation for the 2010 rating period. It has been consistently held that "[a]n administrative body must abide by the remedies and procedures it properly established to conduct its affairs." *Syl. Pt. 1, Powell v. Brown*, 160

W. Va. 723 (W. Va. 1977). Respondent failed to abide by the policy established for evaluating the performance of State employees. Accordingly, the grievance is GRANTED. The remedy in cases where the evaluation has been found to be in violation of policy has been to remove the evaluation from the employee's permanent file. *See Maxey, supra* and *Kemper, supra.* In this matter, the EPA-3 for the 2010 rating period is void and must be removed from all of Grievant's files. Additionally, no negative inference can be made from the fact that Grievant has no evaluation for the 2010 rating period. In the absence of a properly performed evaluation, it must be presumed that Grievant's performance met expectations during that time.

Conclusions of Law

1. Because employee evaluations are not disciplinary in nature, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *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).

2. An employee may challenge his 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 &* 7 *Human Serv*., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); *Kemper v. W. Va. Dep't of Transp*., Docket No. 91-DOH-

325 (Mar. 2, 1992); *Hurst v. W. Va. Dep't of Transp*., Docket No. 91-DOH-326 (Feb. 27, 1992).

3. Grievant established by a preponderance of the evidence that his 2010 performance evaluation was rendered without the benefit of an EPA-1 defining his supervisor's performance expectations during that rating period, that no mid-year review was conducted or documented using an EPA-2, nor was a final evaluation performed within thirty days of the end of the 2010 rating period. These deviations from the policy on administering the performance appraisal process established by the West Virginia Division of Personnel resulted in lower ratings on his annual performance evaluation. *See Parsons v. General Ser. Div.,* Docket No. 2012-0867-DOA (Apr. 17, 2013); *McFadden v. W. Va. Dep't of Health & Human Res*., Docket No. 94-HHR-428 (Feb. 17, 1995); *Maxey v. W. Va. Dep't of Health & Human Res*., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993).

4. "An administrative body must abide by the remedies and procedures it properly established to conduct its affairs." *Syl. Pt. 1, Powell v. Brown*, 160 W. Va. 723 (W. Va. 1977). Respondent failed to abide by the policy established for evaluating the performance of State employees.[4]

Accordingly, the grievance is GRANTED. The EPA-3 evaluation of Grievant's performance is void and Respondent is ORDERED to immediately remove it from Grievant's personnel file and any other files related to Grievant's performance.

[4] In *Powell supra*, the Court cited the United States Supreme Court's holding that: "An executive agency must be rigorously held to the standards by which it professes its action to be judged . . . This judicially evolved rule of administrative law is now firmly established. . ." *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959)

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: AUGUST 27, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE