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JIM HURST

v.

DOCKET NO. 91-DOH-326

WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION

D E C I S I O N

Jim Hurst (hereinafter Grievant) is an employee of the West Virginia Department of Transportation, (hereinafter Transportation) Division of Highways, and is currently classified as a Storekeeper II in Upshur County. Grievant alleges that his 1990 performance evaluation was unjustly low and that this evaluation should be removed from his employment file.<sup>1</sup> Grievant's 1990 evaluation resulted in an overall score of "7.11" corresponding to the "very good" range while his 1989 evaluation was "7.56" also within the "very good" range.

Grievant filed this grievance on March 15, 1991, and it was denied at the two initial Levels. A Level III hearing was held in

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<sup>1</sup>Grievant's original grievance form requested that his evaluation rating for 1990 be changed to reflect the rating that he received in the year 1989. However, Grievant's post-hearing brief requests that this evaluation be removed from his employment file. Because the latter is the typical relief that is granted in situations where it is determined that an employee's performance evaluation is derived by an abuse of discretion, the latter request will be considered as the requested relief.

this matter on June 6, 1991, before a three evaluator panel.<sup>2</sup> The Level III decision was issued on July 12, 1991, holding that neither Grievant had met their burden of proof in demonstrating that their respective performance evaluations were unfairly prepared. Both parties have agreed that this decision could be based upon the record of the Level III hearing and waived a right to a hearing at Level IV.<sup>3</sup>

In cases where an employee challenges his or her performance evaluation, that employee must prove by a preponderance of the evidence that the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules addressing the evaluation process or that the performance rating was established by an abuse of the supervisor's discretion. See, Dadisman v. W.Va. Div. of Rehab. Serv., Docket No. 90-RS-485

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<sup>2</sup>This Grievance was consolidated at the third Level with the grievance filed by Willis Kemper, an Equipment Operator II with the Department of Transportation in Upshur County. Mr. Willis' statement of grievance was identical to Mr. Hurst's. These two grievances were not filed with this office as consolidated grievances and they will each be addressed upon their own merit by a separate decision. The cite to Mr. Kemper's decision is Kemper v. West Virginia Department of Transportation, Docket No. 91-DOH-325.

<sup>3</sup>The record in this case consists of a transcript of the Level III hearing and certain exhibits. The transcript of the hearing contained twenty-one (21) pages of argument and testimony which also included the consolidated grievance of Willis Kemper. The record is deplete of any real substance except for the comparison of the performance evaluation ratings for 1989 and 1990 and a series of questions and answers demonstrating that Grievant had previously discussed these same issues with Mr. Cutright in the past and for the sake of brevity these issues were not fully fleshed out. Because the parties both agreed to be bound by this decision based upon the lower record, ever effort will be taken to interpret the substance of the testimony for this decision.

(April 11, 1991); Williston v. W.Va. Div. of Human Serv., Docket No. 90-DHS-089 (June 25, 1990); Wiley v. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989). In order to prove that his supervisor abused his discretion, Grievant must prove that the supervisor acted in an arbitrary or capricious manner. See generally, Dadisman, supra.

In the case at hand, Grievant compared and contrasted his performance evaluation ratings for the years 1989 and 1990 as follows:

<u>Areas of evaluation</u>	<u>1989</u>	<u>1990</u>
1. Job Knowledge	10	8
2. Quality	8	6
3. Quantity	8	6
4. Judgment	6	8
5. Attitude	8	8
6. Safety	8	6
7. Initiative	6	8
8. Use of time	6	6
9. Human Relations	8	8
Total	68	64
Overall Rating	7.56	7.11
Rating scale	Very Good	

In 1989, Grievant received his evaluation from his direct supervisor, Howard Currence, a Mechanic III. Mr. Hayes Cutright, Upshur County supervisor, had determined that it would be appropriate for Mr. Currence to perform the evaluation because he was familiar with Grievant's job duties and performance. Department of Highways' Administrative Operating Procedures, Vol. No. IX, Chapter 4, Section C, contains a section called Questions on Procedure, which states that there exists some discretion in determining who is to perform the evaluation and it should be a person who "has had an ample opportunity to observe the performance

of the employee." Grievant provided no evidence that Mr. Currence was not capable of preparing his 1989 evaluation or that he did not have authority under this Policy to prepare the evaluation, only that his subsequent 1990 evaluation should reflect the same scores.

Regarding the 1990 evaluation, Mr. Cutright simply based the scores upon his own interpretation of Grievant's abilities under the appropriate categories of evaluation irrespective of the past evaluation performed by Mr. Currence.<sup>4</sup> In fact, Mr. Cutright signed Grievant's performance evaluation of 1989 signifying that he did not agree with Mr. Currence's evaluation. Mr. Cutright stated that he did not feel that it was appropriate for employees to receive "10s" in their evaluation and that maybe he had given one employee as high as a "9". The substance of Mr. Cutright's testimony was that he did not review the 1989 evaluation before he completed the 1990 evaluation and that he did not try to make his evaluation the same as Mr. Currence's. Mr. Cutright felt that Grievant was performing his job in the "very good" range and that the difference in the overall evaluation ratings was simply the result of having two different persons performing the evaluation in successive years.

Grievant did not prove by a preponderance of the evidence that Mr. Cutright misapplied or misinterpreted any applicable policy or

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<sup>4</sup>There was no testimony provided at the Level III hearing on the issue of why Mr. Cutright prepared the 1990 evaluation as opposed to Mr. Currence. Mr. Cutright did testify that he did not agree with the evaluation scores that Mr. Currence had given for the past evaluations. However, this testimony was not given in response to any particular question challenging the appropriateness of who performed the evaluations.

acted in an arbitrary or capricious manner. Grievant tried to question Mr. Cutright concerning specific aspects of his performance that would corresponded to the performance ratings which he received in 1990. Mr. Cutright stated with regard to Grievant's grade in the category of quality:

There again Jim, this is two different people's opinion. To me I gave you a 6 and a 6 on this rating scale is a good. So to me if you're doing your job and you're doing good, then to me that's a 6. And the 8, like I say, was rated by another person.

Later in the hearing, Mr. Cutright did testify with regard to some mistakes that had been made by Grievant:

Q: Well, it's, you know, irregardless whether you look at these, we look at them. And they keep track of them, someone looks at them eventually they look at them. It is going down, I want to know why it's going down. Because if there is a problem with my work, I'd like to know what it is and to be specific, I don't recall being talked to about anything specific that I have been, I mean that indicates the quality of my work has went down.

A: Things going in on the computer, mistakes, Mary Health corrects. The shortages we talked about, gas and oil, materials.

. . .

Q: How many mistakes are you talking about? What kind of percentage are you talking about?

A: The percentages I can't tell you. I just know that there's been several.

. . .

A: There's no set percentages, Jim. I'm just making the point that you do make mistakes, we all make mistakes. And to me, That's the reason you got a 6 because, you know, a 6 is in the good category.

Concerning the evaluation standard of safety, Mr. Cutright testified that Grievant was doing his job as safely as any other employee he evaluated:

If you pull the evaluations of everyone that I did,

I gave them a 6. To me safety is important and it should be done. Everybody does it, it's part of their job. And like I say, if your doing your job, it's a 6.

Mr. Cutright had obviously considered the work of Grievant in some detail before he assigned numbers to Grievant's evaluation form and graded Grievant against the other employees that Mr. Cutright had knowledge of. There is no indication from the very limited record that demonstrates that Mr. Cutright did not fairly evaluate Grievant on the basis of what he perceived was required by the definitions on the form of "average", "above average" and "exceptional". Mr. Cutright's actions would have been arbitrary and capricious if he would have simply rated Grievant the same as Mr. Currence had done in 1989 in order to give Grievant that same score without any basis for his opinion.

In reviewing Grievant's evaluation, he decreased from an "8" to a "6" in three areas and from a "10" to an "8" in one category; he increased from a "6" to an "8" in two categories and stayed the same in three other categories of evaluation.<sup>5</sup> The overall result was that Grievant scored in the "very good" range for both years of evaluation, differing by only 45/100ths of a point overall. At no time had Grievant received a score less than a "6" which corresponds to the rating of "average". Grievant was also above the average score for all Upshur County employees for both 1989 and 1990 and was third in average scores for the Upshur County shop employees both years in question. Grievant has failed to prove

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<sup>5</sup>The evaluation forms did not contain the score of "7" so therefore an decrease from an "8" to a "6" or an increase from a "6" to an "8" is only one step.

that his 1990 evaluation was arbitrarily or capriciously performed by Mr. Cutright.

The foregoing discussion is supplemented with the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. Grievant is employed by the West Virginia Department of Transportation, Division of Highways, and is classified as a Storekeeper II in Upshur County.

2. In 1989, Grievant was evaluated by his direct supervisor, Howard Currence, and he received a total score of "68", an average score of "7.56" and an overall rating of "very good".

3. In 1990, Grievant was evaluated by Mr. Hayes Cutright, Upshur County Supervisor, and he received a total score of "64", an average score of "7.11", and an overall rating of "very good".

#### CONCLUSIONS OF LAW

1. In cases where an employee challenges his or her performance evaluation, the employee must prove by a preponderance of the evidence that the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules concerning the evaluation process or that the performance rating was established by an abuse of the supervisor's discretion. See, Dadisman v. W.Va. Div. of Rehab. Serv., Docket No. 90-RS-485 (April 11, 1991); Williston v. W.Va. Div. of Human Serv., Docket No. 90-DHS-089 (June 25, 1990); Wiley v. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989).


2. In order to prove that a supervisor has abused his or her

discretion in preparing an employee's performance evaluation, the grievant must prove that the supervisor acted in an arbitrary or capricious manner. See generally, Dadisman, supra.

3. Grievant has failed to meet his burden of proof by showing that his 1990 performance evaluation was prepared by an abuse of discretion or that it was the result of a misapplication or misinterpretation of the Department of Transportation's policies.

For the foregoing reasons, this grievance is DENIED.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code, 29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

  
ALBERT C. DUNN, JR.  
Administrative Law Judge

Dated: February 27, 1992