



File
Copy

JAMES PAUL GEARY
Chairman

ORTON A. JONES
DAVID L. WHITE
Members

C. RONALD WRIGHT
Director

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

OFFICES:

240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone: 348-3361

WILLIS KEMPER

v.

DOCKET NO. 91-DOH-325

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION

D E C I S I O N

Willis Kemper (hereinafter Grievant) is employed by the West Virginia Department of Transportation (hereinafter Transportation), Division of Highways, as an Equipment Operator II in Upshur County. Grievant complains that his 1990 employee performance evaluation was unjustly prepared and that it should be removed from his employment file.¹ This grievance was filed on March 15, 1991, at

¹This grievance was originally filed at the same time Jim Hurst filed a grievance challenging the fairness of his 1990 evaluation as compared to his 1989 evaluation. These two grievances were consolidated at the lower three levels and a joint decision was rendered by Transportation. These grievances have not been consolidated at Level IV and a decision is being issued in each case upon its own merits. The cite for Mr. Hurst's decision is Hurst v. W.Va. Dept. of Transportation, Docket No. 91-DOH-326 (Feb. 27, 1992).

Secondly, both grievants, at the time of the initial filing of their grievances, requested that their 1990 evaluation scores be changed to reflect the same scores that they had each received in 1989. However, their post-hearing brief requested that their respective 1990 evaluations be removed from their personnel files. The latter request is consistent with the remedy which this Grievance Board has ordered in similar cases; therefore, the removal of the evaluation form from Grievant's personnel file will be treated as the appropriate requested relief.

Level I and was subsequently denied. An appeal to Level II was filed and that decision of April 10, 1991, was also adverse to Grievant. A Level III hearing was held in this matter on July 12, 1991, in which the Grievant's request was again denied.² Both parties agreed to have the undersigned issue a decision based upon the lower level record and waived any right to a Level IV hearing.

Grievant argues that his 1990 evaluation was unjustly prepared in that he received a score of "6" in the category of evaluation for "Cooperation" instead of receiving a score of "8", which was the score that he had received in 1989 (the form does not allow an employee to receive a "7" because it does not contain any odd numbers to be used for a rating). Grievant believes that because Mr. Cutright evaluated him in both 1989 and in 1990 and because Mr. Cutright could not give specific examples at the hearing why Grievant's grade was lowered, his evaluation must necessarily have been unjust.

The transcript of the Level III hearing corresponding to Grievant's evaluation consisted of approximately five (5) pages of testimony, three (3) of which dealt with the issue of Grievant's decreased score. When Mr. Cutright was asked why Grievant's evaluation dropped in the area of "cooperation", his initial response was as follows:

A: There again these things are from two different years. I don't have them laying side by side when I evaluate them. Just to be honest with you, Willis follows orders. On occasion, in my opinion, he's a

²The Level III hearing was conducted by a three member grievance evaluator panel.

little, how would I put this, a little argumentative. But he'll do anything I ask him to but sometimes I have to explain in a little more detail why I want it done or why I want it done in a particular way or why he feels it should be done in one way or another. But like I say, that's nothing against Willis. There again, it's just the fact that I don't have these things side by side when I evaluate them. There again, like I say, I didn't look at, I don't lay them side by side and say, OK he got an 8 this year, I'm going to give him an 8 too. He got a 6, I'm going to give him a 6. It just doesn't work like that.

Q: You say that he's never refused to do anything that you've asked him to do but he's a little argumentative. Could you give examples of that or be specific about it?

A: No, I don't have any particular details or any particular times or dates or anything else. That's my opinion.

. . .

Q: I think though for Mr. Kemper, he needs to know specifically what's the difference of what you're saying, like what's argumentative? Because his understanding is not the same. Give an example.

A: Like I say, I don't have any examples and this is over a whole period of years time and things just sort of stick in your mind about one thing or another. As far as dates times and stuff like that, no. Like I say, there again I didn't have both of these with me at the time. If I'd had both of them laying here and would have looked at them, I might have thought one way or the other, it might have influenced me.

Mr. Cutright did testify that he was not of the opinion that Grievant's way of being argumentative had to do with either person's view on safety, an area were a difference of opinion might often be helpful or encouraged.

In a situation were an employee challenges his or her performance evaluation, that employee must prove by a preponderance of the evidence that the evaluation was prepared as a result of the supervisor's misinterpretation or misapplication of established

policy or law addressing the evaluation process or that the supervisor abused his 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). In order to prove that a supervisor has acted in a manner that constitutes abuse of discretion, a grievant may prove that the evaluation was the result of some arbitrary or capricious decision-making. See generally, Dadisman, supra.

In the situation at hand, Grievant had been evaluated in 1989 by Mr. Cutright and had received a total score of "50", an overall rating of "7.14" and a rating scale in the "above average" range. In 1990, out of nine categories, Grievant received the same scores except in the category of "cooperation" where he received a "6" as opposed to an "8". His total points were "48", his overall rating was a "6.85", and his rating scale was "average". The change in his rating scale was a result of his overall rating being averaged and that average compared to a set range which included "5" -- "6.99" as "average" and "7" -- "8.99" as "above average". Even though Grievant's total point score did not change by more than 2 points, his rating scale fell below the mark of "7.00" which ultimately determined his rating.

Regarding Grievant's decrease in score in the area of "cooperation", the term "cooperation" as described on the evaluation form means "ability to adapt to changing situations; willingness to follow orders and instructions." A score of "6"

corresponds to the "average" range in which "average" is a middle score intended to represent the majority of employees.³ Mr. Cutright gave Grievant a score of "6" for "cooperation" based upon his perception that Grievant can sometimes be argumentative. However, Mr. Cutright did not give any concrete reasons in response to specific questions for why he gave Grievant a decreased score in this category as compared to the 1989 evaluation. In fact, from looking at the testimony, it appears that Mr. Cutright's opinion that Grievant can sometimes be argumentative is based mainly on an incident that happened prior to 1990. Mr. Cutright stated, "[L]ike I say, I don't have any examples and this is over a whole period of years of time and things just sort of stick in your mind about one thing or another." It would appear that Grievant's 1990 evaluation decreased in score based on events that occurred outside of the 1990 evaluation period. For this reason, it is determined that Grievant's 1990 performance evaluation was prepared by an abuse of discretion. It is understood that a certain amount of subjectivity is inherent in employee evaluations, however, the same evaluator may not randomly assign scores to an employee's evaluation without having some concrete basis for that score, especially when the

³The evaluation forms that were used as exhibits at the Level III hearing for Grievant were slightly different than the forms used as exhibits in the Hurst grievance. The evaluation forms which were used to evaluate Grievant contained the following ratings: unsatisfactory, below average, average, above average, and exceptional. The terms utilized on the forms for Mr. Hurst's evaluations were unsatisfactory, marginal, satisfactory, good, very good and exceptional. On these two forms, the corresponding ratings representing the assigned number "6" was average for Grievant's form and good on Mr. Hurst's form. These two terms will be treated as synonymous for purposes of discussing this case.

employee is evaluated by the same supervisor in successive years.

The record also reflects, in addition to Grievant's argument that he was improperly evaluated with regards to the area of "cooperation", that there has already been some discussion between the parties that his performance evaluation should reflect that Grievant maintains certain additional skills and abilities that were not reflected on the reverse side of the evaluation form under the heading, "Does the employee have skills, training or experience not mentioned before which might bear on his/her performance". Grievant has established that he has attended a Class III grader school and that he also maintains his own electrical license, therefore, inclusion of these skills on his future evaluations would be proper.

The foregoing discussion is hereby 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, as an Equipment Operator II in Upshur County.

2. Grievant's performance was evaluated in 1990 by Upshur County supervisor Hayes Cutright. His evaluation score was the same as it had been in the previous year of employment except for the fact that he received a score of "6" in the area of "cooperation" as opposed to a score of "8".

3. Testimony was provided by Mr. Cutright that the reason Grievant received a score of "6" in the area of "cooperation" was

that he sometimes is argumentative. However, Mr. Cutright could not provide any specific examples of Grievant being argumentative for the period of evaluation.

CONCLUSIONS OF LAW


1. In a situation where an employee challenges his or her performance evaluation, that employee must prove by a preponderance of the evidence that the performance evaluation was prepared as a result of the supervisor's misinterpretation or misapplication of established policy or law addressing the evaluation process or that the evaluation was established by an abuse of 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 acted in a manner that constitutes abuse of discretion, a grievant must show that the evaluation was the result of some arbitrary or capricious decision-making. See generally, Dadisman, supra.

3. Grievant has met his burden of proof in demonstrating that Hayes Cutright has acted arbitrarily or capriciously in lowering his evaluation score in the category of "cooperation" without providing any specific examples of activity which would support this decrease in evaluation.

For the foregoing reasons, this grievance is **GRANTED** with respect to Grievant's request that his 1990 performance evaluation be removed from his permanent employment file.

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. West Virginia 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: March 2, 1992