NANCY LAW and JOANN BRAGG

v. Docket No. 95-HHR-452

WEST VIRGINIA DEPARTMENT OF HEALTH
and HUMAN RESOURCES

DECISION

The grievants are employed by the West Virginia Department of Health and Human Resources (HHR) as Economic Service Workers assigned to its regional office in Fayetteville. They filed grievances at Level I, March 23, 1995, complaining of irregularities and/or policy violations in the agency's decision to re-post a vacant Economic Service Supervisor (ESS) position. The grievances were denied at the lower levels, and appeal to Level IV was made October 19, 1995. At least four hearings were continued on the joint motion of the parties. In January, 1997, they advised that the case could be decided on the record developed at Level III. The record and proposed findings of fact and conclusions of law were received by February 3, 1997.

Background

There is little, if any, dispute over the facts of the case. The grievants, Shelia Goodwin and six other persons made timely applications for the ESS post. After conducting interviews and reviewing resumes, Economic Service Coordinator Keith Kiser reported to Regional Administrator for Income Maintenance Louis Palma that Grievant Law, Ms. Goodwin and Grievant Bragg were his first, second and third choices. Without Grievant Law's knowledge, Mr. Palma recommended to HHR's Charleston headquarters that she be awarded the job.

Shortly thereafter, during an administrative reorganization, Margaret Waybright was named Director of Region IV, a position which would assume supervision of the ESS post in issue. Believing that she might want to be involved in the appointment, Mr. Palma notified Ms. Waybrightthat a recommendation had been made. Apparently, he also advised that he would rescind it if she wished to re-post, conduct interviews and make her own choice. For several reasons, including that she wanted a newly-appointed Community Service Manager, who would be working with the ESS, to

participate in the selection process, Ms. Waybright elected to re-post the position. The paperwork associated with Grievant Law's promotion to the post was halted. The grievances were filed shortly after the grievants learned that the job would be re-posted.

HHR has no regulations which prohibit the re-posting of a position before an offer of employment is made to an applicant. The West Virginia Division of Personnel (Personnel) has adopted administrative rules which provide that a position must be re-posted if not filled within six months of the original announcement, but its regulations are otherwise silent on the issue. The evidence establishes that it is not uncommon for agencies to withdraw recommendations of employment for a variety of reasons, including loss of funds, abolishment of the position, a failure to draw a sufficient field of applicants, and errors in the posting.

Argument

The grievants' only claim is that it was arbitrary and capricious for Ms. Waybright to reannounce the job rather than interview and choose from the original applicants. HHR denies that the re-posting was an abuse of discretion.

Findings and Conclusions

W.Va. Code §29-6A-2(i) defines a grievance as:

> [A]ny claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

It is at least questionable whether an employee's claim that his employer acted arbitrarily and/or capriciously in a particular personnel matter meets this definition. The language unambiguously confines a state employee's causes of action under W.Va. Code §§29-6A-1 et seq., to statutes and workplace rules which the employer has either adopted through official action or practice. It is noticeable and significant that the language makes no reference to an abuse of the employer's

discretion. It is reasonable to infer that the Legislature intended to restrict the grievance procedure to the specific terms of the employer-employee relationship as they are defined by statute, policy or practice, and exclude broad, vaguely-defined complaints which simply question the employer's judgment.

To the extent that the grievants' claim is cognizable, it is without merit. Absent a policywhereby the employer is bound by a first posting, an employee-applicant who has not recieved an offer of employmnet cannot claim that he or she obtained rights via the posting. The undersigned summarily finds that it was not an abuse of discretion for Ms. Waybright to opt for a new posting and a second field of applicants.

Accordingly, the 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

Administrative Law Judge

DATE: July 17, 1997