BARBARA SPRADLING, et al.,

Grievants,

v v.

DOCKET NO. 01-BEP-539

WEST VIRGINIA BUREAU OF EMPLOYMENT

PROGRAMS/WORKERS' COMPENSATION DIVISION,

Respondent.

D E C I S I O N

Grievants Barbara Spradling, Beverly Dean-Bowles, Edmonia Woodson, and Donna Curry, filed this grievance against their employer, the West Virginia Bureau of Employment Programs/Workers' Compensation Division ("Bureau") on October 15, 1999:

> Policy number 6000.10 (F) was not followed in the selection of Temporary District Managers. A consulting firm (Berkley Administrators) was involved in the selection of personnel.
>
> Relief sought: For the division to follow the directives in the policy and procedure manual. Request Berkley Administrators not be involved in personnel issues, which includes the application process.

The grievance was denied at levels one and two, and a level three hearing was held on December 1, 2000, and April 4, 2001. The grievance was denied at level three by Grievance Evaluator Jack W. DeBolt, on June 21, 2001. Grievants appealed to level four on October 12, 2001, and the level four hearing was held on August 16, 2002. This matter became mature for decision on September 16, 2002, the deadline for submission of proposed findings of fact and conclusions of law. Grievants were represented at levelthree by Steve Rutledge, AFSCME, and at level four by Belinda S. Morton,

Esq. The Bureau was represented by Patricia Shipman, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Grievants' Exhibits

Ex. 1 -

W. Va. Code § 23-1-4. Office hours; records; confidentiality; exceptions; executive director.

Ex. 2 -

W. Va. Code § 29-6-2. Definition of terms.

Ex. 3 - Division of Personnel Temporary Classification Upgrades Policy.

Ex. 4 -

RFP (Purchase Order) for Contract of Berkley Risk Administrators.

Ex. 5 -

October 8, 1999 memorandum from Ed Burdette to Tom Rardin re: Temporary District Managers.

Ex. 6 -

Hiring packets for Samantha Boggess, Leilani Van Meter, Melissa McClain, Patricia Huffman, and Connie Johnson.

Ex. 7 -

Letters of interest from Samantha Boggess, Connie Johnson, Pat Perks, Melissa McClain, and Leilani Van Meter.

Ex. 8 -

Not admitted.

Ex. 9 -

Not admitted.

Ex. 10 -

Application packets of Barbara Spradling, Donna Curry, Edmonia Woodson, and Beverly Dean-Bowles.

Ex. 11 -

September 16, 1999 memorandum from Ed Burdette to Thomas K. Rardin re: Applications for Temporary District Managers' Positions.

Ex. 12 -

September 24, 1999 memorandum from Thomas K. Rardin to Ed Burdette.

Ex. 13 -

August 13, 1999 memorandum from Janet Morris to Ed Burdette re: Temporary District Manager List.

Ex. 14 -

July 26, 1999 memorandum from Hope Fallen to Rick McKenna re: Team Size Reductions.

Ex. 15 -

September 14, 1999 memorandum from Sally Edge to Ed Burdette.

Ex. 16 -

July 29, 1999 memorandum from Rick McKenna to John Kottke and Janet Morris.

Ex. 17 -

July 19, 1999 memorandum to Claims Staff re: Temporary Classification Upgrade Opportunities.

Ex. 18 -

August 23, 1999 memorandum from Janet Morris to All Temporary District Manager Candidates.

Ex. 19 -

September 11, 1999 memorandum from Sally Edge to John Kottke, Rick McKenna, and Janet Morris.

Ex. 20 -

Second application of Edmonia Woodson, dated February 28, 2000.

Ex. 21 -

Handwritten notes of Barbara Spradling re: conversations with Tom Rardin.

Ex. 22 -

Administrative Directive 6910.01: Personnel Records.

Ex. 23 -

W. Va. Division of Personnel Administrative Rule Section 20. Records and Reports.

Level Three Bureau Exhibits

None.

Level Four Exhibits

None.

Testimony

Grievants presented the testimony of John Edward Burdette, Thomas K. Rardin, Janet Morris, Hope Fallen, Molly Wilson, Sally Edge, Patricia Spurlock, Lynn Divjak, Jeanne Hensley, Della Freshour, Edmonia P. Woodson, Barbara Spradling, Richard James, Donna Curry, and Beverly Dean-Bowles. The Bureau presented the testimony of Thomas K. Rardin.

Based upon a review of the record in its entirety, I find the following material facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievants are all employed by the Bureau as Deputy Claims Managers in the Workers' Compensation Division ("Division").

2. Effective January 4, 1999, the Bureau entered into a contract for services with Berkley Risk Administrators Company, a management consultant firm, to provide claims management services for the Bureau. The initial contract period was from January 4, 1999, through January 3, 2000, with the option of renewal. The contract was renewed on January 4, 2000 for another year. LIII G. Ex. 4.

3. In connection with its claims management services, Berkley was charged with the task of reviewing processes and procedures, identifying leaders among Division employees, and building

training programs. Berkley had no supervisory authority, nor didit make personnel decisions such as hiring, firing, approving time sheets, or commencing discipline. Several Berkley employees worked at the Division offices, including Janet Morris and Mary Jones.

4. On July 29, 1999, Executive Director Ed Burdette announced to all claims staff an opportunity to apply for five “Temporary District Manager” positions to last up to six months. Applications were required to be submitted to Mary Jones by August 6, 1999. LIII G. Ex. 17. Thereafter, the applicants were instructed to supplement their applications with a written letter of interest.

5. Approximately 20 to 30 individuals, including Grievants, applied for the positions.

6. Ms. Jones collected the applications and sent them to Thomas Rardin, the Bureau's Personnel Administrator. Mr. Rardin forwarded the applications to Mr. Burdette, who in turn gave them to Ms. Morris for review. (See footnote 1)

7. Mr. Burdette and Ms. Morris then returned the applications to Mr. Rardin, who had his staff review the applications to determine whether the applicants met the minimum requirements for the positions. The applications meeting the minimum requirements were sent back to Mr. Burdette.

8. Mr. Burdette then assigned interview teams for the applicants. (See footnote 2)

9. Applicants met with two separate interview teams, which made recommendations to Mr. Burdette. No Berkley staff member was on either of the interview teams.

10. Mr. Burdette made his final recommendations to the Commissioner, who approved the five successful applicants.

11. Grievants were not among those selected for interviews, and did not receive any of the temporary positions.

DISCUSSION

As this is a non-disciplinary grievance, Grievants have the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Grievants allege the process used to select the Temporary District Managers was flawed because of the involvement of the consulting firm, Berkley Administrators. Grievants also allege the Bureau breached confidentiality by allowing Berkley access to their applications for the Temporary District Manager positions. The Bureau denies Berkley made the hiring decisions, contends the Director did not have to advertise, nor interview, applicants

for the temporary positions, and avers the process he followed was lawful and fair. The Bureau further contends there was no breach of confidentiality, because the Director authorized Berkley to have access to employee personnel files as part of its consulting role.

In matters of non-selection for state employees, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. Ashby v. W. Va. Dept. of Admin., Docket No. 02-ADMN-076 (May 15, 2002); McCauley v. W. Va. Div. of Corrections, Docket No.00-CORR-244 (Aug. 2, 2001); Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). Unless provenarbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. Ashley v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995). Generally an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

In the case of temporary classification upgrades, the standard is even less stringent, as the appointing authority has virtually complete discretion in the appointment. The West Virginia Division of Personnel Rules governing temporary classification upgrades provide as follows:

> A. Temporary classification upgrades will be approved by the Director of Personnel on demonstration by the requesting appointing authority that all other management options have been duly considered, and determined to be ineffective, in addressing the agency's need.
>
> B. Temporary upgrades should be the agency's final, not initial, method for addressing this need, as management may utilize its prerogative to schedule, staff, and adjust its work load.
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> C. This policy applies to both classified and classified-exempt employees who are temporarily assigned to a higher classification under the following conditions:
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> 1. To a position in acting capacity as a result of the separation or extended leave of absence of a higher-classified employee; for a short-term project; or for an emergency situation.

> 2. The assignments shall be no less than 30 calendar days nor more than 6 months without the express written authorization of the Director of Personnel.
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> . . .
>
> F. Employees proposed for temporary upgrade shall meet, or be within 3 months of satisfying, the minimum requirements of training and experience for the position to which they will be temporarily upgraded. Any licensure requirements, however, must be satisfied at the time of the upgrade.

LIII G. Ex. 3.

Mr. Rardin testified that Mr. Burdette could have hand-picked employees to fill the Temporary District Manager positions if he had wanted. Instead, he decided that, in order to be fair, he would give all Division employees an opportunity to apply for the positions. Grievants do not argue that Mr. Burdette had this prerogative; however, they contend that Mr. Burdette did not really make the selections, that it was Ms. Morris who selected the successful applicants.

There was obviously a good deal of gossip, rumor, and innuendo floating around the Division at the time these temporary upgrades were made, and clearly, not everyone in the Division appreciated the presence or the input of the Berkley staff. Nevertheless, Mr. Burdette relied on the Berkley people to assist him in a myriad of ways, and valued their opinion on management issues. That is what the Berkley staff was hired to do, and Mr. Burdette's reliance on them in this instance was neither arbitrary or capricious, nor does it constitute a violation of any policy, rule, or regulation. Ultimately, Grievants have failed to prove by a preponderance of the evidence that Ms. Morris did anything other than offer her opinion regarding the selection, something that would be within the purview of Berkley's contract with the Division.

Grievants also maintain that the selection process was flawed because they did not receive interviews. Of course, not only has this Grievance Board held that management “may, at their discretion, choose to interview all applicants who meet the minimumqualifications, or choose only to interview those applicants who clearly possess the best qualifications for the position,” Brown v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-027 (June 2, 1999), there is no requirement that applicants for state positions be interviewed at all.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, Grievants have the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6.

2. In matters of non-selection for state employees, the grievance process is not that of a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. Ashby v. W. Va. Dept. of Admin., Docket No. 02-ADMN-076 (May 15, 2002); McCauley v. W. Va. Div. of Corrections, Docket No.00-CORR-244 (Aug. 2, 2001); Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

3. Unless proven arbitrary or capricious or clearly wrong, an agency decision regarding promotion will be upheld. Ashley v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

4. Generally an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

5. Grievants have failed to prove by a preponderance of the evidence that the Bureau violated any rule, policy, regulation, or procedure with regard to the selection of Temporary District Managers.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 15, 2002

Footnote: 1

Grievants placed much emphasis on testimony that Ms. Morris, who was from Washington state, told employees she was taking the applications home with her for a long weekend. However, as is discussed in the decision, Mr. Burdette authorized Ms. Morris to access employee files and gave her these particular applications; the fact that she took them home over a weekend is of no consequence, anymore than any employee of the Bureau who might take work home.

Footnote: 2

The record does not reflect how many applicants received interviews.