THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN WAYNE WELLS,
Grievant,

v. **Docket No. 2009-1279-HRC**

WEST VIRGINIA HUMAN RIGHTS COMMISSION,
Respondent.

DECISION

Grievant Brian Wayne Wells is employed as the General Counsel for the West Virginia Human Rights Commission ("HRC"). Grievant's position is in the Attorney 1 classification. Grievant was given a Performance Improvement Plan by the HRC Executive Director, Ivin B. Lee. The improvement plan was dated February 24, 2009, and took the form of an eight page memorandum. Grievant Exhibit 1. Subsequently, Director Lee issued Grievant a written reprimand. The written reprimand was dated March 2, 2009. Brian Wells filed a level one grievance form on March 4, 2009, claiming that he was "unfairly disciplined and placed on [a] performance improvement plan." As relief, Grievant seeks: "Rescission of [the] disciplinary action and removal of the disciplinary action from all personnel files and rescission of [the] performance improvement plan."

A level one conference was held on March 24, 2009. Director Lee issued a level one decision denying the grievance on March 26, 2009. Grievant appealed to level two on March 30, 2009. A level two mediation session was held on April 28, 2009, and an Order reflecting the end of the mediation process was entered on May 4, 2009. Grievant appealed to level three, and a level three hearing was held on December 10, 2009, in the

Charleston office of the West Virginia Public Employees Grievance Board. Grievant appeared *pro se* and the HRC was represented by Jennifer K. Akers, Assistant Attorney General.[1] At the close of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received at the Grievance Board on January 26, 2010. This grievance became mature for decision on that date.

Synopsis

The main reason the written reprimand was issued to Grievant was that he advised the HRC Commissioners that they could utilize the agency letterhead to communicate with outside agencies. This advice was contrary to a directive previously issued by Director Lee that no one other than agency staff could utilize the letterhead without her prior approval. However, one of Grievant's main duties is to provide the HRC with legal advice. In this situation, Grievant was reprimanded for performing a basic function of his job and complying with the mandatory conduct code for the practice of law. This portion of the grievance is granted.

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[1] At the start of the hearing Grievant made two motions. The first motion was for summary judgement or judgement on the pleading. The Rules of Civil Procedure do not apply to hearings conducted pursuant to the Public Employees Grievance statute. However, Procedural Rule of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 6.11, allows a grievance to be dismissed for failure of the grievant to state a claim for which relief may be legally granted. Since Grievant was making this motion, this rule clearly did not apply and the motion was denied. The second motion was to consolidate this grievance with another grievance which Mr. Wells had filed three days prior to the date of the hearing. Respondent objected to the consolidation because it had not had time to prepare for the new grievance which was also a disciplinary matter. That motion was also denied.

The Performance Improvement Plan was based upon a number of issues related to Grievant's job performance. While the format of the plan was unorthodox, Grievant did not prove that the plan was arbitrary or capricious. This portion of the grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Brian Wells was employed by the HRC as its General Counsel in November of 2005. His position is classified as an Attorney 1 in the Department of Personnel Classification system.

2. The Human Rights Commission is made up of nine citizens of the State of West Virginia who are appointed by the Governor with the advice and consent of the Senate. The HRC is charged by statute with specific powers, duties and responsibilities. *See* W. VA. CODE §§ 5-11-1 *et seq.*

3. The Executive Director of the HRC is appointed by the Governor with the advice and consent of the Senate and serves as the Secretary of the Commission. The present HRC Executive Director is Ivin B. Lee.

4. The HRC General Counsel is under the direct supervision of the HRC Executive Director and he serves as the in-house legal counsel to the Commission and the Executive Director.[2] Grievant Exhibit 1.[3] One of Grievant's responsibilities as in-house

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[2]Executive Director Lee is not a lawyer.

[3] Attachment C of the Performance Improvement Plan which is part of Grievant Exhibit 1.

counsel is to provide answers to questions of law for the Commission and the Executive Director.[4]

5. During the 2008 legislative session, someone[5] wrote a letter to a member of the West Virginia House of Delegates on the HRC letterhead regarding specific legislation. Director Lee attended a meeting with the Governor and was told that the Governor's office had not taken a position on this legislation and was surprised that the HRC evidently had, as indicated by the letter.

6. As a result of this incident, Director Lee issued a directive to all the HRC employees on February 28, 2008. The directive stated:

> Agency Letterhead should be used for official agency business only!!! Anyone requesting letterhead other than employees of this agency, <u>must</u> get that letterhead from the Executive Director.

(Emphasis and punctuation in original).

7. On February 12, 2009, there was a regular meeting of the HRC. The meeting began at 10:00 a.m. Paul Sheridan, Deputy Attorney General with the Attorney General's Civil Rights Division, attended the meeting to provide information and guidance to the Commission.

8. Prior to that meeting, Grievant and Director Lee had a discussion related to a letter that the Commission was considering sending to the West Virginia State Police related to a high profile crime that occurred in Logan County, West Virginia.

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[4] Performance Improvement Plan, page 7, Grievant Exhibit 1

[5] It appears that the letter was written on behalf of the HRC expressing the position of the Commissioners on that specific legislation.

9. During the meeting, Mr. Sheridan shared a copy of a proposed letter that he was suggesting should be sent to the West Virginia State Police on behalf of the Commission expressing concern related to the proper reporting of hate crimes. A discussion was held related to the proposed letter and Director Lee excused herself from the meeting while this discussion was taking place. Grievant Exhibit 3.[6]

10. During this discussion, a question arose as to whose letterhead the letter should be written on and who should sign the letter. Deputy Attorney General Sheridan stated that if the Commission wanted him to sign the letter it should go on his letterhead from the Attorney General's Office of Civil Rights. He noted that if the HRC "Chair or the Commissioners wanted to be signatories, the letter would go on the Commission's letterhead." Minutes of the HRC February 12, 2009, Regular Meeting, page 8, Grievant Exhibit 3.

11. Following the foregoing comments from Mr. Sheridan, the Chair of the Commission nodded at Grievant and said "Mr. Wells?" Grievant interpreted this gesture as a request for his advice regarding the use of HRC letterhead by the Commission.

12. At that point the meeting minutes reflect that the following occurred:

> General Counsel Wells informed the Commissioners that if they were concerned about using the agency letterhead, he had done some research and found that it was legal for the Commission to use the Human Rights Commission agency letterhead. He stated that he understood there was a concern previously regarding the Commission's use of the letterhead so he

[6] Grievant Exhibit 3 contains a copy of the transcript made of the level one conference (with exhibits), and a copy of the minutes of the February 12, 2009, regular meeting of the HRC.

> had conducted research on his own to determine the legality of their use of agency letterhead.[7]

Minutes of the HRC February 12, 2009, Regular Meeting, page 8, Grievant Exhibit 3.

13. Monica Turley is an Executive Secretary employed at the HRC. After the HRC regular meeting on February 12, 2009, Ms. Turley sent a document to all staff of the HRC entitled "IMPORTANT DIRECTIVE 2-12-09." After a short salutation, the directive stated the following:

> It has come to Ms. Lee's attention that there is a need to remind everyone of her previous directive of last year regarding the use of agency letterhead and/or to inform the new employees of any fraudulent use of the letterhead.
>
> Under NO Circumstances is any full-time or part-time staff member allowed to give anyone outside of our Agency, including anyone from other state agencies or contractual employees or appointed persons our agency Letterhead. If you do so, without specific, clear permission from Ms. Lee, there will be severe consequences up to firing.

(Emphasis in original).

14. After the meeting, Director Lee called Grievant into her office and expressed her dissatisfaction with the fact that Grievant had told the Commissioners that they could send a letter on the HRC letterhead. She also asked Grievant what he felt his responsibilities were and if he understood that he was under her supervision.

15. Grievant acknowledged that he served under Director Lee's direct supervision. On the following day, February 13, 2009, Grievant wrote a memorandum to Director Lee outlining his understanding of his duties as General Counsel as he understood

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[7] When later asked what legal research he had conducted to determine that the Human Rights Commission had the right to use the Human Rights Commission letterhead, Grievant stated that he had contacted the counsels for the Ohio and Virginia Human Rights Commissions and he had spoken with Lewis Brewer, Esquire, who was serving as the director of the West Virginia Ethics Commission at the time.

them. Grievant noted his duties included providing legal advice to her and the Commission, and when rendering that advice he was required to exercise his independent professional judgement by the Rules of Professional Conduct. Grievant Exhibit 1, Performance Improvement Plan, Attachment A.

16. Director Lee issued Grievant a Performance Improvement Plan ("PIP") dated February 24, 2009. The document is in the form of a memorandum and is not in the standard format of a typical improvement plan. *See* Grievant Exhibit 2, Division of Personnel's *Supervisor's Guide to Discipline,* page 24.[8]

17. The first six pages were devoted to Section A of the PIP, which a is detailed response to Grievants Memorandum of February 13, 2009. Section B begins on the bottom of page 6 and sets out seven specific directives which were to be implemented immediately.[9] The directives may be paraphrased as follows:

1. Grievant may not provide anyone outside the agency "anything written on the commission's letterhead without Director Lee's clear prior knowledge and approval.
2. With regard to Commission meetings:
   a) Grievant may only attend when there is an appeal to be considered,
   b) he must leave the meeting after the appeal is presented,
   c) Grievant is prohibited from giving the Commission any advice or opinion as to how they should rule on an appeal.

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[8] While there is no required format for an improvement plan for state employees the Division of Personnel has published the *Supervisor's Guide to Discipline,* which provides recommended contents, examples and suggested formats. A sample Corrective Action Plan is located on page 24 of the Guide.

[9] The PIP indicates that Grievant is to conform to the directives immediately but does not give a specified time period for the plan to be implemented or methods for monitoring progress. These are recommended components for appropriate PIPs as discussed in the *Supervisor's Guide to Discipline*.

d) Grievant must "provide answers based on law pertinent to the Commission to legal questions that may arise. The commission is expected to submit their legal questions to Grievant in writing and Grievant is expected to respond in writing.

3. Grievant is prohibited from contacting the Commissioners regarding changes to the agenda of HRC meetings.
4. Grievant may not contact Commissioners who are absent from HRC meetings to ascertain their vote, opinions or directives concerning items on the agenda.
5. Grievant is required to prepare all certified records to the Circuit and/or Supreme Courts.
6. Grievant will be responsible for processing and responding to Freedom of Information Act requests that come to the agency.
7. Grievant will prepare final orders for the Commission.

Grievant Exhibit 1

18. Directives 5, 6, and 7 were originally Grievant's responsibilities but, for various reasons, have been performed by Monica Turley prior to the Improvement Plan.

19. On March 3, 2009, Director Lee issued a written reprimand to Grievant. While the document discusses the PIP and other performance issues, the reason for the reprimand is clearly set out in the first sentence which states:

> This letter is to inform you of my decision to issue you a written letter of reprimand due to your insubordination of my verbal and written directives regarding the use of Agency Letterhead.

Grievant Exhibit 1.

20. The last paragraph of the letter gives instructions as to how Grievant may file a grievance to contest the reprimand. The instructions directed Grievant to file level one with the DHHR Grievance Unit. This instruction was erroneous because the HRC had opted out of utilizing the DHHR Grievance Unit. Nevertheless, Grievant was able to file his grievance at level one and receive a timely level one conference.

21. During the time period related to the discipline, Grievant did not provide HRC letterhead to any Commissioner or prepare a letter for signature by any of the Commissioners. No letter was sent out on HRC letterhead related to the discussion that took place at the February 12, 2009, HRC regular meeting.

Discussion

Challenges to written reprimands and performance improvement plans have different burdens of proof. For that reason, the two issues will be discussed separately.

The Written Reprimand:

The written reprimand given to Grievant was a disciplinary action. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The written reprimand given to Grievant on March 3, 2009, is a five page document that discusses some aspects of Grievant's job performance and the PIP he was given on February 24, 2009. However, the reason for the reprimand is made clear from the first

sentence wherein Director Lee states that the reprimand was due to Grievant's "insubordination of my [Ms. Lee's] verbal and written directives regarding the use of the Agency Letterhead." Grievant Exhibit 1. Grievant was given a written reprimand for advising the Commissioners that the Commission could use the HRC letterhead to send a letter to another state agency expressing the views of the HRC. Grievant gave this advice to the Commissioners in the February 12, 2009, regular meeting.

There is little dispute regarding the facts surrounding the letter of reprimand. Director Lee issued a written directive dated February 28, 2008, specifically stating that the Agency letterhead was intended for agency use only and that anyone other than employees requesting the letterhead must get the letterhead from the Executive Director. This directive was in reaction to the Commissioners sending a letter to a legislative committee chair person expressing the Commission's position on a specific piece of legislation. The names of the Governor and the Secretary of the Department of Health and Human Resources are also on the letterhead. Director Lee was called to a meeting with these officials regarding this letter because neither of them had taken a position on the legislation and they were concerned that there would be confusion about their positions since their names appeared on the HRC letterhead.

Grievant admits that he was aware of and understood Director Lee's directives related to agency letterhead. Grievant makes two basic arguments: he did not provide HRC letterhead to the Commissioners and he was obligated to give legal advice to the Commissioners regarding the use of the letterhead by his basic job responsibilities and the Rules of Professional Conduct governing the practice of law in West Virginia. Grievant

argues that he was not insubordinate because he was obligated to give his client independent and accurate legal advice.

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id*. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.* Ultimately, "[e]mployees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990); *Lilly v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-387 (June 6, 2008).

Director Lee did not want employees providing HRC letterhead to anyone outside the agency, including the Human Rights Commissioners without her permission. She issued two specific written directives prohibiting employees from giving the letterhead to

anyone but employees of the agency. This directive came about as a result of an incident where the Commissioners had sent a letter without Director's Lee's knowledge that caused difficulties for her with the Governor. There is no doubt that Ms. Lee meant to include the members of the Commission as individuals who should not receive the letterhead without prior approval. There was no proof offered that Grievant gave letterhead to anyone, including the Commissioners. Grievant did not, therefore violate the specific written directives.

Director Lee did make it clear that she did not want the Commissioners to be sending letters on the agency letterhead without her approval and Grievant was aware of Director Lee's feelings on that issue. While it was not specifically proven that Grievant gave letterhead to the Commissioners, Respondent argues that his advice to the Commissioners that they were authorized to utilize the letterhead violated the spirit of her written and verbal directives. Director Lee's testimony, when questioned by the Grievant regarding why he was reprimanded, summarizes this argument:

> You gave them your legal opinion that they had the right to use it [the letterhead] even after I had told you that we were not going to use it because we had an obligation to the Governor and the Secretary not to use it. But you decided it was OK.

Testimony of Ivin Lee, Level three hearing.

Director Lee is Grievant's sole direct supervisor. One of Grievant's basic responsibilities as the HRC General Counsel is to provide legal advice to the Commission and the Executive Director. *See* Grievant Exhibit 1. In providing that advice, he is subject to the WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT ("Rules") which establishes

standards of conduct lawyers in this state must follow in the practice of law. One provision of the Rules provides the following:

> Rule 1.8 (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
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> (1) the client consents after consultation;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by Rule 1.6.

W. VA. RULES OF PROF'L CONDUCT, Rule 1.8(f).[10] This rule is particularly applicable to the situation at hand. Grievant is hired, paid and supervised by Director Lee. However, he is also required to provide legal advice to the Human Rights Commission as a body. The only way Grievant may ethically provide that advice is if he exercises independent professional judgement in advising the Commission. Grievant cannot be swayed in giving that advice by any directives that may be given to him by Director Lee without being in violation of the Rules. That does not mean that Grievant has to go out of his way to find conflicts between these clients, but it does mean that where these conflicts arise he must advise each of these clients according to his independent professional judgement as to what the law requires.

Grievant did not raise the issue of use of the letterhead by the Commission at the February 12, 2009, meeting. That issue was raised when one of the Commissioners asked Deputy Attorney General Sheridan who would write the letter to the State Police. Mr.

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[10] Grievant cited Rule 5.4 (d) (3). However, that rule seems inapplicable because Grievant is not employed by a "professional corporation, association, or limited liability organization authorized to practice law for a profit."

Sheridan responded that the letter could go on his letterhead or the Commission's. At that point, if there was a legal impediment to the Commission utilizing the letterhead, Grievant needed to so advise his client. In giving that legal advice, the Rules prohibited Grievant from taking Director Lee's feelings on the issue into consideration.[11] Any directive given by Director Lee that interfered with Grievant's ability to give legal advice to the Commission based upon his independent professional judgement would not be a reasonable order because it would cause Grievant to violate the ethical code Grievant must follow to practice law in this State. Grievant did not commit insubordination when he gave legal advice to the Commission regarding their use of the HRC letterhead because he did not violate a reasonable directive from his supervisor in performing that duty. *Butts, supra*.

The Performance Improvement Plan ("PIP"):

Performance improvement plans are part of the evaluation process and are management tools to increase production and correct unsatisfactory performance. Evaluations and performance improvement plans are not disciplinary actions. Consequently, Grievant has the burden of proving by a preponderance of the evidence that the performance improvement plan given to him by Director Lee was improper. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *Hedrick v. Dep't of Health & Human Res.*, Docket No. 2009-0496-CONS (Aug. 18, 2009); *Bailey v. Kanawha County Bd. of Educ*. 2009-1594-KANED (January 19, 2010). An employee grieving his evaluation must establish that the evaluation is wrong because the evaluator

[11] Grievant clearly anticipated that this issue might arise because he had investigated the issue, but he did not raise the issue himself.

abused his/her discretion in rating the grievant, or the 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); *Messenger v. W. Va. Dep't of Health & Human Res*., Docket No. 92- HHR-388 (Apr. 7, 1993); *Hurst v. W. Va. Dep't of Transp*., Docket No. 91-DOH-326 (Feb. 27, 1992); *Wiley v. W. Va. Workers' Compensation Fund*, Docket No. WCF-89-015 (July 31, 1989). In order to prove a supervisor has acted in a manner that constitutes an abuse of discretion, the grievant must prove the evaluation was the result of arbitrary or capricious decision-making. *Kemper v. W. Va. Dep't of Transp*., Docket No. 91-DOH-325 (Mar. 2, 1992). *Spence v. Div. of Natural Res*., Docket No. 2008-1112-DOC (Jan. 30, 2009).

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard

of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant argues that the PIP he was given by Director Lee does not meet the basic standards required for such documents. He points to the Division of Personnel *Supervisor's Guide to Discipline* ("Guide") as establishing what must be in such documents. At page 23 of the Guide, a sample PIP is provided for supervisors.[12] Grievant notes that the Guide suggests that the supervisor "[d]escribe with specificity" the employees performance problems, set out expectations and establish a definate time frame in which those expectations should be met. Grievant Exhibit 2, pages 4, 23 & 24. Grievant avers that the PIP he was provided contains none of these elements and is therefore invalid.

The first six pages of the PIP are written in the form of a response to Grievant's February 13, 2009, memorandum. In that memorandum, Grievant set forth his understanding of his duties and his basis for giving the Commission advice about the agency letterhead. In section A of the PIP, Director Lee quotes from the Grievant's memorandum and then gives her response. These quotes and responses are numbered one through six. In the first four items, Director Lee gives her views regarding Grievant's job duties and where they coincide and differ from those expressed by Grievant. She specifically calls attention to the fact that Grievant is under her authority and supervision. In items five and six, Director Lee clarifies her position regarding Grievant's advice to the Commission and specifically notes that she has "not authorized daily usage of the letterhead for the Commissioners". Grievant Exhibit 1, PIP page 6.

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[12] In the Guide, the Performance Improvement Plan is often referred to as a Corrective Action Plan. These terms are different names for the same type of document.

Commencing at the bottom of page six, Director Lee provided seven specific performance expectations for Grievant to follow. *See* Finding of Fact 17 *supra.* These expectations define and limit Grievant's interaction with the Commissioners and his role at HRC meetings. They also outline specific duties Grievant is expected to perform that he had not done in the past. These expectations do not, on their face, impair Grievant's obligation to exercise his independent professional judgement in giving legal advice to the HRC. In fact, Director Lee specifically notes:

> Your responsibility is to provide answers based on law pertinent to the Commission to legal questions that may arise. This is not new. <u>This has always been the directive from the beginning of your hire.</u>

(Emphasis in original) Grievant Exhibit 1, PIP, page 7.

Director Lee does establish a procedure for those legal opinions whereby the Commissioners must present their questions to Grievant in writing. Grievant is then required to give his written legal response to Director Lee and she will convey the response to the Commission. While this procedure may not always be efficient or practical, it is appropriate as written.[13]

The PIP does not provide a specific time period in which Grievant is to meet these expectations. Rather, it states that the directives set out in section B apply immediately. As a general proposition, an employee must be given a reasonable amount of time to comply with the provisions of a corrective action plan before discipline may be taken based

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[13] Significant problems could occur if Director Lee does not convey the response to the Commission or alters the response in any material way. One could envision circumstances wherein providing materially altered legal advice to the Commissioners could result in unauthorized practice of law. However, these issues are not contemplated on the face of the PIP.

upon failure to comply. However, this grievance does not involve disciplinary action based upon the PIP and no evidence was submitted to demonstrate that Grievant cannot comply with the directive set out in the time period allotted.

Grievant has not provided any policy, rule or regulation that demonstrates that the PIP fails to meet a mandatory format. Further, Grievant did not demonstrate that the performance directives set out in the PIP were arbitrary or capricious.[14] In fact, all of the directives appear to be consistent with the duties described in Grievants job description. Grievant Exhibit 1. Therefore, with regard to the PIP the grievance is denied.

Conclusions of Law

1. The written reprimand given to Grievant was a disciplinary action. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. "[F]or there to be 'insubordination,' the following must be present: (a) an

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[14] It must be noted that the directives of the improvement plan may not interfere with Grievants obligation to provide independent professional advice to both the Executive Director and the Commission. W. VA. RULES OF PROF'L CONDUCT, Rule 1.8(f). There are some areas where confusion may arise. For example, the plan prohibits Grievant from providing "anything written on the commission's letterhead [to anyone outside the agency] without Director Lee's clear prior knowledge and approval." This may generally be workable, but it should not be construed to allow Director Lee to censor Grievant's expression of his legal opinion in appropriate agency correspondence. Additionally, Grievant is prohibited from giving the Commission any advice or opinion as to how they should rule on an appeal. While it is ultimately the Commissions role to make the final decision, this directive cannot be interpreted to prohibit Grievant from giving the Commission advice as to the state of the law, how the law applies to the facts in the particular case and the legal consequences of ruling one way or the other.

employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id*.

3. Grievant is required to give legal advice and opinions to both the HRC and the HRC Executive Director. Grievant is required by the WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT to exercise independent professional judgement in advising both of these clients. He cannot allow his non-lawyer supervisor to influence his legal advice to the Commission. W. VA. RULES OF PROF'L CONDUCT, Rule 1.8(f).

4. The Respondent failed to prove that Grievant was guilty of insubordination. Grievant was obliged by his job responsibilities and the WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT to utilize independent professional judgement in advising the Commissioners regarding their legal rights in utilizing the agency letterhead. Any directive to the contrary would not be reasonable and cannot be the basis of an insubordination charge. *See Butts supra*.

5. Performance improvement plans are part of the evaluation process and are management tools to increase productivity and correct unsatisfactory performance. Evaluations and performance improvement plans are not disciplinary actions. Consequently, Grievant has the burden of proving by a preponderance of the evidence that the performance improvement plan given to him by Director Lee was improper. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v.*

W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990); *Hedrick v. Dep't of Health & Human Res.*, Docket No. 2009-0496-CONS (Aug. 18, 2009); *Bailey v. Kanawha County Bd. of Educ*. 2009-1594-KANED (January 19, 2010).

6. An employee grieving his evaluation must establish that the evaluation is wrong because the evaluator abused his/her discretion in rating the grievant, or the 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); *Messenger v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-388 (Apr. 7, 1993); *Hurst v. W. Va. Dep't of Transp*., Docket No. 91-DOH-326 (Feb. 27, 1992); *Wiley v. W. Va. Workers' Compensation Fund*, Docket No. WCF-89-015 (July 31, 1989).

7. In order to prove a supervisor has acted in a manner that constitutes an abuse of discretion, the grievant must prove the evaluation was the result of arbitrary or capricious decision-making. *Kemper v. W. Va. Dep't of Transp*., Docket No. 91-DOH-325 (Mar. 2, 1992). *Spence v. Div. of Natural Res.*, Docket No. 2008-1112-DOC (Jan. 30, 2009).

8. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for*

the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

9. Grievant did not prove that the Performance Improvement Plan given to him by Director Lee was arbitrary and capricious.

Accordingly, the grievance related to the written reprimand is GRANTED and in all other respects the grievance is DENIED. The written reprimand is void and Respondent is Ordered to remove the written reprimand from all files.

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: JUNE 14,2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE