THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA L. SPRADLING,
Grievant,

v. **Docket No. 2010-1015-DOR**

WEST VIRGINIA INSURANCE COMMISSION,
Respondent,

DECISION

_____Grievant Barbara Spradling is employed by Respondent Office of the Insurance Commissioner ("OIC") as a supervisor in the Claims Unit. She has been employed by the OIC since the Workers Compensation Commission was privatized in 2006.[1] In November 2009, the OIC posted a vacancy for the position of Insurance Program Manager. Grievant applied for the position but was not selected. Barbara Spradling filed a level one grievance form dated February 3, 2010, contesting the validity of the selection process stating:

> Selection process for Insurance Program Manager posting number INS100020 was arbitrary in nature and did not allow 10 working days before the closing date, among other defects.

As a remedy, Grievant seeks to have the position posted again and a new hiring process conducted by a different interview committee.

A level one conference was held on April 6, 2010, and a decision was entered denying the grievance on April 12, 2010. Grievant appealed to level two by filing a form

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[1] On January 1, 2006, the Workers Compensation Commission ceased to exist as a state agency and more than 300 employees previously assigned to that agency, including Grievant, were transferred to the OIC.

dated April 14, 2010, and a level two mediation was held on May 7, 2010. Thereafter, Grievant appealed to level three.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on August 27, 2010. Grievant appeared at the hearing and was represented by Matthew R. Oliver, Esquire. Respondent was represented by OIC Associate General Counsel Gregory A. Elam, Esquire. At the close of the hearing the parties agreed to submit proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals, the latter was received by the West Virginia Public Employees Grievance Board on September 27, 2010. This grievance became mature for decision on that date.

Synopsis

Grievant avers that the process for filling the Insurance Program Manager position was flawed from start to finish. She opines that the position was not posted for the required ten days, a set of questions was not submitted to the Human Resources Unit for approval and the candidates were not asked the same job-related questions at the interview. Grievant argues that these procedures are accepted “best practices” for filling vacancies and the failure to follow them prevented the applicants from revealing all of their best attributes which rendered the process arbitrary and capricious.

Respondent disagrees that the position was not posted for ten days but notes that, as a precaution, Grievant was given additional time to submit her application. Respondent also argues that the procedure for submitting questions for approval is a guideline rather than a requirement and it is not necessary to be followed at the highest management levels.

Finally, Respondent argues that any faults in the interview process were minor and did not prevent the applicants from presenting their qualifications to the interviewers for full consideration. Consequently, Respondent feels the process was not arbitrary or capricious and should be upheld.

Grievant was able to demonstrate that the posting and interview process was so flawed as to render it arbitrary and capricious. The position must be posted again, and a new selection process must be undertaken by the OIC.

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 Barbara Spradling is employed by the Respondent Office of the Insurance Commissioner ("OIC") as a supervisor in the OIC Claims Unit. Grievant has been employed by the OIC in that position since January 1, 2006.

2. Grievant was employed for a number of years in the Claims Section of the Workers Compensation Commission. She was one of more than 300 employees of that agency who were transferred to the OIC when the West Virginia Workers Compensation System was privatized.

3. There were three supervisors in the Claims Unit; Barbara Spradling, Joan Abbott and Samantha Boggess. These supervisors reported to the Insurance Program Manager for the Claims Unit.

4. In 2009, the Insurance Program Manager retired. William Kenny, OIC Deputy Commissioner held three or four meetings with the Claims Unit supervisors to determine what might be the best management structure for the Unit going forward.

5. Ultimately, Deputy Commissioner Kenny decided that the Insurance Program Manager position would be posted and filled. Supervisor Joan Abbott was told by Supervisor Samantha Boggess that the position was going to be posted several weeks before the posting took place. Grievant was not told of the decision to post the Manager position.

6. OIC employee Karen Blake Epperly received the job posting that was prepared by the West Virginia Division of Personnel on Wednesday, November 18, 2009. On Friday, November 20, 2009, she prepared an internal posting e-mail for the Program Manager position and sent that document to Kathy Damron who is the OIC Director of Administrative Services and the Manager of the OIC Human Resources Unit. Karen Blake Epperly placed a copy of the posting on the Bulletin Board of Greenbrooke Building on November 20, 2009. The number assigned to this posting was INS 100020. Respondent Exhibit 1.

7. Internal postings have been e-mailed throughout the agency for a number of years so they reach all agency employees.

8. Director Damron was attending a conference on November 20, 2009, and did not discover the proposed posting until November 24, 2009. She caused the internal posting to be sent to all of the OIC employees on Tuesday, November 24, 2009. The closing date for the posting was listed as December 1, 2009. Grievant Exhibit 2.

9. The West Virginia Division of Personnel policy entitled *Posting of Job Openings* in Section III contains the following requirements:

> B. All job postings will be posted throughout the agency where the vacancy is located for ten (10) calendar days prior to the selection and announcement of successful candidate for the position.

> H. An established closing date, if any, for the receipt of all applications shall allow sufficient time to ensure that the job posting has been posted throughout the agency for the required ten days.

This Policy applies to all classified position vacancies including the Insurance Program Manager position involved in this grievance. Grievant's Exhibit 1.

10. OIC employees have offices in more than one building. Grievant's office is located in the Players' Club complex not the Greenbrooke Building. She, and other employees located away from the Greenbrooke Building, did not receive the job posting until November 24, 2009, when it was posted "throughout the agency."

11. The time between the distribution of the internal posting throughout the agency, November 24, 2009, and the application closing date, December 1, 2009, was seven (7) calendar days.

12. On November 25, 2009, Grievant sent an e-mail to Director Damron noting that the posting did not give the applicants ten full days of notice. This was particularly troublesome since there was a four day break for Thanksgiving starting Thursday, November 26, 2009. Grievant suggested that the posting should be reissued giving all employees a full ten day notice. Grievant Exhibit 7.

13. Director Damron replied to Grievant the same day stating that she could not amend the posting because it came from the Division of Personnel. However, she determined that ten days would end on December 3, 2009, and that any applications received by that day would be accepted. No further notice was sent to the OIC employees regarding that date.

14. The time between the distribution of the internal posting throughout the agency, November 24, 2009, and the December 3, 2009, was nine (9) calendar days.

15. After Grievant was told that the application closing date established by DOP could not be changed, she was afraid that the OIC might not be able to accept applications beyond that date and submitted her application on November 30, 2009.

16. Director Damron sent a memorandum to Insurance Commissioner Jane Cline and Deputy Commissioner Kenny dated December 4, 2009. The memorandum was related to the posting # INS100020 for the position of Insurance Program Manager. The memorandum set forth the standards adopted by the OIC for filling vacant positions and was titled as follows:

******NEW STANDARD REGARDING EMPLOYMENT SELECTION******
******READ CAREFULLY AND FOLLOW DIRECTIONS******

The memorandum listed the applicants for the position as follows:

- Boggess, Samantha L. Promote
- Clark, David S. Transfer/Promote
- Hughs, Robin L. Transfer/Promote
- Spradling, Barbara L. Transfer/Promote
- Swanson, Charles L. Transfer/Promote

Under the heading "******INTERVIEW PROCESS****

17. The procedure for filling vacant positions that was set out in the memorandum which Director Damron sent to Commissioner Cline and others was adopted to comply with the requirements of the West Virginia Division of Personnel's Best Practices Regarding Appointments in the Classified Service, effective September 1, 2006. *See* Grievant Exhibit 4. Memorandum entitled *Compliance with Merit System Selection Standards.*

18. Interviews were scheduled, and they were conducted with four of the applicants on December 22, 2009. Each interview lasted fifteen minutes. The first interview began at 2:00pm and the last began at 2:45pm. Grievant Exhibit 6.

19. The interviews were conducted by Deputy Commissioner Kenny who had worked with the candidates previously. Rebecca White attended the interviews for the Human Resources Unit and took notes related to the questions and answers.

20. Deputy Commissioner Kenny did not submit a list of questions to the Human Relations Unit prior to the interviews and he did not ask the same questions to all of the candidates. The candidates were rated on a score sheet that contained the following indicators:

- Experience
- Education/Training
- Job Knowledge
- Presentation
- Work History
- Special Job Requirements
- Maturity
- Leadership
- Appearance
- Overall Evaluation.

21. Deputy Commissioner Kenny asked few questions of each applicant. He did not ask each applicant questions related to each scoring criterion. For example: he asked Samantha Boggess four questions. Three of the questions related to specific changes the candidate hoped to make in the unit operation and the fourth was whether the applicant was up to the challenge. Mr. Kenny asked Grievant three questions: one related to her qualifications to be a manager rather than a supervisor, one regarding the "approval process to settlement for all carriers" and one related to "strategic planning." The questions asked each applicant had little, if any, relationship to the questions asked the other applicants. Grievant Exhibit 5, Applicant Evaluation Forms for all interviews.

22. Samantha Boggess scored highest on the interview evaluation with a composite score of 3.9. Grievant held the second highest score of 3.6. Out of the ten criteria Samantha Boggess scored "4" on nine and "3" on one. Grievant scored "4" on six criteria and "3" in four criteria. A score of "4" was considered "excellent" and a score of "3" was considered "good."

23. Samantha Boggess was selected to fill the position of Insurance Program Manager.

24. On December 23, 2009, Rebecca White signed an *HR Interviews Confirmation Form* noting the time each interview was held with each candidate and certifying that the "same questions were asked of all applicants."[2] Grievant Exhibit 7.

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[2] At the level three hearing Rebecca White testified that the applicants were not asked the same questions at the interview but maintained that all of the questions asked were job-related. She did not give a specific explanation as to why she marked on the form that all applicants were asked the same questions when she knew that did not happen.

Discussion

Grievant argues that Respondent OIC failed to follow the procedures it has adopted for conducting interviews for filling vacant positions and the West Virginia Division of Personnel Policy related to posting those positions. She alleges that as a result of these flaws the process was arbitrary and capricious. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. 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). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent avers that by posting the notice of vacancy on the bulletin board in the Greenbrooke Building on November 20, 2009, the ten calendar day posting requirement was met. However, there is no dispute that the practice of the OIC had been to e-mail the vacancy notices to all employees. This practice had been in effect for a number of years and the employees have rightfully come to rely upon it. More importantly, the Division of Personnel Policy requires that the vacancy be posted "throughout the agency." The Policy states that the vacancy must be posted to "allow sufficient time to ensure that the job posting has been posted throughout the agency for the required ten days." The intent of the policy is that it be posted in a manner that is sufficient to give all interested employees at least ten days notice. Posting the vacancy on one bulletin board in a single building in

an agency which has employees deployed in several buildings is not sufficient to meet the intent of this policy. It can only be assumed that the OIC Human Resources Unit recognized this problem when the practice for electronically submitting the notices to all employees was initiated.

Next, Respondent notes that when Grievant brought the posting issue to the attention of Director Damron she assured Grievant her application would be accepted if it was submitted by December 3, 2009. Therefore, Respondent asserts that Grievant was not harmed by the failure to follow the posting policy. However, Grievant notes that Director Damron was unable to change the posting deadline submitted by Division of Personnel. Consequently, she was concerned that if her application was submitted after that deadline it might be rejected if contested by another candidate. Based upon this belief, she submitted her application on November 30, 2009, to avoid any chance of controversy. Grievant notes that this was an important management position and it would have been very helpful for her to have a few more days to compile her materials and prepare her application. Given the fact that few questions were asked at the interviews, it is not unreasonable to believe that the written applications were relied upon heavily in the final scoring.

Additionally, extending the period for Grievant to submit her application until December 3, 2009, would only have given Grievant nine days from November 24, 2009, when the vacancy was posted. W. VA. CODE § 2-2-1 states the following related to the calculation of time periods to accomplish specified acts:

> (d) In computing any period of time prescribed by any applicable provision of this code or any legislative rule or other administrative rule or regulation promulgated pursuant to the provisions of this code, the day of the act,

> event, default or omission from which the applicable period begins to run is not included. The last day of the period so computed is included, unless it is a Saturday, a Sunday, a legal holiday or a designated day off in which event the prescribed period of time runs until the end of the next day that is not a Saturday, Sunday, legal holiday or designated day off.

Pursuant to this statute, November 24, 2009 is not counted because it is the first day the position was posted in compliance with the posting policy. November 25 would be day one, and each day thereafter would be counted including December 3, 2009. Because November only has thirty days, the job would have been posted for only nine days[3] even if Grievant had waited until December 3, to submit her application.

Respondent admits that Deputy Commissioner Kenny did not submit a list of questions to the Human Resources Unit prior to the interview and he did not ask the same question of each candidate interviewed. Respondent does not dispute that these are requirements listed in its own standards related to interviewing applicants. In fact, these requirements were included in the instructions Director Damron provided to Commissioner Cline and Deputy Commissioner Kenny related to this very position vacancy. *See* Grievant Exhibit 3. Respondent claims that these standards are not policies but guidelines. OIC avers that these guidelines are in place to insure that middle and lower level managers comply with laws and avoid discrimination and disability requirement violations. Respondent opines that these standards do not apply to upper level managers such as Deputy Commissioner Kenny. OIC also argues that Mr. Kenny was familiar with the work performance of all the applicants since they were all internal applicants and it would have been a waste of time to ask them all questions to which he already knew the answers.

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[3] November 25, (1); November 26, (2); November 27, (3); November 28, (4); November 29, (5); November 30, (6); December 1, (7); December 2, (8); December 3, (9).

Respondent's assertion that the rules do not apply to the upper level management makes little sense. First, if these rules did not apply to the filling of this vacancy, Director Damron would have no reason to send them to the Commissioner and her deputy before the interviews were conducted with the instructions "****READ CAREFULLY AND FOLLOW DIRECTIONS****" emblazoned across the top of the memorandum. Additionally, Deputy Commissioner Kenny specifically testified that he did not know much about the posting policy because he relied upon the Human Resources Unit to keep the agency in compliance. If the Division of Personnel and the OIC Human Resources Unit believe these are the best practices for selecting the best applicant for the job and for treating all applicants fairly, it does not make sense that these procedures would not be applied for filling important management positions. The evidence indicates that these procedures are more than mere guidelines. They are standards and procedures adopted to comply with the requirements of the West Virginia Division of Personnel's Best Practices Regarding Appointments in the Classified Service. The West Virginia Supreme Court of Appeals has ruled many times that:

> An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.

Syl. pt. 1, Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977). Nothing in the standards and procedures adopted by the OIC states that they do not apply to management positions. Respondent must abide by its own procedures in conducting interviews to fill all positions.

Director Damron's memorandum also indicated that the interviews were to last one half day each. Deputy Commissioner Kenny scheduled fifteen minutes for each interview.

He believed that he was familiar with all the applicants and only had to ask a few specific questions to complete his understanding of their strengths and weaknesses. However, not all of the applicants worked in the same building as Mr. Kenny. It is reasonable to believe he was much more familiar with the day to day performance of those employees he was able to observe on a daily basis. Grievant was not one of those employees. Grievant was also concerned that she was not asked a question regarding her education or her presentation skills, both criteria for selection. Nor was Grievant given sufficient time in a fifteen minute interview to expand on those topics on her own. Four hours might very well be an excessive time for an interview with internal candidates but fifteen minutes hardly gives the participant the opportunity to get past customary salutations.

In a selection case, a grievant must prove, by a preponderance of the evidence, that she was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra*. The grievance procedure is not intended to be a "super interview," but rather, a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv*., Docket No. 93-RS-489 (July 29, 1994).

The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault, supra*. The "clearly

wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

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 & Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

Grievant proved that Respondent OIC did not comply with the Division of Personnel posting policy and did not give Grievant the required ten days to prepare and submit her application for an important management position. Additionally, Grievant proved that Respondent OIC did not follow its own standards and procedures that it adopted for

conducting interviews for position vacancies. These procedures were developed by the Division of Personnel and distributed to state agencies such as the OIC to provide supervisors with research based, best practices for making defendable personnel decisions in a manner intended to ensure that the most qualified candidate is selected for the position. Certainly by failing to follow its own standards and procedures, this process failed to be conducted by Respondent in accordance with those best practices. *See Forsythe v. Div. of Pers.,* Docket No. 2009-0144-DOA (May 20, 2009). Once OIC adopted these procedures it was obligated to follow them in all interviews unless a specific exception is made in the procedures or policies. *Powell, supra.*

Grievant did not prove that she was the most qualified applicant for the position of Insurance Program Manager. Grievant did demonstrate the Respondent did not follow the policies and procedures established to insure that the interview and selection process treats all applicants in a fair and equitable manner. Additionally, Grievant demonstrated that the failure to follow these procedures made it unlikely that each candidate had a reasonable opportunity to reveal his or her qualifications for the vacant position. These flaws were sufficient to render Respondent's selection process arbitrary and capricious. Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that she should have been selected for the position, the position should be reposted and a new selection process undertaken. *Forsythe supra*; *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009). Consequently, the Grievance is GRANTED and the position of Insurance Program Manager must be reposted by the OIC and a new selection process undertaken. The present staff configuration may

stay in place while the selection process proceeds.

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. 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). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. *Syl. pt. 1, Powell v. Brown*, 160 W.Va. 723, 238 S.E.2d 220 (1977).

3. Respondent did not post the vacant position of Insurance Program Manager for ten calendar days as required by the West Virginia Division of Personnel *Posting of Job Openings*. Respondent also failed to follow its own standards for filling vacant positions by failing to provide adequate time for interviews, failing to submit questions to the Human Resources Unit prior to the interview and failing to ask the applicants the same questions.

4. Grievant did not prove that she was the most qualified applicant for the position of Insurance Program Manager. Grievant did prove by a preponderance of the evidence that Respondent did not follow the policies and procedures established to insure that the interview and selection process treats all applicants in a fair and equitable manner. The flaws in the hiring process were sufficient to render Respondent's selection process

arbitrary and capricious.

5. Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that she should have been selected for the position, the position should be reposted and a new selection process undertaken. *Forsythe v. Div. of Pers.,* docket No. 2009-0144-DOA (May 20, 2009); *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to repost the position of Insurance Program Manager within thirty days of receipt of this decision, and select the most qualified applicant for the position.

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: FEBRUARY 28, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE