THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JERRI SUE LISA BROWN,
Grievant,

v. **DOCKET NO. 2012-0736-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES and
DIVISION OF PERSONNEL,
Respondents.

DECISION

Jerri Sue Lisa Brown ("Grievant") filed this grievance against her employer, the Department of Health and Human Resources/Bureau for Children and Families ("DHHR" or "Respondent DHHR"), on January 12, 2012. Grievant provided the following Statement of Grievance at that time:

> I Jerri Brown, Secretary II for the Division of Family Assistance (DFA) submitted a Position Description for re-classification for an Administrative Secretary position with the DFA on July 18, 2011. I was told to re-submit it again by Sue Hage and Doug Robinson but in a different process. I re-submitted it again and checked the status on July 27, 2011 with no response. The process was changed (*sic*.) our Division had a OAII position that we were to request to an Adm. Secretary position. The posting of the Adm. Sec. position was submitted on September 9, 2011. I kept emailing our personnel procurement person (Shannon Wallace/Darlene Burrells) to find out the status of the posting of the position of the Adm. Sec. their response was it is still up at DOP. I continually checked each week. On November 2, 8, and 30th of 2011 and on October 21, 28, and was told once again that it was still up at DOP. Then I checked the status on December 7, 2011 after almost 3 months of going back and forth trying to find the status of the posting of Adm. Sec. then was told on December 9, 2011 that it had been denied. *Once again we submitted it with the info. Requested from DOP and still have not heard anything about the posting of the Adm. Sec. position posting # BCF1010090. After that being said I once again checked the status of the Adm. Sec. Posting on December 22, 28, 2011 and was told

> it was still pending up at DOP and submitted to Harold Clifton's Office for review/approval. I feel that I was given the run around for something that was totally uncalled for the way the communications with DOP and our Personnel and Procurement was not doing their jobs in the way they should have been. I am asking for the posting of the position with an increase of 15% for lost wages due to non posting (*sic*.) of the position in a timely manner.
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> *The staff person that denied it said that Jerri Brown's duties were insufficient to meet the requirements of the Adm. Sec. All the Director was requesting was an upgrade of the OAII position to be internally posted. There was no basis for this denial.

Because the grievance was perceived to involve classification and compensation matters, it was waived to Level Two of the grievance procedure without a decision at Level One. For that same reason, the Division of Personnel ("DOP" or "Respondent DOP") was joined as an essential party on January 23, 2012. Following mediation at Level Two, Grievant appealed to Level Three on July 25, 2012. A Level Three hearing was held in the Grievance Board's office in Charleston, West Virginia, on April 29, 2013. Grievant appeared *pro se*. Respondent DHHR was represented by Assistant Attorney General Michael E. Bevers, and Respondent DOP was represented by Assistant Attorney General Stacy L. Nowicki. All parties waived filing of post-hearing arguments, and this matter became mature for decision at the conclusion of the hearing.

Synopsis

Grievant is employed by Respondent DHHR in the Division of Family Assistance ("DFA"), which is part of the Office of Policy and Programs within the Bureau for Children and Families. Grievant has been serving as a Secretary II under the direct supervision of the DFA Director since her position was reallocated in 2002. In or around June of 2011,

Grievant's supervisor, Sue Buster, as requested by the Deputy Commissioner of Finance in the Bureau, Doug Robinson, initiated an effort to post a vacant Office Assistant II ("OA II") position to be filled as an Administrative Secretary. For various reasons, not fully developed in the record, this initiative had not obtained the necessary approval from the Governor's Office, Respondent DOP, or higher management within Respondent DHHR as of January 2012, when Grievant filed this grievance. While the grievance was pending on February 16, 2012, Sue Hage, the Bureau's Deputy Commissioner of Programs, withdrew the posting request.

Grievant failed to demonstrate how the actions of her employer or DOP in regard to any failure to follow through by posting an Administrative Secretary position violated any applicable law, rule, policy or agreement, or involved an abuse of the agencies' substantial discretion in determining whether and how to fill a particular position in the work force. Therefore, this grievance is DENIED.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievant is employed by the West Virginia Department of Health and Human Resources ("DHHR") in the Bureau for Children and Families. She serves as secretary to the Director of the Division of Family Assistance ("DFA") in the Bureau's Office of Policy and Programs.

2. Sue Buster served as Director of DFA in the Office of Policy and Programs from approximately 2002 until her retirement in 2012. In that capacity, Ms. Buster served as Grievant's immediate supervisor.

3. Grievant's position is presently classified as a Secretary II. This position was reallocated from Secretary I to Secretary II in or about 2002.

4. At the time of the events discussed in this grievance, Doug Robinson was employed by DHHR as Assistant Commissioner for Finance and Administration in the Bureau for Children and Families.

5. Sue Hage is employed by DHHR as Deputy Commissioner for Programs in DHHR's Bureau for Children and Families.

6. In or about July 2011, Mr. Robinson directed Ms. Buster to take a vacant position for an Office Assistant II and submit the position for posting as an Administrative Secretary. Ms. Buster also discussed this initiative with Ms. Hage, who agreed with Mr. Robinson's proposal.

7. Consistent with Mr. Robinson's request, between July and October 2011, an effort was undertaken within the Bureau for Children and Families to obtain approval to post a position vacancy for an Administrative Secretary in DFA that was to be upgraded from a vacant Office Assistant II position. Ms. Buster formally submitted a request to post on September 30, 2011.

8. The posting request was returned in December 2011 to be revised based upon a request from DOP to include the class specifications for Administrative Secretary in the Position Description Form. *See* G Ex L & O.

9. As of December 2011, the posting still required approval from Harold Clifton in DHHR's Office of Human Resource Management. *See* G Ex N.

10. The posting for an Administrative Secretary was never approved by DOP.

11. On February 16, 2012, Ms. Hage withdrew the request to post two Administrative Secretary positions in the Bureau for Children and Families, including the position in DFA at issue in this grievance. *See* DOP Ex 1.

12. Prior to withdrawing the request, Ms. Hage conferred with Mr. Clifton in DHHR's Office of Human Resource Management.

13. According to Ms. Hage, Mr. Clifton was concerned that Ms. Buster was asking to post a new position for an Administrative Secretary for the Division when she was already assigned a Secretary II (Grievant's position), without any justification for having two secretaries at the division level.

14. Ms. Hage also discussed these concerns with Mr. Robinson and the Bureau's Acting Commissioner at the time, before deciding to withdraw the request for posting.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *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). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

At the Level Three hearing, Grievant clarified that her grievance was not intended to contest whether she is properly classified as a Secretary II. Instead, the focus of her grievance is upon the failure of DHHR and DOP to post an Administrative Secretary position in DFA. Ms. Buster had been asked to initiate this process by one of her managers, and Grievant would have been a logical prime candidate to fill that vacancy, if DHHR had proceeded with that posting.

Under W. Va. Code § 6C-2-2(i)(1), a "grievance" means:

> [A] claim by an employee alleging violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including:
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> (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination;
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> (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer;
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> (iii) Any specifically identified incident of harassment;
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> (iv) Any specifically identified incident of favoritism; or
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> (v) Any action, policy or practice constituting a substantial detriment to or interference with an effective job performance of the employee or the health and safety of the employee.

Administrative notice is taken of the Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 (2012) which contains the following language governing position postings:

9.5. Posting of Job Openings - Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. Posting of job openings using electronic or other communications media shall satisfy the requirement to post a notice provided that the appointing authority makes regular and convenient access to the media used available to each classified employee in the agency, or otherwise provides notice to each classified employee in the agency. The notice shall be posted for at least ten (10) days before making an appointment to fill the job opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the class to be used to fill the job opening.

(a) The term job opening refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer, except any vacancy filled as a result of an employee exercising his or her bumping rights as provided in subdivision 12.4(g) of this rule.

(b) The posting notice shall include a description of the duties to be performed by the person selected, the minimum qualifications for the position, the job class to be used in filling the job opening, the salary level or range that will be considered, the full-time equivalent for the position, and the job location.

(c) An established closing date shall allow sufficient time to ensure that the job vacancy circulation has been posted throughout the agency for a minimum of ten (10) days. The naming of an individual to fill the position is the appointment and is not altered by the fact that the individual will not assume the duties until a later date. Therefore, the agency shall not make an appointment to a position prior to the closing date as listed on the posting. The appointing authority may accept applications after the closing date; however, all applications received on or prior to any established cut-off date must be accepted and considered.

(d) The appointing authority shall give due consideration to those employees who apply and are eligible for the posted vacancy.

(e) If a posted vacancy is not filled within six (6) months of the established closing date, the appointing authority must re-post the vacancy prior to an appointment to the vacant position.

(f) The vacancy posting requirements in this subdivision shall apply to all classified position vacancies except vacancies filled as a result of employees exercising bumping rights, demotions with prejudice and/or transfers for cause.

> (g) If an individual selected for a posted vacancy refuses the offer of employment, fails to report to work, or resigns or otherwise separates from employment within the first ten (10) work days of employment, the appointing authority is not required to repost the vacancy prior to making another appointment to the position provided that the appointment is made within thirty (30) days of the separation and the appointment is made from the pool of eligible applicants from which the first employee was hired. This time period supersedes the six-month limitation specified in subdivision (e) of this subsection.

Respondents argued that the decision not to post an Administrative Secretary position is not grievable under the statute. Grievant contends that the Respondents failed to approve posting the Administrative Secretary position, as requested by her immediate supervisor, Ms. Buster, in a timely manner. Under the broad scope of the grievance procedure for public employees in W. Va. Code § 6C-2-1, *et seq*., Grievant has alleged that either DHHR or DOP, or both, have failed to act in a proper manner in the processing of this posting. Because the grievance procedure was designed as a way to resolve problems that arise within the context of a grievant's employment, on its face, this allegation states a grievance. *See Nolan v. Dep't of Health & Human Res*., Docket No. 04-HHR-191 (Oct. 6, 2004).

However, Grievant has not established how Respondents' failure or refusal to approve the posting for an Administrative Secretary position violated any statute, policy, rule, or written agreement under which she works. *See Straughn v. Dep't of Health & Human Res*., Docket No. 2011-0054-CONS (May 6, 2011). To the contrary, the DOP Administrative Rule on posting positions gives agencies broad discretion on posting position vacancies, and Grievant has not identified any requirement in that rule which Respondents violated. The record indicates that there was no vacant Administrative

Secretary position to post. The vacant position in DFA was for an Office Assistant II ("OA II"), and Grievant expressed no interest in competing for that position.

DHHR management initially wanted to convert the vacant OA II position to an Administrative Secretary position, and simultaneously post this newly-established position. However, this initiative did not make its way through the approval process before the decision was made by Ms. Hage and her supervisors not to pursue this approach any further. When an employer exercises its management discretion by making a decision not to post a position, or not to post the position in a particular classification, as DHHR did here, such management decision must be judged by the arbitrary and capricious standard of review. *See Mikles v. Dep't of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007); *Hamilton, et al. v. W. Va. Human Rights Comm'n*, Docket No. 91-HRC-446 (Feb. 28, 1992). *See also Law v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-452 (July 17, 1997); *Roberts v. W. Va. Div. of Highways*, Docket No. 90-DOH-378 (Feb. 26, 1992).

"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." *Mikles*, *supra*; *Forth v. W. Va. Dep't of Transp*., Docket No. 98-DOH-433 (July 22, 1999). *See Bedford County Mem. Hosp. v. Health & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985). Ms. Hage explained that establishing a new Administrative Secretary position by converting a vacant OA II position would effectively give the Director of DFA two secretaries, an Administrative Secretary

and a Secretary II. Management determined that, if the Director requires an Administrative Secretary, it would be more appropriate to reallocate the Secretary II position currently held by Grievant to an Administrative Secretary. Although there is no guarantee that DHHR will follow through on this approach, or that DOP will ultimately approve DHHR's request, this explanation nonetheless provides a rational basis for the management decision Grievant has challenged, and this decision does not constitute an abuse of the agency's discretion in determining when and how to fill vacancies in its work force. *See Straughn*, *supra*.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *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). Where the evidence equally supports both sides, the Grievant has not met her burden. *Id*.

2. The grievance procedure was designed as a way to resolve problems that arise within the context of a grievant's employment. *Nolan v. Dep't of Health & Human Res*., Docket No. 04-HHR-191 (Oct. 6, 2004).

3. "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." *Mikles v. Dep't of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007); *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1997). *See Bedford County Mem. Hosp. v. Health & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985).

4. The posting of a position within the classified service necessary to accomplish the work of the agency is a management decision, and Grievant failed to demonstrate how any decision by Respondent DHHR or Respondent DOP was arbitrary and capricious, an abuse of discretion, or a violation of any applicable law, rule or regulation. *See Straughn v. Dep't of Health & Human Res*., Docket No. 2011-0054-CONS (May 6, 2011); *Roberts v. W. Va. Div. of Highways*, Docket No. 90-DOH-378 (Feb. 26, 1992). *See also Hamilton v. W. Va. Human Rights Comm'n*, Docket No. 91-HRC-446 (Feb. 28, 1992).

Accordingly, this grievance is **DENIED.**

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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LEWIS G. BREWER
Administrative Law Judge

Date: May 8, 2013