



JAMES PAUL GEARY
Chairman

ORTON A. JONES
DAVID L. WHITE
Members

C. RONALD WRIGHT
Administrator

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

OFFICES:

240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone: 348-3361

**PAUL L. HAMILTON, JOYCE M. PORTER, and
STEPHEN M. RUTLEDGE**

v.

Docket No. 91-HRC-446

WEST VIRGINIA HUMAN RIGHTS COMMISSION

DECISION

The grievants, Paul Hamilton, Joyce Porter and Stephen Rutledge, each filed a level four appeal on October 25, 1991.¹ These appeals were consolidated for all purposes at the time of filing and stated as follows:

I was denied an opportunity to apply for a promotion from Intergroup Relations Specialist/Investigator I to Intergroup Relations Specialist/Investigator II with a 5% pay increase. The position became vacant on September 1, 1991. I became aware of this on September 13, 1991.

The Intergroup Relations Specialist/Investigator II position should be posted for bidding with a 5% pay increase to the most qualified candidate, retro-active to September 1, 1991.^[2]

¹Jackie Heath also filed a level four appeal on October 25, 1991. However, by correspondence dated November 7, 1991, this individual withdrew from the grievance.

²The grievants requested an informal conference on September 23, 1991. A level one denial was issued on September 24, 1991 and level two denial issued on October 3, 1991. A level three hearing was held on October 18, 1991, and a denial issued on October 22, 1991. A level four hearing was held December 5, 1991. Post-hearing briefing was complete on January 13, 1991.

The grievants all hold the classification of Intergroup Relations Specialist (IRS) I with the West Virginia Human Rights Commission (HRC). This IRS job classification contains the positions of both intake and investigation.³ The grievants are investigators.

The following joint stipulations were filed by the parties:

1. An Intergroup Relations Specialist II position became an unfilled budgetary position at the West Virginia Human Rights Commission on or about September 1, 1991.

2. The Executive Director of the Human Rights Commission, by virtue of W.Va. Code §5-11-6[,] may employ such personnel as may be necessary for the effective and orderly performance of the functions and services of the commission.

3. All grievants meet the minimum qualifications for the position of Intergroup Relations Specialist II.

4. To date, the unfilled budgetary position of Intergroup Relations Specialist II has not been posted.

5. Whenever practicable and in the best interest of the service, a vacancy will be filled by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of demonstrated capacity and quality and length of service. In filling vacancies, an effort should be made to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Division of Personnel Administrative Rules and Regulations, Section 12.01.

At the lower levels, the grievants asserted that the Executive Director of HRC, Quewannocoi C. Stephens, had a non-discretionary duty, mandated by personnel regulations, to

³The intake position apparently involves the initial interview and screening of claims. Investigation involves the development of cases once they have passed the intake stage.

post the position at issue when it became available. At the level four hearing, the grievants redefined their theory. While conceding that Mr. Stephens did not have a non-discretionary duty to post the position, they assert that he abused his discretion and acted in an arbitrary and capricious manner by failing to post. The respondent contends that, pursuant to W.Va. Code §5-11-8(h) which empowers the Commission, and thereby the Executive Director, "[t]o do all other acts and deeds necessary and proper to carry out and accomplish effectively the objects, functions and services contemplated by the [West Virginia Human Rights Act]," Mr. Stephens has broad and sweeping discretionary authority to administer HRC as he sees fit and, accordingly, may post or not post positions as needed.

In a non-disciplinary matter it is incumbent upon the grievants to prove the allegations constituting their complaint by a preponderance of the evidence. Bonnett v. W.Va. Dept. of Highways, Docket No 89-DOH-043 (Mar. 29, 1989), and cases cited therein. In support of their assertions the grievants submitted into evidence a document, endorsed by Mr. Stephens, reflecting that in 1985 HRC had seven IRS positions devoted to the investigation of claims and two IRS positions devoted to the initial intake of cases.⁴ This same document shows that as of September 1, 1991, HRC had five IRS investigatory and two IRS intake positions filled. Accordingly, the number of

⁴Some of these positions were IRS Is and some were IRS IIs. For the purposes of this decision the distinction is not pertinent.

investigators has decreased by two since 1985.⁵ The grievants also presented testimony that the workload of the IRS investigatory personnel has significantly increased over the last several years and that a backlog of cases awaiting assignment to an investigator exists. In addition, Mr. Steve Starks, owner and editor of the West Virginia Beacon Digest, testified on behalf of the grievants and confirmed that there exists great concern throughout West Virginia regarding the functions of the HRC and its current ability to carry out its legislative mission.

The grievants contend that the IRS II investigative vacancy, which is the subject of this grievance, has contributed to the overwhelming workload experienced by the five remaining investigators.⁶ The grievants also assert that, inasmuch as HRC is mandated by statute to receive, investigate and issue decisions on complaints which allege discriminatory practices, the filling of the IRS II position at issue is necessary for

⁵In the years 1986, 1987, 1988, 1989 and 1990, as many as twelve IRS personnel were employed. The current staffing level of seven is apparently the lowest during this time period.

⁶The relief sought by the grievants is that the position "be posted for bidding with a five percent pay increase to the most qualified candidate." They apparently presume, based upon past practice of HRC and the language of West Virginia Division of Personnel Administrative Regulations §12.01, which states "whenever practicable and in the best interest of the service, a vacancy will be filled by promotion," that the position will be bid upon in-house and filled by a current IRS I employee who will receive a pay raise. The newly vacated IRS I position will then be filled by a new employee, bringing the number of investigators up to six.

the effective and orderly performance of this function. Finally, the grievants assert,

The defacto decision not to promote an Investigator I to Investigator II on or around September 1, 1991 has left an existing budgetary vacancy unfilled resulting in substantial harm to the timely processing of complaints due to the overwhelming overload of cases coming in twice as fast as before with one less investigator to investigate them. This represents an arbitrary and capricious abuse of discretion which is unlawful.

Grievants' Proposed Conclusion of Law No. 8.

In support of their contention, the grievants cite Allen v. State Human Rights Commission, 324 S.E.2d 99 (W.Va. 1989). The Allen decision holds that the HRC Executive Director has certain mandatory non-discretionary duties. A review of the decision reveals that these duties were defined by the court as follows:

[T]o place on its docket all complaints tendered that meet five criteria: (1) verification; (2) name and address of the respondent; (3) description of the alleged discriminatory action or practice; (4) other information as required in rules and regulations promulgated by the Commission; and (5) filing within ninety days after the alleged act of discrimination.

Allen at Syllabus Pt. 5.

[T]o employ at least one full-time hearing examiner, who is an attorney duly licensed to practice law in the State of West Virginia, for the conduct of public hearings authorized under the West Virginia Human Rights Act.

Id. at Syllabus Pt. 6.

[T]o hold adjudicatory hearings within one hundred eighty days, and to issue final orders within one year, from the date of filing of complaints upon which it is determined probable cause exists for substantiating their allegations.

Id. at Syllabus Pt. 8.

[T]o promulgate rules and regulations pursuant to West Virginia Code § 5-11-8(h) (Supp. 1984) specifying internal procedural time limits through which adjudicatory time limits can be met.

Id. at Syllabus Pt. 9. Clearly, none of these mandates require Mr. Stephens to post the IRS II position at issue. The Allen court also held as follows:

Under West Virginia Constitution art. III, § 10, which provides that "No person shall be deprived of life, liberty, or property, without due process of law...", and under West Virginia Constitution art. III, § 17, which provides that "justice shall be administered without...delay," administrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted.

Id. at Syllabus Pt. 7. Once again, this does not specifically mandate Mr. Stephens to post the vacant investigative position.

The grievants, however, point to the Allen court's reference to HRC's statutory mandate to make a "prompt investigation" of all claims as support of their position that Mr. Stephens has abused his discretion by not posting the vacancy. However, it is noted that the Allen court also referred to HRC's statutory mandate to immediately endeavor to conciliate parties and, if that fails, to hold a hearing and issue a decision. Allen at p. 110. The court stated, "The primary functions of the Human Rights Commission are investigation, conciliation, and adjudication. Until additional funding is available, essential personnel for the Commission are those performing these three functions along with their limited support staff." Id., p. 126, (emphasis added).

This statement summarizes the flaw in the grievants' argument. Although the undersigned finds that the grievants

are without question saddled with a tremendous workload investigating complaints, this is clearly not the only function and service performed by HRC. Mr. Stephens must also allocate resources to the conciliation and adjudication of claims. Further, he has the discretion, pursuant to W.Va. Code §5-11-8(h), to make such allocations to any function of the HRC he believes is most in need of resources, so long as his actions do not constitute an abuse of discretion. It is noted that Mr. Starks, who testified as grievants' expert witness, asserted that HRC has an overall staffing problem. Even he could not say which staff position was most important and concluded that doing anything at all would help the functioning of HRC. Clearly, even Mr. Starks' testimony does not support the grievants' theory that another investigator must be hired in order to further the effective and orderly performance of the functions and services of the commission. Neither does his testimony support a finding that failing to hire another investigator constitutes an abuse of discretion.

The grievants also assert,

The standard of "whenever practicable and in the best interest of the service" cited in Section 12.01 of the Civil Service Rules and Regulations has been met; specifically, that under such circumstances, this vacancy, which is an unfilled budgetary position, will be filled, and that it meets the criteria needed to be classified as a mandatory non-discretionary duty of the Director of the WVHRC.

Grievants' Proposed Conclusion of Law No. 9. However, as previously stated, the grievants have not been able to show that the posting of the position at issue is "in the best interests of the service," given the necessary allocation of

limited resources. Accordingly, the posting of the position cannot be deemed a "mandatory non-discretionary duty."

In conclusion, inasmuch as the HRC Executive Director has broad managerial powers to determine how best the agency will fulfill its functions and services, the undersigned finds that the grievants have not shown, by a preponderance of the evidence, that Mr. Stephens abused his discretion or acted in an arbitrary and capricious manner by not immediately posting the vacant IRS II position.⁷

In addition to the findings of fact and conclusions of law made in the foregoing discussion and analysis, the following findings and conclusions are made.

FINDINGS OF FACT

1. The grievants are Intergroup Relations Specialist Is employed by the Human Rights Commission.
2. An Intergroup Relations Specialist II position became an unfilled budgetary position at the Human Rights Commission on or about September 1, 1991.

⁷On February 20, 1992, the respondent filed a Motion to Dismiss in this grievance, stating that the position at issue had been eliminated, as the result of the Governor's mandate to reduce the agency budget by four per cent. The respondent asserted that the relief sought was moot in that the job at issue no longer existed. It will simply be noted that the grievance was not moot inasmuch as the position was certainly at issue from the date it became available until the date it was eliminated. The merits of the respondent's assertion that the grievance was moot following the elimination of the position need not be addressed.

3. All grievants meet the minimum qualifications for this position.
4. The Executive Director of the Human Rights Commission did not post the position when it became available.


CONCLUSIONS OF LAW

1. In a non-disciplinary matter a grievant must prove the allegations constituting their grievances by a preponderance of the evidence. Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989), and cases cited therein.
2. Pursuant to the W.Va. Code §5-11-8(h), the Executive Director of the Human Rights Commission has broad powers "[t]o do all other acts and deeds necessary and proper to carry out and accomplish effecting the objects, functions and services contemplated by the [West Virginia Human Rights Act]."
3. Pursuant to W.Va.Code §5-11-6, the Executive Director may "employ such personnel as may be necessary for the effective and orderly performance of the functions and services of the commission."
4. The Executive Director has discretionary power to post vacancies within the agency.
5. The grievants did not prove by a preponderance of the evidence that the Executive Director abused his discretion

or acted in an arbitrary or capricious manner when he failed to post the vacant Interpersonal Relations Specialist II position.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.


CATHY RIDER CULHANE
ADMINISTRATIVE LAW JUDGE

February 28, 1992