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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Nos. 18-0929 and 18-0932

DIVISION OF HIGHWAYS
and TERRA GOINS,

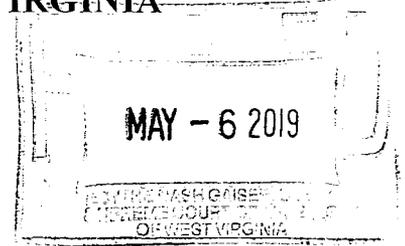
Petitioners,

v.

MICHAEL A. POWELL,

Respondent.

Appeal from final order of the
Circuit Court of Kanawha County
(Case No. 17-AA-15)



RESPONDENT'S BRIEF

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I.

STATEMENT OF THE CASE

A. *Proceedings in the Court below.*

Respondent has no additions or comments regarding the Statement of the Case as prepared by Petitioner Division of Highways (herein after "DOH"). Respondent disagrees with the Intervenor's Statement of the Case wherein, intervenor states that Respondent raised his conversation with Goins for the first time at the Level three grievance. Respondent maintains that he asserted this position at both level 1 and level 2 of the grievance process as evidenced by Mr. Powell's email of March 14, 2016. **App. Vol I p. 153.** The email was written in response to the

Motion to Dismiss filed by the DOH at level 2. As discussions at grievance levels 1 and 2 are not recorded, there is no written record other than Respondent's email. Petitioner Goins' statement also wrongly implies that Mr. Powell knew Goins well by stating that he had known her for ten years. The record simply reflects that they had both attended college classes at Bluefield State and were acquainted. At no time during the proceedings did Petitioner Goins assert or argue that Respondent had prior knowledge of her qualifications or lack thereof. Respondent has adopted and referenced the Appendix submitted by Petitioner DOH as it was intended to be the Joint Appendix.

II.

SUMMARY OF ARGUMENT

Respondent filed a grievance alleging that the DOH hired an applicant for the position of Highway Engineer that did not meet the minimum qualifications. This position required "Seven years of Professional Highway Engineering Experience Involving the Design, Construction, or Maintenance of Highways." **App. Vol II p. 171.** Intervenor's Application for Employment, testimony of DOH employees, and Intervenor's own testimony establishes that she did not have the requisite background to be considered for the position, let alone hired.

Respondent's grievance was dismissed for failure to timely file his grievance. Respondent does not dispute that there are statutory guidelines setting forth time requirements for the filing of grievances. See W.Va. Code §6C-2-4(a)(1). Under the "discovery rule exception," the time in which "to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl. Pt. 1, *Spahr v. Preston County Bd. of Educ.*, 182 W.Va.

726, 391 S.E.2d 739 (1990). DOH's representatives testified that Grievant had a reasonable expectation in relying on their duty and ability to perform the vetting procedure properly. **App. Vol II pp. 58-59 and 114-115.** Respondent testified that he filed his grievance promptly upon learning of Goins' failure to meet the minimum qualifications for the position of Highway Engineer. This was learned through a discussion with Intervenor Goins in November of 2016. **Powell testimony App. Vol. II p. 149 and Powell email App. Vol I p. 153.**

Moreover, Petitioners placed no evidence into the record that Grievant did not timely file his grievance when viewed in light of the "reasonable expectation" testimony provided by the employees of Petitioner DOH. Because Respondent has established a legitimate basis for the discovery rule exception, the Administrative Law Judge's dismissal order is contrary to law, clearly wrong and/or arbitrary and capricious, in light of the reliable probative evidence. The Circuit Court correctly applied the statutory law to the facts on the record and correctly reversed and modified the ALJ's dismissal order.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

After considering the criteria listed in **W.Va. R.App. p. 18(a)**, Mr. Powell asks that oral argument be granted in this case pursuant to **W.Va. R.App. p. 20**. This is a case involving the proper application of statutory law and issues of fundamental public importance. Accordingly, Mr. Powell believes that oral argument will be useful to the Court in its deliberative process.

IV.

ARGUMENT

A. STANDARD OF REVIEW

Grievance rulings involve a combination of both deferential and plenary review. A reviewing court should give deference to factual findings rendered by an administrative law judge. Plenary review is conducted as to the conclusions of law and application of laws to the fact, which are reviewed *de novo*.

Syllabus Point 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E. 2d 437 (2000).

B. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE ADMINISTRATIVE LAW JUDGE FAILED TO APPLY W.VA. CODE §6C-2-4(a)(1) TO THE FACTS ELICITED IN THE GRIEVANCE HEARING AND THAT THE DECISION DISMISSING RESPONDENT'S GRIEVANCE FOR FAILURE TO FILE IN A TIMELY MANNER WAS CONTRARY TO LAW AND CLEARLY WRONG IN VIEW OF THE EVIDENCE ON THE WHOLE RECORD.

1. The Discovery Rule

W.Va. Code §6C-2-3(a)(1) requires an employee to file a grievance within the time limits specified in this article. W.Va. Code §6C-2-4(a)(1) identifies the time lines for filing a grievance and states as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . (emphasis added)

Respondent has developed evidence, through level 3 hearing testimony, that makes the “discovery rule” and/or “continuing practice exception” applicable to the case before this Court.

Two DOH representatives responsible for interviewing the candidates testified that Respondent had a reasonable expectation and could reasonably rely on the DOH to properly vet and review the potential applicants to determine if they met the minimum qualifications. Stephen Rumbaugh was a DOH employee on the selection committee and the only engineer present at the grievance hearing on behalf of the DOH. Mr. Rumbaugh testified as follows on this issue:

Mr. Stroebel - Now, would you agree with me that the applicants for this job, just like you did, had a reasonable belief or understanding that H.R. would properly vet the candidates to make sure that they met the minimum requirements.

Mr. Rumbaugh - Yes

Mr. Stroebel - And fair to say that that's the assumption that you made when you decided to pick Mrs. Goins as your choice to fill that position, Correct?

Mr. Rumbaugh - Yes

Mr. Stroebel - And you would agree with me that if it turns out that she didn't meet those qualifications that she should not have been appointed to that position.

Mr. Rumbaugh - If Human Resources and the Department of personnel determined she did not meet those qualifications then they-she should not have been put in the position.

App. Vol II pp. 114-115.

Kristen Shrewsbury, the DOH Human Resources representative testified as follows on the selection process:

Mr. Stroebel - Mam' can you tell us what your position is with the Department of Highways?

Ms. Shrewsbury - I am the Human Resource Manager for District 10.

Mr. Stroebel - And as the Human Resource Manager for District 10, you were involved in the hiring of Ms. Goins, Correct?

Ms. Shrewsbury – Yes

Mr. Stroebel - And you were a part of a panel that interviewed each of the witnesses or each of the applicants, correct?

Ms. Shrewsbury - Correct

Mr. Stroebel - and let me ask you – do you have a degree in engineering?

Ms. Shrewsbury – No, I do not.

Mr. Stroebel – You don't . . . would you agree with me that the applicants and in particular, Mr. Powell, he had the reasonable expectation that this panel would do a thorough job reviewing the applications and qualifications of all of the applicants? Correct?

Ms. Shrewsbury – Correct.

Mr. Stroebel - Cause that's what your job is correct?

Ms. Shrewsbury – Correct.

App. Vol II pp. 58-59.

Unlike the cases cited by the ALJ in support of the Order dismissing the grievance, Respondent developed evidence that establishes that Respondent had a reasonable expectation that the hiring committee would properly carry out their job duties. Respondent established his knowledge and reasonable expectation throughout the grievance process as well as through testimony at his hearing. **App. Vol I. p. 153 and App. Vol. II, p. 144.** Respondent also testified that he filed his grievance within 15 days of learning from Petitioner Goins in November that she did not meet the minimum qualifications. This was not contested by Goins or the DOH. *Id.*

The cases cited in support of dismissal are factually dissimilar. Those cases involved

individuals or groups intentionally waiting to file their grievances while an investigation was conducted or other litigation was pursued. Those grievants clearly believed that wrongful conduct occurred long before their grievances were filed. The position taken by the ALJ would require all individuals to immediately file a grievance in every selection case to avoid dismissal. Furthermore, the ALJ's ruling obviates the very purpose of the discovery rule and the statutory language. In essence, the DOH's representatives testified that Mr. Powell acted reasonably by accepting the outcome of the selection by relying upon DOH to carry out their selection duties properly. Grievance testimony of Mr. Powell establishes that he filed his grievance in a timely manner upon learning of facts giving rise to his grievance. **AR Vol II p. 149.** As such, the DOH should be estopped from arguing that his grievance is untimely because it is clear DOH failed to perform its basic responsibility of determining who met or did not meet the minimum qualifications.

In the present case, it is clear that the ALJ failed to consider the testimony of the DOH's representatives. In this regard, the Circuit Court set forth the following in its Order:

7. Lastly, this Court **CONCLUDES** that the Administrative Law Judge failed to apply the facts/evidence to the statutory law as set forth in West Virginia Code § 6C-2-4(a)(1), and therefore was clearly in error and in contradiction of the law by dismissing Appellant's Grievance for failure to file in a timely manner. Moreover, this Court further **CONCLUDES** that the ruling below was arbitrary and capricious in light of the Appellee's own representatives' testimony.

App. Vol. I pp. 004-005.

Generally, an action is arbitrary and capricious if it did not rely on facts that should be considered, entirely ignored important aspects of the problem or results in a decision contrary to the evidence. *Bedford County Memorial Hosp. v. Health and 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.V.a 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)).

Failure to apply the discovery rule exception to this case, in light of the testimony proffered by the Petitioner’s representatives, is clearly erroneous when considering the facts in light of the statutory law. The Circuit Court determined that the dismissal of the grievance was a clear failure to apply the law as written. The code contains this language for a reason, and it should be applied in this instance. The Circuit Court correctly determined that the dismissal was clearly wrong.

C. THE CIRCUIT COURT DID NOT ERR IN MODIFYING THE ALJ’S DECISION AND AWARDED RESPONDENT THE PROMOTION.

1. The Circuit Court Did Not Violate West Virginia Code §6C-2-5.

The decision of the ALJ essentially denied Respondent the relief he sought (i.e. being promoted to the position of Highway Engineer). The Circuit Court had the entire record available for review prior to reaching its decision. Importantly, the Court had available the testimony and exhibits that were introduced at the grievance hearing. **App. Vol. II pp. 003-237.** West Virginia Code §6C-2-5 provides the following:

- (b) A party may appeal the decision of the administrative law judge on the grounds that the decision:
 - (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
 - (2) Exceeds the administrative law judge's statutory authority;
 - (3) Is the result of fraud or deceit;
 - (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
 - (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

- (d) The court shall review the entire record that was before the administrative law judge, and the court may hear oral arguments and require written briefs. The court may reverse, vacate or modify the decision of the administrative law judge, or may remand the grievance to the administrative law judge or the chief administrator for further proceeding.

Subsection (d) allows the Circuit Court to modify the decision of the ALJ. A review of the "Findings of Fact, Conclusions of Law, and Final Order Granting Appeal from Decision of Grievance Board" demonstrates that Respondent Powell established that he was properly qualified, and that Intervenor Goins was not qualified. **App. Vol I, pp 001-003**. The extensive record clearly supports the Circuit Court's conclusion that Grievant was qualified for and entitled to be placed in the position. Should this Court determine otherwise, Grievant requests that the matter be remanded to the ALJ for additional findings and conclusions.

2. The Circuit Court Possessed the Authority to Award Respondent the Relief Sought in His Grievance Pursuant to the Statutory Powers Granted in W.Va. Code §6C-2-5.

As previously stated, the Circuit Court's Order was based on a substantial record that included extensive testimony and documentary evidence. The evidence when taken as a whole, clearly establishes that Petitioner Goins did not meet the minimum qualifications for the position

and should not have been awarded the job. Respondent provided testimony regarding his qualifications for the position as well as testimony that he was the only candidate still seeking the position. The record when viewed as a whole, supports the placement of Respondent in the position for which he applied.

Again, as set forth above, the Circuit Court is empowered pursuant to W.Va. Code §6C-2-5 to modify orders of the ALJ. As a thorough review of the record establishes, Respondent met or exceeded the minimum qualifications and Petitioner Goins did not. For these reasons, the Circuit Court acted without its authority by granting Respondent the Relief Sought. Should this Court determine otherwise, Grievant requests that the matter be remanded to the ALJ for additional findings and conclusions.

3. The Circuit Court's Order Was Not Contrary to the Evidence and Did Not Violate the Separation of Powers Doctrine.

Respondent sets forth herein the same argument as previously stated, *i.e.*, that the Circuit Court was granted the authority to modify the ALJ's ruling. As such the Circuit Court did not usurp to authority of the ALJ. Moreover, the evidence conclusively established that Respondent Powell met the qualifications and that Petitioner Goins did not.

The evidence was overwhelming that Intervenor was not qualified for the position. Petitioner Goins' admitted during the grievance hearing that her work history, as set forth in the application, did not establish the requisite minimum professional engineering experience required for the job of professional engineer. **Goins' testimony App. Vol II p. 29, lines 9-14.** Petitioner Goins' failure to meet the minimum requirements was further confirmed through this testimony of

DOH employee Rumbaugh. **Rumbaugh testimony App. Vol. II pp. 105-136.** Finally, after reviewing Goins' work history, Rumbaugh conceded, even giving Goins the benefit of the doubt that her work history somehow involved engineering, she still did not meet the minimum requirements. **Rumbaugh testimony App. Vol. II p. 133, lines 16-20.**

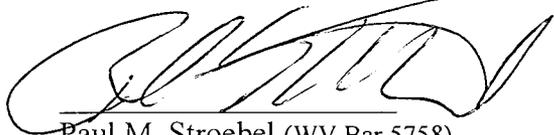
Goins now attempts to argue that Respondent filed late even if the discovery rule is applicable. However, both Petitioners DOH and Goins submitted proposed findings of fact which state the grievance was filed on November 18, 2015. **Intervenor's Proposed Findings of Fact and Conclusions of Law. App. Vol I, p. 031, ¶6** and **DOH Proposed Findings of Facts and Conclusions of Law. App. Vol I. p. 064, ¶4.** Goins fails to take into consideration that the grievance was filed with multiple parties. Respondent complied with the statute when he filed it as directed with the chief administrator of his department. This is confirmed by the DOH letter dismissing Respondent's level one grievance which states in three places that Mr. Powell filed his grievance on November 18, 2015. **App. Vol I pp. 10-11.** The filing date is also confirmed in the ALJ's Dismissal Order, Findings of Fact ¶7. **App. Vol. I p. 051.** The November 18, 2015 filing date is not in dispute. Moreover, this issue was never raised by the Petitioners below. As such, Petitioner's argument is without merit.

CONCLUSION

For the reasons set forth above, Respondent Michael Powell respectfully asks the Court to affirm the Order entered below. In the alternative, Respondent requests that the matter be remanded for additional Findings of Facts as deemed appropriate by this Court. Mr. Powell also

respectfully asks the Court to grant him all additional or cumulative relief to which it finds him entitled.

Respectfully submitted,
MICHAEL POWELL
By Counsel

A handwritten signature in black ink, appearing to read 'P. Stroebel', written over a horizontal line.

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