GENEVIEVE BENNETT/VIRGINIA WICKLINE

v. Docket No. 93-HHR-518

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/DIVISION OF PERSONNEL

DECISION

The grievants, Genevieve Bennett and Virginia Wickline, are employed by the Respondent West Virginia Department of Health and Human Resources (hereinafter Respondent or HHR), as Social Service Supervisors in its Lewisburg office. They initiated this grievance at Level I January 14, 1993, protesting the implementation and/or the effects of an agency-wide reclassification project involving all HHR classified positions. Their supervisor was without authority to grant relief and the case was waived to Level III where a hearing was held November 17, 1993. Upon receipt of an adverse decision at that level, the grievants made an appeal to Level IV December 15, 1993. At the grievants' request, the case was held in abeyance for nearly nine months. A hearing was held September 7, 1994 and the parties declined to submit proposed findings of fact and conclusions of law.

There is little if any dispute over the facts of the case. On December 16, 1992, the West Virginia Division of Personnel, (Personnel), pursuant to its authority to do so under W.Va. Code §29-6-10(1), (See footnote 1) implemented a plan calling for the reclassification of most HHR classified positions. Simultaneous to this action, Personnel abolished the then-current pay plan for positions in the classified service, which included thirty-five grades and identifiable steps within each grade. It was replaced with a plan which provided for only twenty-three grades with salary "ranges" instead of steps. A result of the overall plan was that the starting minimum salaries for a great many positions were raised. Personnel's "Pilot Administrative Guidelines", by which the reclassification of HHR positions and pay plan changes were implemented, provided that an employee who had previously earned a salary lower than the new minimum set for his position would be raised to that level. The grievants' salaries were apparently already above the new minimum established for Social ServiceSupervisor (SSS), which was placed in pay grade 12. The duties and responsibilities assigned to the SSS classification were not altered.

A "side effect" of the aspect of the plan was that employees who had previously received salaries considerably lower than other, higher-ranked employees, were suddenly much closer in terms of pay to those employees. Contributing to this "compression" was a lack of regularly-scheduled pay increases for more tenured employees during the years preceding the implementation of the plan.

The grievants complain generally that it is unfair for subordinates and perhaps other less senior lower-ranked employees to now be receiving salaries which are not substantially lower than their salaries. They take exception with Personnel's determinations that the duties and responsibilities of their positions warranted their placement in pay grade 12. They allege that the determination to place Social Service Supervisor in that pay grade was arbitrary and capricious. (See footnote 2)

Personnel responds that its determinations as to the grievants' proper classification and pay grade assignment were made only after consultation with HHR officials; that the duties and responsibilities of the grievants' positions were given due consideration; that their placement in the pay plan was not based on tenure and experience but rather on the relative difficulty of and the importance assigned to the duties of their positions; and that the salary ranges established for SSS positions is comparable to that paid similar positions in other states. Personnel asserts that it relied heavily on the "Southeastern Salary Survey", a compilation of reported salaries of various government posts in fourteen states in the southeastern United States. Personnel appears to place the blame for the difference between the salaries of the grievants' positions and that of lower-ranking positions on HHR's failure or inability over the years to grant sufficient pay raises to its more tenured employees.

HHR confirms that its chief administrator was consulted on and ultimately agreed with Personnel's determinations regarding the proper pay grade for the grievants' positions. HHR essentially responds that it had little further say in the matter. There islittle if any dispute that the grievants' complaint is with Personnel. (See footnote 3)

The evidence presented by the grievants is wholly insufficient to support any part of their claim. Essentially, the only evidence presented to show that Personnel acted arbitrarily in determining the proper pay grade for SSS positions was a November 2, 1992 memorandum from Social Services Director Harry Burgess to Lowell Basford, Personnel's Assistant Director, in which he disagreed with Personnel's initial and perhaps final determinations regarding the proper classification and salary for SSS positions. They did not refute, however, Mr. Basford's Level IV testimony that Ruth Ann Panepinto, the appointing authority for HHR at the time, did participate in Personnel's review and

ultimately "signed off" on its determinations in regard to the SSS positions. The regulations under which Personnel implemented the plan required no more.

The grievants also submitted the results of an extensive study conducted by the Massachusetts Institute of Technology (MIT) of various personnel problems within HHR. The study generally concluded that there was high turnover in the agency and that it was due at least in part to the agency's failure to compensate itsemployees adequately. The grievants failed, however, to demonstrate that these conclusions should have been a part of Personnel's consideration in developing the new pay plan or that Personnel was even aware of the study.

Mr. Basford testified persuasively that the decision to place the SSS position in pay grade 12 was made only after a careful review of the salaries paid comparable positions in those states included in the Southeastern Salary Survey and consultation with HHR's appointing authority. He explained that the SSS salary was lower than that paid similar positions in approximately seven states and higher than that of at least six states participating in the survey. The grievants did not rebut any portion of Mr. Basford's testimony.

It is understandable that the grievants believe that it was unfair that lower-ranked employees attained salary increases under the new pay plan while their salaries remained the same. As was noted in Tomlinson v. W.Va. Dept. of Transportation, Docket No. 94-DMV-209 (Oct. 20, 1994), however, an action which is unfair in certain respects is not necessarily an arbitrary and capricious action. The undersigned finds, as did the Administrative Law Judges in Tomlinson and Colesante v. W.Va. Bureau of Employment Programs, Docket No. 93-BEP-004 (April 27, 1993), that the grievants have failed to show by a preponderance of the evidence that Personnel or HHR acted arbitrarily or capriciously or violated any policy, statute or regulation in developing and implementing the December 16, 1992 pay plan for HHR classified positions.

In addition to the foregoing discussion, the undersigned makes the following formal conclusions of law.

FINDINGS OF FACT

1) In a case such as this, the grievants must prove all allegations constituting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989).

2) The West Virginia Division of Personnel is the State Agency charged with establishing and maintaining a position classification plan pursuant to W.Va. Code §§29-6-1 et seq.

3) The December 16, 1992 HHR position classification plan was not premised on the qualifications, education or experience of the employees holding particular classifications but upon the relative difficulty of the duties and responsibilities assigned those classifications; the salaries paid persons in comparable positions in neighboring states; and the restrictions of the agency's personnel budget.

4) The grievants have failed to establish that Personnel or HHR abused their discretionary authority in establishing the salary for Social Service Supervisor.

5) The grievants have failed to establish that Personnel or HHR violated, misapplied or misinterpreted any laws, rules or regulations in establishing the pay grade for Social Service Supervisor.

Accordingly, the 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.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: June 23, 1995

Footnote: 1 *The statute in pertinent part provides:*

> *"The board shall have the authority to promulgate, amend or repeal rules, in accordance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, to implement the provisions of this article:*
>
> *(1) For the preparation, maintenance and revision of a position classification plan for all positions in the classified service and a position classification plan for all positions in the classified-exempt service,*

> *based upon similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class."*

Footnote: 2At the Level IV hearing, the grievants also asserted that they were misclassified, i.e., they were classified as Social Service Supervisors but were performing the duties of Coordinator of Social Services. HHR objected to this assertion on the grounds that the issue had not been raised or litigated at the lower levels. After a review of the transcript of the Level III transcript, the undersigned agreed with HHR and ruled that the grievants were prohibited from proceeding on the issue at Level IV. See, W.Va. Dept. of Health and Human Res. v. Hess, 432 S.E.2d 27 (W.Va. 1993).

It is noted that the grievants also asserted at the hearing that they were entitled to a "step" raise upon the implementation of Personnel's new salary schedules. During the course of the presentation of evidence on this issue, it became apparent that the grievants were basing their argument on the regulations on reclassification in effect prior to the implementation of the newplan and that the grievants were unaware that those regulations were repealed through the Pilot Administrative Operating Guidelines used by Personnel. For that reason, the undersigned ruled at hearing that the contention was without merit. See Colesante v. W.Va. Bureau of Emp. Programs, infra.

Footnote: 3At the Level IV hearing, counsel for HHR asserted that the Grievance Board was without authority to declare invalid any part of the process by which Personnel assigned positions to a particular pay grade. Counsel was referred to Hazelock v. Civil Service Commission, No. 17280 (March 19, 1987), an unpublished decision in which the West Virginia Supreme Court of Appeals announced that the reclassification of a state employee's position must be accomplished in a manner which is not arbitrary or capricious. The undersigned ruled that the Grievance Board did have the authority to apply that standard to the process by which HHR positions were reclassified and placed in the new pay plan.