FAYE D. FIKE,

Grievant,

v.

DOCKET NO. 95-HHR-156

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Faye Fike, an Employment Services Worker ("ESW") with the Department of Health and Human Services/Work and Training Unit ("HHR"), filed this grievance on January 14, 1993, alleging her placement into Pay Grade 7 during the Statewide Reclassification Project violated statutory requirements of equal pay for equal work. Grievant seeks as relief to be placed in Pay Grade 8 or 9.

The matter was waived at levels one and two of the grievance process, and a level three hearing was held August 30, 1994, where the Division of Personnel ("DOP") was joined as an indispensable party. The level three decision was rendered on February 6, 1995, by Grievance Evaluator Roberta Gail Mullen. Grievant appealed that decision to level four on April 19, 1995. Thereafter, this matter was held in extended abeyance pending the outcome of Trimboli v. W. Va. Dept. of Health and Human Res., Docket No. 93-HHR-322 (June 6, 1997). Subsequent to the issuance of the Trimboli decision, and after several continuances for good cause, this matter was set for hearing at level four onMay 14, 1998. Grievant was represented by Lynn Belcher, representative for the West Virginia State Employees Union. HHR was represented by B. Allen Campbell, Esq., Assistant Attorney General, and Lowell D. Basford, Assistant Director, Classification and Compensation Section, appeared on behalf of the Division of Personnel.

SUMMARY OF EVIDENCE

Level Three

Grievant's Exhibits

Ex. 1 -

Functional Job Description for Employment Service Worker.

Ex. 2 -

West Virginia Administrative Rule, Chapter 29-6-10, Series 1, Sections 4 and 5.

Ex. 3 -

Employment Programs Interviewer Classification Specification.

Ex. 4 -

Employment Relations Specialist Classification Specification.

Ex. 5 -

Employment Service Worker Classification Specification.

Ex. 6 -

Comparison Chart between Employment Programs Interviewer, Employment Service Worker, and Employment Relations Specialist.

Ex. 7 -

Classification Definitions.

HHR's Exhibits

The Employer submitted no exhibits.

Personnel Exhibits

Division of Personnel submitted no exhibits.

Level Four

Joint Exhibit 1 -

1989 Southeastern Salary Conference Survey Results.

Grievant's Exhibits

Ex. 1 -

December 16, 1992 letter from Michael T. Smith to Faye Fike.

Ex. 2 -

Position Description Form for Employment Service Worker, with reclassification appeal documents, dated September 13, 1990.

Ex. 3 -

Faye Fike's Appeal of Reclassification Decision, dated January 8, 1993.

Ex. 4 -

July 7, 1993 letter from Robert L. Stephens, Jr. to Faye Fike.

Ex. 5 -

July 14, 1994 letter from Faye Fike to Terry Ridenour.

Ex. 6 -

Notice of Level III Hearing and Order of JoinderEx. 7 -
Memorandum from Faye Fike to Lowell D. Basford, with attached Position Description Form for Employment Service Worker, dated August 14, 1994.

Ex. 8 -

September 1, 1994 Memorandum from Terry Ridenour to Lowell D. Basford.

Ex. 9 -

Level III Decision, dated February 6, 1995.

Ex. 10 -

February 10, 1995 letter from Faye Fike to Grievance Board.

HHR's Exhibits

The Employer submitted no exhibits.

Personnel Exhibits

Ex. 1 -

July 30, 1992 memorandum from Sharon Paterno to Michael F. McCabe.

Ex. 2 -

July 26, 1991 memorandum from Sharon Paterno to Michael F. McCabe.

Ex. 3 -

Class Comparison Chart, approved 11/21/91. (See footnote 1)

Testimony

Grievant testified in her own behalf, and presented the testimony of Charles Robert Cool, Betty Ann Nicholson, and Lowell D. Basford. HHR presented the testimony of John Hammer and Michael McCabe. Personnel presented the testimony of Lowell D. Basford.

PRELIMINARY ISSUE

Grievant alleges she was denied due process and a fair hearing at level three, because “the decision to deny the grievance was made prior to receiving a response from the Office of Personnel, as requested by Ms. Terry Ridenour, Grievance Evaluator, who heard the Level III grievance.” A review of the record in this case reveals that the Division of Personnel, although named as a party in the original grievance statement, did not appear at the level three hearing before Ms. Ridenour. At the close of the level three hearing, Ms. Ridenour forwarded the exhibits which had been introduced to Mr. Basford at DOP for his review, along with a recommendation that he reevaluate DOP's position regarding the ESW pay grade. LIV G. Ex. 8. No response was ever received, nor anyformal position on the grievance offered, by DOP. In the meantime, Ms. Ridenour was replaced by Ms. Roberta Mullen as Grievance Evaluator for HHR, and Ms. Mullen issued the level three decision denying the grievance.

It is clear from the record that Grievant had every opportunity to testify, submit evidence, and present witnesses at the level three hearing. The fact that DOP did not appear at the hearing did not serve to deny her a fair hearing. Rather, Personnel's absence enhanced her chances of success at that level. While Ms. Ridenour could have issued a decision without the benefit of input from DOP, she chose to allow DOP an opportunity to respond to the evidence which had been presented at the level three hearing. DOP did not. Unfortunately for Grievant, Ms. Ridenour was replaced as Grievance Evaluator before she rendered a decision in this matter, as it appears Ms. Ridenour favored Grievant in this matter. Nevertheless, there is no evidence that Ms. Mullen did not review the entire record available to her and base her decision denying the grievance on the applicable facts and law, with or without any input from DOP. There simply is no evidence that Grievant was denied a fair hearing at level three, and that portion of Grievant's claim is denied.

BACKGROUND

The Legislature directed DOP to develop a new statewide job classification and pay plan for all state employees. DOP was to review all positions within the classified service, consolidate and decrease the number of job titles, and place employees within equitable pay grades based upon a similarity of duties and responsibilities. During the reclassification project the number of classifications decreased from 1300 to 700, and the number of pay grades decreased from 35 to 27. DOP began to reclassify HHR employees some time in 1989. All HHR employees completed position description forms (“PDF”) which indicated all of their job duties and the percentage of time spent on each job duty. These PDF's were reviewed by each employee's supervisor for accuracy before they were returned to DOP. Grievant completed a PDF in September 1990. LIV G. Ex. 2.

DOP completed a detailed analysis of the PDF's submitted by all HHR employees. From these forms, as well as field visits and job audits, DOP divided HHR employees into groups based upon job duties. From an analysis of these job duties, DOP created various job specifications which described the duties of all proposed positions. These job specifications were submitted to HHR for comment and review. HHR reviewed the job specifications and made suggestions and proposals. Some proposals were adopted by DOP. Grievant was placed into the ESW classification. See LIII G. Ex. 5.

Once appropriate job specifications were developed, DOP assigned the specifications to

appropriate pay grades. To facilitate this assignment, DOP utilized the 1989 Southeast Salary Conference Survey ("Survey"), which contains benchmark classifications and salaries from member states. LIV Jt. Ex. 1. The Survey is recognized and utilized by state personnel departments throughout the member states, and it identifies each position and the average salary each state pays the employees in that position.

When the Survey contained an exact match for a classification, DOP placed that classification in the closest pay grade to that salary. When there was no exact match for a classification, DOP extrapolated an appropriate pay grade based upon the relative complexity of jobs within the same job family utilizing a job classification that had an exact match. See Trimboli, supra. There was no exact match for an ESW in the Survey. Benchmarks in the ESW's job family that were utilized were an Economic Service Worker, Pay Grade 8, and Social Services Worker III, Pay Grade 10. Based on DOP's analysis, ESW was assigned Pay Grade 7.

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Discussion

In order to prevail in a grievance of this nature, Grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). The concept of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. .Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992).

Grievant argues the placement of ESWs at Pay Grade 7 is arbitrary and capricious and contrary to DOP's own regulations. She believes the complexity of the ESW's work requires a higher pay grade within her job family to achieve equity among the classifications.

Respondents maintain ESW's are properly placed in Pay Grade 7 based on their job duties. Respondents noted the arbitrary and capricious standard is a high one,requiring willful and unreasonable action and disregard of known facts, and Grievant failed to meet her burden of demonstrating Respondents' actions were arbitrary and capricious or an abuse of discretion.

The West Virginia State Personnel Board, a part of DOP, was created in 1989 to replace the former Civil Service Commission. W. Va. Code § 29-6-6 (1989). The duties and responsibilities of the former Director of the Civil Service Commission were also transferred to the Director of Personnel. W. Va. Code § 29-6-9 (1989). Pursuant to W. Va. Code § 29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or appeal legislative rules governing the

preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a 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.

The Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). The Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Trimboli, supra; Moore v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-126 (Aug. 26, 1994). See, Callaghan v. W. Va. Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va. 1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985). This standard of entitlement to substantial weight applies when a grievant attempts to review DOP's interpretation of its own regulations and classification specifications to determine if DOP's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR- 052 (July 10, 1995). “There is no question DOP has the authority to establish pay grades within a pay plan.” Stephenson v. W. Va. Bureau of Employment Programs/Div. of Personnel, Docket No. 92-DOP-447 (Aug. 12, 1993).

Further, a grievant may prevail by demonstrating his or her reclassification was made in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989). 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. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). 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 DOP. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W. Va. 1982).

An employee who alleges impropriety regarding a reclassification project and challenges the pay grade to which his or her position was assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1995); Bennett v. Dept. ofHealth and Human Resources/Div. of Personnel, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR- 206 (June 15, 1995); Thibault v. Div. of Rehabilitation Services/Div. of Personnel, Docket No. 94-RS-061 (May 31, 1995); Frame v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-140 (Nov. 29, 1994). See O'Connell v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR-251 (Oct. 13, 1995).

Unless a grievant presents sufficient evidence to demonstrate DOP's determination of pay grade is clearly wrong, or the result of an abuse of discretion, an administrative law judge must give deference to DOP and find that the pay grade assignment was correct. Farber, supra; O'Connell, supra.

On close examination Grievant's argument is not actually one of equal pay for equal work, but an argument for a higher pay grade based on comparative worth. Grievant is not comparing herself to other employees within her classification who perform substantially similar work through exerting the same effort and by utilizing the same skill level within a substantially similar working environment. See Moore, supra.

Most comparative worth litigation concerning an employer's establishment of pay scales has been

handled by federal courts in cases brought by employees within the context of discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2a. See, IUE v. Westinghouse Electric Corp., 631 F.2d 1094 (3rd Cir. 1980), cert. denied, 452 U.S. 967 (1981); Gunther v. County of Washington, 602 F.2d 882 (9th Cir, 1979), reh'g denied with supplemental opinion, 623 F.2d 1303 (9th Cir. 1980), aff'd 452 U.S. 161 (1981); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300 (E.D. Mich. 1980); Taylor v. Charley Brothers Co., 25 F.E.P. 602 (W.D. Pa. 1981). Most federal courts have expressly rejected claims brought under a pure comparative worth theory absent a showing of intentional discrimination. (See footnote 2) See, Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983); Power v. Berry County, 539 F. Supp. 721 (W.D. Mich. 1982). In 1987, the Ninth Circuit overruled a district court's decision in American Federation of State, County and Municipal Employees (AFSCME) v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983), which had ruled that the State of Washington had discriminated against female employees through adoption of its job classification system. The district court determined that comparability of jobs was determined by the State's own evaluation studies. The Ninth Circuit reversed the District Court and stated as follows:

Disparate impact analysis is confined to cases which challenge a specific, clearly delineated employment practice applied at a single point in the job selection process . . . . A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by Dothard and Griggs; such a compensation system, the result of a complex array of market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory.

770 F.2d 1401 (9th Cir. 1985), reh'g denied, 813 F.2d 1034 (9th Cir. 1987). Most federal courts have been reluctant, if not expressly unwilling, to strike down an employer's paysystem on the basis of a pure comparable worth theory, absent a companion showing of intentional discrimination.

The majority of federal courts are unwilling to substitute their judgment for that of the various employers in the comparative worth Title VII cases dealing with the issue of numerous positions' value to their employers. In Moore, supra, the Administrative Law Judge stated, “this Grievance Board is likewise reluctant to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, and substitute its judgment for that of the administrative agency in charge of classification and compensation. DOP chose to rely upon the Survey in setting the pay grades for the positions in question. DOP believes this salary schedule to be a valid tool to

utilize in establishing pay grades for the positions within its classified plan, as this schedule is a model derived from a comparative worth analysis of public sector positions. There has been no showing that DOP's decision was clearly wrong, or arbitrary and capricious." Moore, supra.

Mr. Lowell Basford, Assistant Director of Compensation and Classification at DOP, testified at level four about the process and method of reclassifying HHR's employees. Mr. Basford indicated DOP had more information and feedback sessions with HHR than any other agency whose employees it reclassified, and this increased communication was at the request of the appointing authority.

Section 5.01 of the Division of Personnel Administrative Rules requires the compensation plan be developed, in part, based on comparability with salary levels in other public jurisdictions and the private sector. The 1989 Southeastern Salary Survey consisted of salary data from 14 southeastern states for 69 benchmark job classifications. In developing a classification scheme, it is important to evaluate and compare all job classifications against each other, but the most important comparisons are within the job family. ESW's job family is in the Social Services area. The comparison of the ESW's duties with those of the other job-family classifications demonstrates the differences in the positions with respect to complexity of duties, consequence of error, exposure to danger, need to travel, required level of supervision and review, and independence in judgment and interaction.

The ESW classification (Pay Grade 7) is in the same job family as Economic Service Worker (Pay Grade 8), Social Service Worker I-III (Pay Grades 8, 9, 10), Employment Relations Specialist (Pay Grade 9), Child Advocate Legal Assistant (Pay Grade 9), and Protective Services Worker (Pay Grade 10). All of these job classifications were evaluated and assigned pay grades based on the relative level of difficulty and complexity and after full consultation with the appointing authority.

During the presentation of evidence, Grievant compared her classification, Employment Service Worker, and job duties to other classifications with higher pay grades in an attempt to demonstrate her work had the same or greater degree of complexity. Grievant compared her duties to the duties of Employment Programs Interviewers, Pay Grade 8, and Employment Relations Specialists, Pay Grade 9.

The classification specifications for the above identified classifications are restated below:

EMPLOYMENT SERVICE WORKER

Nature of Work

Under general supervision, performs entry level work providing basic employment-related social services to applicants and recipients of publicassistance, such as Work and Training, Food Stamp Job Search, Job Training Partnership Act (JTPA), and information and referral. Contacts employers to monitor services provided to clients. May develop training materials for individual or group training. May be required to have access to transportation for field work. Performs related work as required.

Examples of Work

Maintains a caseload for employment programs and employment services; encourages clients who must participate to receive benefits.

Develops clients service employability plans to assist clients in attaining employment.

Provides information on and refers clients to other community and social service agencies.

Reviews employer attendance records for the Community Work Experience Program (CWEP) monitoring and analyzing attendance, in-kind contributions, and CWEP special need allowance.

Uses individual or group employment counseling techniques in assisting persons in job search.

Writes reports on case findings.

Develops materials to teach clients job hunting skills such as resume writing.

EMPLOYMENT PROGRAMS INTERVIEWER

Nature of Work

Under general supervision, performs work at the full-performance level, using standardized interviewing methods to obtain, verify, or interpret information from applicants, claimants, and employers in a local employment office or an itinerant point. Performs related work as required.

Distinguishing Characteristics

Work at this level is characterized by the emphasis placed on the use of general knowledge rather than specialized program knowledge. Typically, duties at this level do not involve lead work.

Examples of Work

Interviews applicants to obtain or verify employment history and complete or update applications.

Assigns occupational title and code to application using the Dictionary of Occupational Titles.

Takes job information from prospective employers by telephone, mail or in person, and writes job orders.

Searches files for qualified applicants to fill job orders.

Enters, updates, and deletes information in the computer system.

Interviews claimants to obtain or verify reason for unemployment.

Consults printed guidelines to determine eligibility of claimant.

Assists claimants in completing proper claims forms.

Verifies claimants' continued availability for employment.

EMPLOYMENT RELATIONS SPECIALIST

Nature of Work

Under general supervision, performs advanced work providing a wide range of employment-related social services to applicants and recipients of public assistance such as Work and Training, the Job Training Partnership Act (JTPA), and the Community Work Experience Program (CWEP). Develops jobs for CWEP sponsors. May lead and train new employees in the supervisor's absence. May be required to travel. Must have access to reliable transportation. Performs related work as required.

Examples of Work

Maintains a caseload for employment programs and employment services.

Develops client service employability plan designed to assist clients in attaining employment while receiving employment and social services.

Negotiates and writes CWEP and JTPA contracts with non-profit agencies and employers.

Monitors and evaluates CWEP sponsors and participants to insure compliance with program standards.

Collects and interprets data from CWEP sponsors to calculate and compile reports on program placement.

Counsels clients/families in achieving employment goals.

Prepares periodic social assessment of clients' circumstances and recommends action to accomplish employment goal.

Interacts with a variety of professionals, elected officials, agency directors, and community leaders to assess employment needs of the community and to refer clients to appropriate agency services.

Plans and implements an effective employer relations program in order to develop employment opportunities for clients.

Promotes public relations through speaking engagements and news media.

Directs client in job search activities through utilization of job seeking skills and group or individual employment counseling.

Writes reports on case findings.

May lead and assist in training new employees.

Grievant has been employed as an ESW for 4-1/2 years. Grievant's duties, as set forth in her classification specification, are to provide basic employment related social services to applicants and recipients of public assistance, such as Work and Training, Food Stamps, and

JTPA. Since 1994, due to a Federal mandate, the ESW's duties have changed significantly to include providing assistance to those not receiving payments, and instruction and training in job search skills.

Mr. Basford testified that DOP worked closely with the agency in developing classifications and grades. Both Sharon Paterno, Director, Office of Work and Training, and Michael McCabe, the Director of the Office of Personnel Services for HHR, concurred with DOP's recommendation to place the ESW classification into pay grade 7. DOP Ex. 1. In a July 30, 1992, memorandum Ms. Paterno indicates that "we have elected to assign only the lower classified Employment Placement Worker position to the Food Stamp Employment and Training program because this is a much less complex program. Staff in this program do not work with public assistance cases, the CWEP program, or purchase of service contractors." DOP Ex. 1. The Employment Placement Worker ultimately became the Employment Service Worker position.

In an earlier, July 26, 1991 memorandum, Ms. Paterno voices her concern to Mr. McCabe that the proposed titles for the Work and Training classifications do not "adequately define[s] the full range of functions being performed in the provision of employment related social services. Staff in the Office of Work and Training are more involved with the development of career plans for recipients of public assistance and/or food stamps rather than just placement into employment." It is clear from these two memoranda that Ms. Paterno believed there was a clear distinction between the complexity of the work performed by the ESWs, who primarily were responsible for the Food Stamp Program, and the ERS workers, who dealt with more complex and more varied public assistance programs, as well as grant-writing responsibility.

However, Betty Ann Nicholson, Grievant's supervisor, testified that due to the changes in ESW duties, the ESW and the ERS positions have come closer in regard to duties and responsibilities; however, ERS' must have the ability to write OJT and CWEP contracts and work with those programs and their payment systems, which is a more complex task than that assigned to ESWs. Ms. Nicholson opined that the pay grade for the ESW may be inappropriate due to the Federally mandated changes in duties.

Nevertheless, despite Ms. Nicholson's opinion, the distinction in classification between the

ESWs and the ERS' was not arbitrary or capricious, but was based on real distinctions in job duties and complexity of services performed.

With regard to Grievant's comparison between an ESW and an EPI, however, the distinction in complexity and difficulty of duties becomes blurred. Mr. Basford testified that these classifications fall within different agencies, thus explaining the difference in pay grades. However, the statute governing equal pay for equal work makes no such distinction. Rather, it states that the "Board shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies (emphasis added)." Further, the Class Comparison Chart provided by Mr. Basford does not separate the classifications by agency, but by job family. Thus, the Social Services job family includes both the ESW and the EPI. DOP Ex. 3. Mr. Basford testified that, where there was a benchmark classification, i.e., where there was an identical match in the Survey, DOP simply assigned the pay grade listed in the survey. Where there was no exact match, DOP divided positions into job families determined by the similarity of the types of duties performed. Once positions were divided into job families, the benchmarks were used to determine starting points for pay grade assignments, and pay grades for non-listed positions were extrapolated depending on the relative complexity of the position in relation to the benchmark in that job family. The EPI was a benchmark in the Survey and was simply placed in pay grade 8 as it was an exact match.

The ESW was not an exact match and was extrapolated from other positions within the Social Services job family, including the Economic Service Worker, Social Service Worker, and Employment Relations Specialist positions, but, interestingly, not the Employment Programs Interviewer. The ESW was given a pay grade 7, the lowest pay grade in that job family, with Economic Service Worker being a benchmark classification at pay grade 8. ESW was slotted at pay grade 7 because it is considered an entry level social service position in relation to the other positions.

Despite Mr. Basford's representations regarding the complexity of work of the EPI versus the ESW, a review of those classification specifications indicates that the descriptions are nearly identical, and to the extent there are more complex or varied tasks to be performed by the employee, those tasks fall within the ESW classification specification. For instance, an

ESW must have "knowledge of approved interviewing techniques." An ESW must have "knowledge of the general principles of economics, and of social and labor market conditions prevailing in the state." An ESW must have the"ability to learn federal and state laws pertaining to social welfare Work and Training programs and related laws, rules and regulations." An ESW must have the "ability to learn theories, principles, methods and techniques of employment-related social service case work." In addition, ESWs maintain caseloads, write reports on case findings, utilize individual or group counseling, and perform job training functions.

In comparison, an EPI is required to able to learn "approved interviewing techniques." An EPI also must be able to learn state and federal laws pertaining to the agency. An EPI also must be able to make reports, effectively interview, and have "knowledge of the functions and objectives of public employment offices."

ESWs and EPIs both must have knowledge of job training programs, employment programs, JTPA, CLEP, and a variety of other social services available to those in need and qualified for the services. Mr. Basford testified that the EPI has a distinctly different function than the ESW both in terms of the number of programs involved and the variety of client population. While it is true that an EPI's task is to advise individuals on employment, and an ESWs' task is to advise those in need of public assistance, it seems that the clientele of both an ESW and EPI would necessarily overlap to some degree, although not in every instance. In any event, though, knowledge of the services available to those without jobs, looking for jobs, or because of their unemployed status, in need of public assistance, is essential to the effective performance of both of those positions.

It was not arbitrary and capricious for DOP to give the ESW a lower pay grade than an ERS based on Ms. Paterno's representations that it involved entry-level work within the Work and Training Unit. However, it is evident that in their analysis, DOP and HHR ignored the similarities in complexity and job responsibilities between the ESW and theEPI. Job classifications are meant to be state-wide, not agency-by-agency. Thus, it was important for DOP to look beyond HHR to make sure there were not other classifications within the social service job family which would provide a closer benchmark for the ESW than those utilized. Reviewing the classification specifications of the ESW and the EPI, it is clear that the EPI

classification is nearly identical in scope and complexity to the ESW position, and thus, the ESW falls more squarely within that benchmark pay grade than the others to which it was compared.

FINDINGS OF FACT

1. Grievant was employed by HHR as an ESW from April 1990 until January 1998, when she assumed another position with HHR. Grievant, as an ESW, was assigned to Pay Grade 7 as part of the statewide reclassification.

2. The assignment of a pay grade to a position is based on multiple factors which include complexity of duties, degree of public contact, exposure to harm, consequence of error, comparison with other positions in the same pay grade, comparison of positions within a job family, level of technical support, required level of supervision and review, and independence of judgment and interaction. See Vickers v. W. Va. Dept. of Tax and Revenue/Div. of Personnel, Docket Nos. 94-T&R-092/142 (Nov. 14, 1994).

3. A comparison of the job duties of ESW's to those of the ERS' demonstrates that the ESW classification consists of entry-level work in comparison to the more complex work associated with the ERS classification.

4. The pay grade of ESW's was based on the Survey, their job duties, and a comparison with other state employees. 5. DOP conferred extensively with HHR, the appointing authority, and received the input, assistance, and approval of its job classification plan and pay grade plan from the Secretary and Personnel Director of HHR.

6. The reclassification of HHR, in general, and the ESW's, in particular, was conducted and completed in the same manner as it was conducted in other state agencies.

7. A comparison of the job duties of the ESWs to the EPIs demonstrates they involve nearly identical tasks involving the same skills and abilities, and serve the same clientele utilizing the same social service programs.

CONCLUSIONS OF LAW

1. Grievant has the burden of proof in this case to establish, by a preponderance of the

evidence, that the assignment of the ESW class title to Pay Grade 7 was clearly wrong, arbitrary, capricious, contrary to regulation, or otherwise illegal and improper. W. Va. Code § 29-6A-6; Bennett v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-206 (June 15, 1995).

2. W. Va. Code § 29-6-10 authorizes the State Personnel Board to promulgate rules for the implementation and administration of the classified State employees' job classification and pay plans for which plans the Personnel Board is responsible. Frame v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR- 140 (Nov. 29, 1994).

3. W. Va. Code § 29-6-10 vests the responsibility for preparing, maintaining, and revising classified State employees' job classification plans and pay plans in the State Personnel Board. 4. DOP assigned pay grades to class titles so that equity is achieved within a "family" of class titles, as well as within an agency as a whole.

5. 143 C.S.R. 1 § 4.01 requires DOP to confer with the "appointing authority" (in this case, HHR) when adopting and implementing a job classification plan for classified State employees, and requires DOP to base its job classification plan upon "an investigation and analysis of the duties and responsibilities of each position."

6. The Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2).

7. The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Moore v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-126 (Aug. 26, 1994).

8. "[T]he rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation." Farber v. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR-052 (July 10, 1995). See, Callaghan v. W. Va. Civil Service Comm'n, 273 S.E.2d 72 (W. Va. 1980).

9. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its

expertise is entitled to substantial weight. Syl. pt. 3, W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985); Dillon v. Bd. of Ed. of County of Mingo, 301 S.E.2d 588 (1983). 10. An employee who alleges impropriety regarding a reclassification project and challenges the pay grade to which his or her position was assigned bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. Blankenship, supra; Bennett, supra; Johnston, supra; Thibault v. Div. of Rehabilitation Services/Div. of Personnel, Docket No. 94-RS-061 (May 31, 1995); Frame, supra; See O'Connell v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR-251 (Oct. 13, 1995).

11. A grievant may prevail by demonstrating his or her reclassification was done in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989).

12. An action is arbitrary and capricious if the agency making the decision 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 is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996).

13. An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." Id.

14. 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 lawjudge may not simply substitute her judgment for that of DOP. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W. Va. 1982).

15. Unless a grievant presents sufficient evidence to demonstrate DOP's determination of pay grade is clearly wrong, or the result of an abuse of discretion, an administrative law judge must give deference to DOP and find that the pay grade assignment was correct. Farber, supra; O'Connell, supra.

16. In order for Grievant to prevail she must show that HHR and DOP acted in an

arbitrary and capricious manner by placing the ESW position in Pay Grade 7. To meet this burden Grievant must show HHR and DOP had no rational basis for placing Grievant in her current pay grade, or that Respondents acted in bad faith by placing the ESW classification in Pay Grade 7 despite overwhelming evidence indicating the classification should be otherwise placed.

17. Grievant has proven by a preponderance of the evidence that HHR and DOP ignored important criteria and data when assigning the ESW classification in pay grade 7. Specifically, they ignored the existence of another benchmark position within the same job family which corresponded nearly identically to that of an ESW. DOP and HHR's rationale for not utilizing this benchmark position in assigning the ESW pay grade is that the EPI position falls within the Bureau of Employment Programs, not HHR. Nevertheless, the statute governing equal pay for equal work makes no such distinction. Rather, it states that the "Board shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies (emphasis added)." Further, DOP's Class Comparison Chart does not separate the classifications byagency, but by job family. The ESWs and the EPIs are in the same Social Services job family.

Accordingly, this grievance is GRANTED, and Respondents are hereby ORDERED to compensate Grievant with back pay, plus interest, for the difference, if any, between her ESW Pay Grade 7 salary and what she would have made in a Pay Grade 8, from April 1990, her starting date in the ESW classification, until January 1998, when she left that position.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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.

MARY JO SWARTZ

Administrative Law Judge

Dated: August 28, 1998

Footnote: 1 ***This document was submitted after the close of the level four hearing, at the request of the Administrative Law Judge.***

Footnote: 2 ***In Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982), the District Court found that the employees who were nurses had established a prima facie case of discrimination under a theory of comparable worth after comparing their skills, efforts, responsibilities, and working conditions to those of a group of sanitarians. In accepting the plaintiff's showing of discrimination on its face, the court in Briggs stated the employees would have been paid similarly absent the employer's discriminatory treatment. Ultimately however, the Briggs court found in favor of the city as it demonstrated that the existing market conditions justified the differences in the two positions' pay ranges.***