WILLIAM CURRY and MAGGIE MOLITOR,

Grievants,

v. **Docket No. 98-HHR-149**

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/ BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

Grievants, William Curry and Maggie Molitor, are employed in Kanawha County as Child Protective Service workers by the West Virginia Department of Health and Human Resources ("HHR" or "Department"). (See footnote 1) They allege the Corrective Action Plan which was designed to bring the Bureau for Children and Families into compliance with the statutory and policy deadlines is punitive and discriminatory. They request as relief that the Corrective Action Plan not be put into effect until the Bureau for Children and Families has adopted the caseload standards proposed by ACTION. (See footnote 2)

This grievance was filed on, or about, November 20, 1997. This grievance was denied at all lower levels, appealed to Level IV, and a hearing was held on January 21, 1999. This case became mature for decision on March 5, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

___ Grievants allege Respondent's Corrective Action Plan for Child Protective Service Workers is discriminatory, punitive in nature, and violates West Virginia Administrative Rules as they apply to an employee's use of Annual Leave. Grievants also aver their failure to meet the required deadlines should not be considered as a part of their performance evaluation. (See footnote 4) Grievants further argue that Respondent's Corrective Action Plan is an inappropriate method of insuring the completion of paperwork.

Respondent contends the Corrective Action Plan for Child Protective Services was required by the report of the Legislative Auditor, and is designed to meet mandated timelines and to protect the children of West Virginia from abuse and neglect. Respondent stated prior plans were ineffective, and a plan which was strongly worded and emphasized the importance of meeting these deadlines, was essential for Kanawha County. Respondent noted that pursuant to the Administrative Rules, annual leave is granted when it will not affect the efficient functioning of the agency; thus, not allowing Grievants to take annual leave until Grievants' caseloads are current is appropriate. As far as noting on the performance evaluations that the timelines were not met, Respondent maintains this action is appropriate because meeting the mandated timelines is an essential part of the duties of the position of a Child Protective Services worker.

Findings of Fact

1. Grievant Curry has been a Child Protective Services worker for approximately twenty-five years. Grievant Molitor has been employed as a Child Protective Services worker by the Bureau for Children and Families since 1995.

2. In 1996, a Legislative Audit was conducted on the Child Protective Services provided by the Bureau for Children and Families to see if the deadlines mandated by law and required policies were being followed and to assess the Bureau's performance.

3. This review indicated multiple problems in many areas of the State. The Kanawha District was especially having difficulty providing timely services, and was one of the four worst providers of the twelve counties surveyed. This report also stated that while the addition of more staff might improve the problem, the major problem was the lack of proper supervision and case management. This determination was based on the finding that counties with a lower ratio of staff to the number of clients, frequently were more timely in their contacts and completed assessments more quickly than counties with a lower caseload.

4. W. Va. Code § 49-6A-9 requires a face-to-face contact be made with the child or children within fourteen days of the reported abuse. HHR policy requires an initial assessment be completed within thirty days, and a family assessment/treatment plan be completed within forty-five days. These various assessments are to be conducted by a Child Protective Services intake worker, such as Grievants.

5. After receipt of this 1996 review, a Corrective Action Plan was put into place. This plan

followed the above-stated timelines within which certain services were to beprovided, and indicated employees who did not meet these deadlines would be counseled and asked to develop a plan for correcting their backlog.

6. This Corrective Action Plan resulted in little improvement in the timeliness of Child Protective Services workers meeting the required deadlines.

7. In 1997, another Legislative Audit was conducted on the Child Protective Services provided by the Bureau for Children and Families to see if the deadlines mandated by law and required by policies were being followed and to assess any improvement in the Bureau's performance. The 1997 Audit again indicted the problem was not a lack of workers, but management's failure to hold the employees responsible. Again, this conclusion was reached because some counties with fewer workers per case met the deadlines, while other counties or regions with more workers per case did not.

8. This review indicated that while some improvement had been made, problems with meeting the required deadlines continued, and again the Kanawha District had trouble providing timely services.

9. After receiving this review, each district or region was required to formulate an individual Corrective Action Plan to correct the specific problems revealed by the Legislative Audit.

10. Kanawha County developed a comprehensive Corrective Action Plan, and it was put into place on November 1, 1997. This plan indicated the timelines within which certain services were to be provided, and noted an employee would not be allowed to take annual leave until his caseload was current. Additionally, Child Protective Services workers were required to work overtime if deadlines were not met. This Corrective ActionPlan also indicated that the failure to meet the required/mandatory deadlines would be reflected in the employee's performance evaluation.

11. Grievants have never actually been denied annual leave, but the approval for their annual leave was conditioned upon all deadlines being met, and their caseloads being current. At times, Grievants were not able to take the requested and approved annual leave because their caseloads were not up-to-date, and the required deadlines had not been met. Grievants did not lose any annual leave at the end of the year even though they were not allowed to take all the annual leave they wished to take when they wished to take it.

12. Grievants received a 1 on their 1997 performance evaluation in the area of

"Dependability." (See footnote 5) This category assesses the following areas: 1) "Trustworthy and reliable in completing assignments"; 2) "Produces an amount of work commensurate with expectations and job standards"; 3) "Observes policies in completing assignments"; and 4) "Meets deadlines". (See footnote 6)

13. Prior to the implementation of the 1997 Corrective Action Plan, Child Protective Services workers were allowed to take vacation without regard to theircaseloads; their performance evaluations did not reflect the failure to meet deadlines; and an employee who did not meet the required deadlines could receive a merit increase. (See footnote 7)

14. Grievants did not grieve their performance evaluations.

15. Although an exact number was not given, some Child Protective Services workers in Kanawha County routinely meet the stated deadlines.

16. Many counties did not restrict the use of annual leave, but some counties other than Kanawha County did. Each county or region was to develop a plan to resolve its own individual problems. (See footnote 8)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). Grievants argue the Corrective Action Plan is punitive in nature, discriminates against them, and violates the West Virginia Division of Personnel rules as they relate to annual leave. They also argue their failure to meet the deadlines is because there is insufficient staff to meet the needs, and that it is impossible with their large caseloads to meet these deadlines and do a competent job. Grievants argue the caseloads and mandated standards are unreasonably high.

W. Va. Code § 49-6A-9(b)(3) states a Child Protective Services worker shall:

> Upon notification of suspected child abuse or neglect, commence or cause to be commenced a thorough investigation of the report and the child's environment. As part of this response, within fourteen days, there shall be: A face-to-face interview with the child or children, and the development of a protection plan if necessary for the safety

or health of the child, which may involve law-enforcement officers or the court.

The Child Protective Services' Manual, Chapter 9000 states: (See footnote 9)

> An SS-CP-2 (Assessment for Child Protective Services) MUST be completed on all cases opened for child protective services. The Assessment must be completed within 30 days of the date of the SSIS transmission that was made to open the case or the SS-CP-1 was completed, whichever came first . . . .

The Child Protective Services' Manual, Chapter 9000, also states that a family assessment/treatment plan is to be completed within 45 days after the case is opened. This assessment is required before the case can be transferred to a Case Management worker for further services. These required deadlines can be examined in light of West Virginia Administrative Rule 15.03 which states "accrued annual leave shall be granted at such times as will not materially effect the agency's efficient operation . . . ." Respondent has taken the position that the failure to meet the mandatory deadlines will materially affect its efficient operation, and of course, could result in severe injury or even death to an unprotected child. This assessment cannot be seen as incorrect or arbitrary and capricious. While it is true that inability to take annual leave can be unsettling, and certainly there must be times when Child Protective Services workers could benefit from a break from their important and essential positions, the needs of the abused and neglected children must take precedence over Grievants' desire for time off.

Annual leave is a privilege, and its use cannot take priority over the needs of the agency, and the public which it serves. As stated in Roberts v. Division of Highways, Docket No. 92-DOH-148 (June 28, 1992), "there is obviously a legitimate business reason to limit an employee's use of annual leave when the date that an employee's work is finalized becomes vitally important to the operation of the employer." The same reasoning applies to the situation at the Bureau for Children and Families; there was a legitimate reason for not allowing annual leave as long as the required deadlines were not met. See Riddle v. Bd. of Directors/Southern W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994).

As for HHR's inclusion of Grievants' failure to meet deadlines in their performance evaluations, the question that comes to mind is why this factor was not considered before, as meeting statutory and policy deadlines are an essential part of the position. Again, itcannot be seen as a violation of

any rule, regulation, policy, or statute to note a key failure to meet standards on one section of an employee's performance evaluation.

Grievants have also alleged that Kanawha County's Corrective Action Plan is discriminatory. W. Va. Code § 29-6A-2(d) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Although Grievants are comparing themselves to other Child Protective Services workers, Grievants have failed to establish a prima facie case of discrimination. Although not all Child Protective Services workers throughout the state are subject to the sameannual leave restrictions, some Child Protective Services workers in counties other that Kanawha County are. As previously stated, each plan was developed to correct the specific problems of a region or county. This more restrictive Corrective Action Plan was based on the failure of Kanawha County to meet the required deadlines two years in a row, as reflected in the Legislative Auditor's reports of 1996 and 1997, and is clearly job related. The prior Corrective Action Plan, without these restrictions, did not create any change in the Child Protective Services workers' timeliness. Not all counties were facing the same

problems as Kanawha County, and not all regions needed the detailed plan required by Kanawha County's failure to meet the deadlines. Thus, Grievants have failed to establish they were discriminated against, and Respondent has demonstrated the plan imposed is related to the actual job responsibilities of Grievants.

It must be noted that Grievants were not denied annual leave; annual leave was conditionally granted. However, Grievants were required to have their caseloads up-to- date before annual leave could be taken. Whether Grievants got to take the requested annual leave was in their hands. The work requirements and deadlines of the agency shall take priority over the scheduling of annual leave. Riddle, supra; Roberts, supra.

Grievants' argument that the deadlines should not be enforced until caseload standard have met recommended levels, while certainly a good idea, is unfortunately not practical. It also must be noted that there are many Child Protective Services workers who are meeting the mandated deadlines. It is also noted that some of the Child Protective Services workers who meet these deadlines have more cases than Grievants. Thus, while it is recognized that the difficult job that Grievants have elected to fulfill would be madeeasier by decreasing the caseload, Grievants have not demonstrated that the tasks and goals set out for them are impossible to meet, or that their employer has treated them unfairly.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33- 88-130 (Aug. 19, 1988).

2. The work requirements and deadlines of the agency shall take priority over the scheduling of annual leave. Riddle v. Bd. of Directors/Southern W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Roberts v. Div. of Highways, Docket No. 92-DOH-148 (June 28, 1992).

2. Grievants have failed to demonstrate Respondent has violated any statute, rule, regulation,

or policy by its failure to allow Grievants to take annual leave when their caseloads are not within the mandated deadlines.

3. Grievants have failed to demonstrate Respondent has violated any statute, rule, regulation, or policy by reflecting their failure to meet the required deadlines on their performance evaluation under the category of "Dependability." 4. Grievants have failed to demonstrate they were discriminated against by the actions of HHR.

Accordingly, this grievance is **DENIED**.

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 theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: March 31, 1999

Footnote: 1

Prior to coming to Level IV there were more employees involved in this grievance. By the time the case reached Level IV these employees were no longer working as CPS workers, and since there were no monetary issues, these prior Grievants were dismissed from the grievance pursuant to Respondent's motion.

Footnote: 2

This acronym was not explained but represents a non-profit organization which provides services to child welfare agencies nationwide.

Footnote: 3

HHR was represented by Assistant Attorney General B. Allen Campbell, and Grievants appeared pro se.

Footnote: 4

Grievants are also required, at times, to work mandatory overtime when they have not met the mandated timelines. Although Grievants appear to be displeased with this requirement, this issue was not included as a part of their grievance.

Footnote: 5

The performance evaluations are rated from 1, unsatisfactory to 5, excellent.

Footnote: 6

Grievants attempted to argue that the failure to meet deadlines should not be the only thing considered in assessing this category. A review of the types of behavior rated in this category indicated that the failure to meet deadlines relates to all the types of behavior to be assessed in this category; thus, Grievants' argument will not be discussed further.

Footnote: 7

For example, Grievant Curry received a merit increase in January of 1997 when he had approximately 300 initial assessments that he had not completed within a sixty day period.

Footnote: 8

Pursuant to W. Va. Code § 49-6-1a, in 1994, the Secretary of HHR was to develop a plan to allow the Department to progressively reduce the caseload standards and to submit this plan to the Legislature. This plan could be adopted by the Legislature during the regular session in 1995, with implementation in 1996. It was unclear from the evidence presented whether this plan was submitted, and whether any subsequent action was taken by the Legislature.

Footnote: 9

Grievants argued that the Policy deadlines were changed into estimated deadlines when HHR went to the new assessment system. This clearly is not the case. Although in certain very rare incidences, a Child Protective Services worker may be able to get an extension on the deadlines for the initial assessment and the family assessment/treatment plan, the deadlines are considered mandatory by HHR and were not changed by the advent of the new system.