KIMBERLY BENTLEY, et al.,

Grievants,

v. **DOCKET NO. 03-HHR-251**

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/BUREAU FOR CHILD

SUPPORT ENFORCEMENT and DIVISION

OF PERSONNEL,

Respondents.

DECISION

On May 23, 2003, Grievants (See footnote 1) filed separate but essentially identical grievances against their employer, Department of Health and Human Resources (DHHR)/Bureau for Child Support Enforcement (BCSE), stating:

> On May 12, 2003, I learned that approximately two and one-half months ago the Division of Personnel, without notice to me or to my employer, the BCSE, upgraded my job classification's paygrade from Attorney III, Pay Grade 20 to Attorney III, Pay Grade 22 [or Attorney Supervisor, paygrade 22 to paygrade 24]. Associated with the Division of Personnel's raising the paygrade was a “special implementation” which allowed the Bureau of Employment Programs and agencies with notice the opportunity to raise the pay of their employees in this classification and paygrade. Neither I nor the BCSE was informed of this change of paygrade and the “special implementation” associated with it until after the “special implementation” had already been put into effect. Thus, I was deprived of the opportunity to be considered by my employer, the BCSE, to be included in the “special implementation” and any increase in salary which would have been associated with such inclusion.

As relief, Grievants seek, “That the Division of Personnel be ordered to reopen the 'special implementation' and allow the BCSE to participate in it so that I may be considered for any pay increase the BCSE may deem appropriate for me under the 'special implementation' plan.” The parties waived levels one and two, filing directly at level three, where the Division of Personnel (DOP) was joined as a party.

Having been denied at level three, a level four hearing was held in the Grievance Board's

Charleston office on February 5, 2004. Grievants represented themselves. Respondent DHHR was represented by counsel, Landon Brown, and Respondent DOP was represented by counsel, Karen O'Sullivan Thornton. The matter became mature for decision on March 8, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievants are all employed by BCSE in various positions. Grievants Bentley and Burdette are classified as Attorneys III. Grievants Talmage and Alter are classified as Attorney Supervisors.

2. In 2002, the Bureau for Employment Programs (BEP) contacted DOP with a two-part proposal to address recruitment and retention problems it was experiencing with attorneys. The first part was a revision of the pay plan for the attorneys, and the second part was a Special Implementation of the revised pay plan that would allow BEP to grant salary advancements to its employees within those classifications. 3. Since DOP could not revise the pay plan for attorneys only in BEP, it proposed to revise the pay grades for all state employees within the legal series: Attorneys, Attorney Supervisors, and Administrative Law Judges. Consistent with its rules, it sought comment from the Appointing Authorities of all agencies within the classified service.

4. DOP contacted DHHR Secretary Paul Nusbaum's office, and received no objection to the plan. DHHR did not request a special implementation similar to the one requested by BEP.

5. DHHR Cabinet Secretary Paul Nusbaum was given signature authority on State Personnel Board Matters such as proposals, Agency's comments on policies and rules, and organizational charts, as well as other personnel matters, from Governor Bob Wise by Signature Authorization Form executed January 16, 2001. Grievant's Exhibit No. 1.

6. Secretary Nusbaum delegated some of these powers to Susan Perry, Commissioner for the BCSE, by DOP Signature Authorization Form executed March 16, 2001. Grievant's Exhibit No. 1. Secretary Nusbaum did not delegate any authority relating to State Personnel Board matters.

7. Upon approval of the pay plan revision, Grievants Burdette and Bentley were changed from pay grade 20 to pay grade 22; Grievants Alter and Talmage were changed from pay grade 22 to 24.

None of the grievants received a salary advance at the time.

DISCUSSION

Since this grievance does not challenge a disciplinary action, Grievants bear the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work. Their claim must be proven by a preponderance of theevidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claims are more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Boylan v. W. Va. Dep't of Transp., Docket No. 94-DOH-211 (Oct. 25, 1994); Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. Id. The only breach of policy Grievants claim is that their appointing authority was not notified prior to the pay plan revision and special implementation proposed by the BEP. Additionally, Grievants claim the increase in their pay grades hurts their prospects for promotion and future pay raises, and places some of them in higher pay grades than their supervisors. Respondent DHHR has no position on the issues, and DOP asserts that all rules, policies and laws were followed and no harm befell Grievants.

An “Appointing Authority” is defined by the DOP Administrative Rule as “The executive or administrative head of an agency who is authorized by statute to appoint employees in the classified or classified-exempt service.” 143 C.S.R. 1 § 3.8. That section further states, “By written notification to the Director of Personnel, the appointing authority may delegate specific powers authorized by this rule to persons who satisfy the definition of employee as established in this rule.” As Lowell Basford, DOP Assistant Director for Classification and Compensation explained, the functions Grievants see their Bureau Commissioner perform that led them to believe she was their agency's Appointing Authority are no more than the specific powers that have been delegated to her by the Secretary for the DHHR, who is the actual appointing authority for the Department and all its agencies. This delegation of powers is evidenced by Grievants' Exhibit No. 1, the DOP Signature Authorization Forms by which the Secretary has made these delegations. While Ms. Perrymay have the authority to hire and set salaries of employees within her agency, she has not been delegated any authority relating to DOP Board matters, such as the proposals at issue here, so whether she was notified in advance of the proposal to change the legal series pay grades is immaterial.

The issue is relevant because DOP must consult with the appointing authorities before revising its pay plan. “After consultation with the appointing authorities and State fiscal officers and after a public hearing, the Director and the Board shall prepare and submit to the Governor for his or her approval any revision of the pay plan.” 143 C.S.R. 1 § 5.2. While Grievants contended Ms. Perry was never contacted, Respondent DOP maintained that Secretary Nusbaum, the Appointing Authority for such matters, was contacted. Grievants, who bear the burden of proof, failed to prove otherwise.

Secondary to the question of whether the pay plan revision was implemented correctly is the question of whether BCSE should have been permitted to participate in the Special Implementation requested by the BEP. Grievants rightly argue BCSE was never notified of BEP's special implementation. However, they ignore the fact that there was no reason to notify BCSE of matters that did not concern it. No matter how much notice BCSE had of the proposal, it would not have been permitted to participate in a Special Implementation of the pay plan that affected an entirely different cabinet-level division. The Secretary of the BEP is not the Appointing Authority for the BCSE, so could not request a Special Implementation affecting that agency.

DOP clearly had the power to revise its pay plan, as it did. "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).” Tyler, et al. v. Dep't of Admin./Public Employees Ins. Agency and Div. ofPersonnel, Docket No. 00-DOA-291 (Aug. 8, 2001). The Personnel Board has authority and responsibility to establish and revise a pay plan for all positions within the classified service. 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. 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. Moore v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-126 (Aug. 26, 1994). *See*, Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). DOP's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

Grievants also assert that the pay plan revision was unreasonable because their prospects for promotion and future salary increases were hurt by the pay grade change. Specifically, Grievants Alter and Talmage note that they are now in a higher pay grade than their supervisors, which is a

disincentive to move into those jobs that are higher on the organizational chart. Grievants failed to tie these effects to a violation of rule, policy or law, and DOP stated it is not unheard of for professional employees such as grievants to be supervised by an administrator in a lower paygrade.

Grievants clearly misunderstand the personnel transactions that took place, and have failed to identify any violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work. Grievants repeatedly referred to the pay grade changes as the special implementation, when in fact they are two different things. The special implementation only affected the BEP, and no matter how much notice BCSE or even DHHR had of that action, they would not have participated because the BEP doesnot control the DHHR. DOP properly effected its change in paygrade for the legal series, with no prejudice to Grievants.

Grievants point out that BCSE never objected to the relief sought, but only claimed not to have the authority to grant it. While this does not affect the merits of their grievance, it does indicate Grievants may have better success convincing their Appointing Authority to request a Special Implementation for their bureau, since this may be done at any time, not just coincident with a pay grade change.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance does not challenge a disciplinary action, Grievants bear the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work. Their claim must be proven by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claims are more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Boylan v. W. Va. Dep't of Transp., Docket No. 94-DOH-211 (Oct. 25, 1994); Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. Id.

2. The “Appointing Authority” for personnel matters is “The executive or administrative head of an agency who is authorized by statute to appoint employees in the classified or classified-exempt service,” or such employees to whom the Appointing Authority has delegated specific powers to by written notification to the Director of Personnel. 143 C.S.R. 1 § 3.8. 4. For matters relating to

State Personnel Board proposals, the Secretary of the DHHR is the Appointing Authority for all agencies, bureaus and divisions of the DHHR, unless he has specifically delegated that authority. He has not delegated that authority to the Commissioner for the Bureau of Child Support Enforcement.

5. "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)." Tyler, et al. v. Dep't of Admin./Public Employees Ins. Agency and Div. of Personnel, Docket No. 00-DOA-291 (Aug. 8, 2001). 6. The Personnel Board has authority and responsibility to establish and revise a pay plan for all positions within the classified service. 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. 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. Moore v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-126 (Aug. 26, 1994). *See*, Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). DOP's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

7. Grievants have failed to prove by a preponderance of the evidence a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work.

For the foregoing reasons, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filedwithin 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: April 1, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Kimberly Bentley, Heidi Talmage, Dee-Ann Burdette and David Alter.