BARBARA AKOR et al.,

Grievants,

v. Docket No. 04-HHR-271

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

BUREAU for CHILDREN and FAMILIES

and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants are employed by Health and Human Resources ("HHR") as Economic Service Workers and Family Support Specialists in the Bureau for Children and Families ("BCF"). (See footnote 1) On January 15, 2004, they filed this grievance. Their Statement of Grievance reads:

> Economic Service Workers and Family Support Specialists are assigned a case load volume exceeding the standard recommended amount and exceeding the average case load data as provided January 5, 2004.

The initial relief sought contained eight separate points relating to case load standards, pay differentials, and pay increases. At some point in time, not specified by the parties, they engaged in mediation and agreed a committee would be established toaddress case load standards in detail. The parties also agreed the grievance was timely filed.

Also at some point in time, Grievants amended their grievance, apparently with the agreement of HHR, as these changes were accepted at Level III. This amendment again had eight points and stated in inordinate detail the relief sought. The relief sought is as follows:

Addendum to Relief Sought for Grievance Filed 01-15-2004

1.

Establish and enforce a caseload standard as per WV State Code 9-2-6A,

"Commission to Develop Caseload Standards." Change this code to reflect WV Works caseloads along with Income Maintenance caseloads. (See footnote 2) This standard should be required to be complete and enforced no later than April 1, 2004. The establishment of this standard will ensure several items are eliminated, such as workers needing to adjust their work schedules due to the heavy volume of clients required to be served on a daily basis. This could also have a positive impact on the state's error rate, as well as a positive impact on The Governor's initiative to improve customer service, because this will cut down on the amount of time a client will be required to wait for their service to be completed. The caseload standard should not exceed 450 cases for Income Maintenance and 50 cases for WV Works, as per statewide staff 113003 450-50 chart sent statewide on 01-05-2004.

2.

Authorize and hire a 10% overage of Income Maintenance (See footnote 3) and WV Works case managers (See footnote 4) to allow for the high turnover of workers in Kanawha County; this will facilitate authorizing and hiring 4 Income Maintenance workers and 3 WV Works workers, and maintaining this staffing level at all times. This will ensure that if a worker leaves their employment we will have coverageimmediately. These additional workers can be hired as full time, nonpermanent employees. (See footnote 5)

3.

Once the caseload standard as per WV state code 9-2-6A is placed in force, assigned workers will be paid a special pay differential of 10% of every 100 cases per worker, averaged annually, assigned to an Economic Service Worker and supervisor and 10 cases per worker, averaged annually, assigned to a Family Support Specialist and supervisor over the caseload standard. This 10% pay differential will be based on the employee's salary, not the job classification base pay. When calculating the case averages in increments of 100, 49 or less will be rounded down and 50 or more will be rounded up to the nearest 100 for Income Maintenance; in increments of 10, 4 or less will be rounded down and 5 or more will be rounded up to the nearest 10 for Family Support.

4.

Provide Family Support workers and supervisors and Economic Service Workers and supervisors as well as assigned support staff in the Kanawha County office, a 10% pay differential due to the complexity of the assigned job and the number of clients serviced on a daily basis. Also, the cost of living in Kanawha County has been proven to be higher than in other counties as shown in the established meal rate chart published on the DHHR web site effective October 11, 2003 "Standard CONUS Rate." It shows that the daily rate in the Charleston area is $43.00 daily, while all other locations listed in the matrix are significantly lower, with an average amount of $38.20 daily. In cities of similar size in the surrounding area of Kentucky, Maryland, Ohio, Pennsylvania, and Virginia, the average per diem is $41.00 daily, while the average salary in these states for a function comparable to an ESW is $28,559.70, compared to the starting pay of $19,392.00 for an ESW in Kanawha County. (See footnote 6)

5.

This relief is to begin April 1, 2004 and if approved either totally or in part, any relief will be retroactive to April 1, 2004. All caseload calculations will be done every 12 months and reported April 1 of the respective year to determine any due compensation.

6.

Increase the current pay for Kanawha County Income Maintenance and Family Support staff and assigned support staff 15% due to the high turnover in staff leaving this office for either more money or a similar job function with less volume or less complex programs involved. The job is very complex,detail-oriented, and very error-prone, and can lead to federal sanctions if not completed correctly. If the workers', supervisors' and support staffs' pay were increased, our retention level would increase.

7.

Pay a tenure differential of 3% annually on the employee's anniversary month to all Income Maintenance and Family Support staff and assigned support staff to effect the retention of more experienced staff and to attract favorable applicants.

8.

I am challenging the validity of the statement or inference made as to whether this grievance was filed in a timely manner. These items occur daily and often do not come to light until an analysis is conducted. Therefore I feel this grievance was filed in a timely manner, and as long as these items continue, the grievance will remain timely.

This grievance was denied at Levels I and II for lack of authority to grant the relief sought. Grievants appealed to Level III, and a Level III hearing was held on June 11, 2004. This grievance was denied by Level III Decision dated July 6, 2004. Grievants appealed to Level IV on July 23, 2004. A Level IV hearing was held on November 4, 2004, and this case became mature for decision on that date, as the parties elected not to file proposed findings of fact and conclusions of law. (See footnote 7)

Issues and Arguments

The Statement of Grievance asserts Grievants' case loads exceed the recommended standard. Grievants argue the enforcement of recommended case load standards will assist them in managing their work schedules and will decrease the amount of time customers have to wait. It is clear,

however, that this concern is not the major point of this grievance, as demonstrated by the Addendum focusing on the relief sought. The actual nucleus of this grievance is Grievants' request for their salaries to be increased to compensate them for their perceived stress level caused by what they view as excessive case loads. Further, Grievants maintained the high turnover rate in Kanawha County is caused by this factor, and they believe an increase in salaries will decrease the turnover rate for this area. Basically, Grievants want the Economic Service Workers and Family Support Specialists in the Kanawha County area to be treated differently from the rest of the state. All totaled, Grievants seek two ten per cent pay differentials, a fifteen percent increase in their current rate of pay, and a three percent tenure differential.

Respondents maintained these matters are not grievable as no statute, policy, rule, or regulation has been violated, the case load standards established by HHR are advisory rather than mandatory, and the issues raised by Grievants in their relief sought are management and budgetary matters. Further, HHR noted it is taking steps to decrease Grievants' case loads.

While the Division of Personnel noted there were no regulations preventing the majority of relief Grievants were seeking, these types of differentials and increases have never been granted by the State Personnel Board. Additionally, the Division of Personnel maintained Grievants had not demonstrated that an increase in salaries would decrease stress and error rates. Further, Grievants could not prove increasing salaries would be more effective than hiring more employees as a way to decrease case loads. The Division of Personnel averred Grievants' assertions are not logical and are internally inconsistent. The Division of Personnel also pointed out that all employees with three years of employment already receive a tenure differential in the form of the annual increment. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are all employed as Economic Service Workers or Family Support Specialists in Kanawha County.

2. Pursuant to W. Va. Code § 9-2-6a, HHR sets advisory case loads. This Code Section states, in pertinent part:

> The commissioner shall develop caseload standards based on the actual duties of

> employees in each program area of the department and may take into consideration existing professional caseload standards. Standards shall be reasonable and achievable.
>
> . . .
>
> The caseload standards which are developed establishing minimum and maximum caseloads shall be advisory for the department in the hiring of staff and in individual caseload assignments, and may be used as a basis of the department of health and human resources personal services budget request to the governor and the Legislature.

3. The currently recommended case load standard is 450 for an Economic Service Worker, and 50 for a Family Support Specialist.

4. W. Va. Code § 9-2-6a also requires the Commissioner to set up a committee to meet twice a year and make recommendations to the Commissioner. After the filing of this grievance, Assistant Commissioner Barbara McPhail, in charge of planning, coordinated efforts to review current case load standards and assess whether they should be revised. A ticking and timing study that covered a ten-day period has already been conducted, and this data has been submitted for analysis. (See footnote 8) 5. Several witnesses indicated they had left the Kanawha County BFC to work in another county with no change in pay because the case load was lower and this decreased their stress. One of these witnesses, Stefanie Cyrus, testified she would not have remained in the Kanawha County office for $75.00 more a pay period. No witness indicated he/she had left for a higher paying position. (See footnote 9)

6. Currently, HHR is reallocating Economic Service Worker and Family Support Specialist positions from other counties to the Kanawha County office, to decrease case loads by increasing the staff.

7. In May 2004, Kanawha County had filled 93% of its allocated staff positions for Economic Service Workers, with each Economic Service Worker having a case load of 484. Additionally, in May 2004, Kanawha County had filled 90.1% of its allocated staff positions for Family Support Specialists with each Family Support Specialist having a case load of 55.5. (See footnote 10) Grt. No. 1 at Level IV. (See footnote 11) Other counties have higher or lower percentages of filled positions and case load numbers. For example, some counties have greater than 100% of Economic Service Workers positions filled, and several are lower than theKanawha County percentages. Some counties have greater than 100% of Family Support Specialists positions filled, and approximately half are lower

than the Kanawha County percentages.

8. Kanawha County has a high turnover rate in the Economic Service Worker position, but there are no recruitment or retention problems in this classification as a whole. As noted previously, many Economic Service Workers transfer to another county, and new ones are hired.

9. No evidence was presented to demonstrate there was a problem with the error rate in the Kanawha County area, or that HHR was in danger of losing Federal funding.

10. The majority of the relief sought by Grievants is not contrary to any of the Division of Personnel's rules or regulations, but since the relief requested by Grievants deals with management decisions and budgetary constraints, the Division of Personnel would not direct HHR to implement these requests, nor has it ever granted any requests of this type. (See footnote 12)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

The only real issue to address is the sole assertion identified in Grievants' Statement of Grievance: their case loads exceed the recommended standard. While not clearly pled, it appears Grievants are asserting these standards are mandatory, and failure to follow these requirements justify the detailed relief sought.

It is clear that while HHR is required by W. Va. Code § 9-2-6a to set case load standards, these case load standards are "advisory." Grievants assert these recommended case load standards are not being met in Kanawha County, and HHR does not disagree. HHR is currently reallocating positions from other areas of the state to increase the number of workers in Kanawha County and decrease the case load. Additionally, HHR is currently assessing whether the old standard is "reasonable and achievable" or should be revised.

What Grievants have not proven is that their case loads are excessive as compared to all other

counties in the state, and they have not demonstrated why they should betreated differently than other Economic Service Workers and Family Support Specialists. (See footnote 13) The numbers given to the undersigned Administrative Law Judge by Grievants demonstrate many counties have similar or higher case loads than Kanawha County, especially when it comes to the Family Support Specialist positions. Grievants did not assert any other statute, policy, rule, or regulation was violated, and have not proven there is a violation of W. Va. Code § 9-2-6a.

The rest of Grievants' arguments and the majority of their assertions are not tied to their Statement of Grievance, but focus on the relief sought. In light of the fact Grievants have failed to establish they must deal with excessive case loads as compared to other Economic Service Workers and Family Support Specialists throughout the state, there is no need to address Grievants' request for monetary relief, as Grievants have failed to establish entitlement to any sort of relief within the context of this grievance.

It is also noted that Grievants' concerns have not fallen on deaf ears. HHR is working on the case load problem, and several positions have already been reallocated to Kanawha County. Additionally, case load standards are being reevaluated. 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 their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. W. Va. Code § 9-2-6a requires HHR to set case load standards, but these case load standards are "advisory."

3. Grievants did not demonstrate any statute, policy, rule, or regulation has been violated or

that their case loads were excessive as compared to other Economic Service Workers and Family Support Specialists.

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. 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: February 14, 2005

Footnote: 1

Grievants are Keith Adams, Barbara Akor, John Ballard, Stacy Barno, Elisabeth Beardsley, Levetta Casto, Rodney Cecil, Phil Cook, Susan Cook, April Cutlip, Sheila Davis, Jeffery Dean, Tammie Drumheller, Rita Eggleston, Addie Fielder, Danny Fields, Tammy Garris, William Gibbs, Melisa Green, Stephanie Haaland, Donnie Harris, Leroy Hazelock, Mary Henderson, Terra Hoff, Amanda Holland, Forrest Holley, Carol Holley, Randall Johnson, Alice Kayrouz, Amber Kroening, Anita Kuhn, Patricia Landers, Alicia Livesay, Vicky Malone, Carol Martin, Nancy Martinez, David Mason, Cheryl McKinny, Shawn McMaster, Elisabeth Moore, Tim Mullins, Jeremy Null, Susan Pauley, Joseph Pawlowski, Kristi Peterson, Barbara Polen, Christina Saunders, Daniel Saylor, Pamela Scarbro, Tamara Smith. Sheree Smith, Leane Soard, Donald Thomas, Cassandra Toliver, Johnnie Tomer, Susan Tucker, Cheryl Turnes, Kimberly Waugh, Kimberly Whiting, Stephen Williams, Sheila Wolfe, Larry Wolfe, and Deborah Young.

Footnote: 2

Of course this issue cannot be dealt with at an administrative level. This Grievance Board has no authority or jurisdiction to change legislation. Grievants should address this matter with the legislature.

Footnote: 3

The terms Income Maintenance Workers and Economic Service Workers were used interchangeably by the parties.

Footnote: 4

It appears Family Support Specialists are also called WV Works Case Managers.

Footnote: 5

This term was not clarified by Grievants at any level, and the undersigned Administrative Law Judge does not believe this is a proper state employment designation.

Footnote: 6

Here, Grievants are comparing apples (average salaries) and oranges (starting salaries).

Footnote: 7

Grievants were represented by Grievant Dean, the Division of Personnel was represented by Karen Thorton, Esq., and HHR was represented by B. Allen Campbell, Senior Assistant Attorney General.

Footnote: 8

Ticking refers to the frequency of the action, and timing to the length of time it takes to complete a task.

Footnote: 9

Although Grievants submitted a document naming people who had "left" Kanawha County because of pay issues, a review of this document does not establish this assumption. Many of the names were employees who had transferred or been promoted within HHR, or had retired. Additionally, there was no data indicating why any of the employees had "left."

Footnote: 10

It appears an Economic Service Worker does not carry a case load during the first year, but this fact is not specified in the class specification. Accordingly, the undersigned Administrative Law Judge is unclear what these workers do for the first year, and if they assist more tenured Economic Service Workers in their duties.

Footnote: 11

This exhibit was given to the undersigned Administrative Law Judge in multiple pages, and it could not be read in that format. I have taped this exhibit together so it could be read as a whole.

Footnote: 12

Grievants attempted to compare this grievance to Skiles v. Department of Health and Human Resources, Docket No. 02-HHR-111 (April 8, 2004). This case is easily distinguishable because it dealt with classification issues the Division of

Personnel had recommended and HHR refused to implement because of budgetary constraints. Grievants also attempted to compare their issues with those of the retention problems with nurses at Mildred Mitchell Bateman Hospital. Again, this issue is readily distinguishable because there, the nurses were being drawn out by the much larger salaries offered in the surrounding private market. Here, there are no positions or jobs in the private sector that equate with Grievants' classifications.

Footnote: 13

While it is understandable Grievants would want to keep Economic Service Workers and Family Support Specialists in Kanawha County, their plan to do so by increasing salaries is not the most logical, as it does nothing to correct the main problem of decreasing the case loads. As demonstrated by Grievants' own witnesses, workers are not leaving for more money; they are leaving to diminish their case load. As testified to by Lowell Basford, Assistant Director of the Classification and Compensation Section of the Division of Personnel, Grievants' requested relief does not make good managerial sense. If the reason for the turnover rate is stress related to high case loads, and these high case loads are leading to errors, putting much needed federal money in jeopardy, then the answer is to increase the number of employees to decrease the case loads. Then the stress should be decreased and the error rate should improve. An increase in salaries would do little to resolve the problems of high case loads, stress, and errors. *(See footnote 14)* *Test. Basford, Level III and IV Hearings.*

Footnote: 14

The undersigned Administrative Law Judge believes Grievants' desire to retain trained and qualified workers in Kanawha County is certainly an appropriate one. In that regard, it would appear to be a good idea to reassess the retention aspect after the additional workers are in place to see if there are other causes for the problems in Kanawha County that should be addressed.