WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ARLETTA MATHES,

Grievant,

v. **Docket No. 04-HHR-149(B)**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/BUREAU
FOR CHILDREN AND FAMILIES
and DIVISION OF PERSONNEL,

Respondents.

DECISION

This grievance was filed by numerous employees of the Department of Health and Human Resources' ("DHHR"), Bureau for Children and Families ("BCF"), as a result of new classifications and pay grade assignments which were implemented for positions within the Bureau for Child Support Enforcement in 2003. Grievant, an Accounting Technician 3 ("AT 3"), alleges that, although the Accounting Technician series of classifications does have a "career ladder," similar to that created for the child support classifications, it is insufficient and does not provide advancement opportunities for employees in her classification. She believes that her duties are similar to those of the Child Support Technician 2 ("CST 2"), which is in a higher pay grade.

Procedural History

In October of 2003, approximately 250 individuals filed these grievances around the state. After denials at levels one and two, the various grievances were consolidated at level three, and the Division of Personnel ("DOP") was joined as an indispensable party. A level three hearing was conducted, in person and by videoconferencing, before David M. Adkins, DHHR Grievance Evaluator, on November 21, 2003, January 30, 2004, and March 9, 2004. The grievances were denied by level three decision dated April 15, 2004.

Upon appeal to level four, these cases were ultimately divided into separate grievances, according to job classifications. The instant grievance is the only one filed by an Accounting Technician, and a level four hearing was held in the Grievance Board's Charleston office on February 20, 2007. Grievant was represented by counsel, Christopher G. Moffatt; DHHR was represented by B. Allen Campbell, Senior Assistant Attorney General; and DOP was represented by Karen O'Sullivan Thornton, Assistant Attorney General. There was no discussion on the record regarding the filing of post- hearing proposals, so it appears that none were filed. Due to the resignation of Chief Administrative Law Judge Paul Marteney, this matter was reassigned to the undersigned on August 18, 2007. The undersigned has been provided with, and has reviewed, the entirety of the level three record, along with the recordings of the proceedings conducted at level four.

Synopsis

In response to recruitment and retention problems, along with federal requirements in the area of child support, new classifications were created within the Bureau for Child Support Enforcement, along with higher pay grade assignments. Grievant claims that her duties are substantially similar to those of the Child Support Technicians and that she is entitled to similar pay. Grievant failed to prove that she was improperly classified, evidence established that she is compensated within the appropriate pay grade assigned to her classification, and she failed to demonstrate that the pay grade assignment for her positionwas improper. The decisions of Respondents regarding the child support positions, vis-a- vis Grievant's position, were not proven to be arbitrary and capricious, an abuse of discretion, or the result of discrimination or favoritism.

Findings of Fact

1. Grievant has been employed by the BCF as an AT 3 since 1992. She is assigned to a BCF

district office, and her functional job title is “financial clerk.”

2. Pursuant to a request from its former commissioner, and as the result of severe recruitment and retention problems, DOP conducted a classification study of various positions within the Bureau of Child Support Enforcement (“BCSE”). As a result of the study, in January of 2001, DOP recommended the creation of several new classifications, including Child Support Technician 1 and 2, Child Support Paralegal, Child Support Specialist 1, 2, and 3, Child Support Supervisor 1 and 2, and Child Support Regional Manager.

3. In 2002, BCSE Commissioner Susan Shelton Perry submitted a request for approval of the implementation of the new classifications, but it was rejected by the DHHR Secretary, because DHHR could not provide the necessary funding. Although most of the funds were to be provided by federal sources, DHHR was asked to provide nearly $1,000,000 of the necessary money.

4. On September 1, 2003, the State Personnel Board approved the creation of the new BCSE classifications, prompting the filing of the instant grievances. Virtually all of the funding for this program was provided by the federal government, through matching and incentive funds designated for child support issues, based upon the West Virginiaprogram's performance. These federal funds are only to be used by BCSE and cannot be “shared” with any other division of DHHR.

5. Grievant contends that her job duties overlap with and are similar to those of the CSS 2. Grievant's classification, AT 3, is assigned to Pay Grade 7, with a salary range of $15, 816 to $29,268. The CST 2 classification is assigned to Pay Grade 9, with a salary range of $18,120 to $33,540.

6. The Accounting Technician series is divided into four classifications, based upon level of responsibility and complexity of duties.

7. Grievant's duties include maintaining a monthly budget, issuing checks, and paying invoices. She both receives and distributes funds, recording each transaction and updating the budget.

8. The classification specifications for AT 3 and CST 2 describe these positions, in pertinent part, as follows:

ACCOUNTING TECHNICIAN 3

Nature of Work

Under general supervision, performs full-performance accounting support duties. The incumbent is responsible for performing moderately complex posting,

encumbering of funds, and examining records to assure adherence to accounting laws and regulations. Performs related work as required.

Distinguishing Characteristics

This is the full-performance level of paraprofessional accounting. Responsibilities may include training and reviewing work of subordinate staff.

Examples of Work

Classifies/codes a variety of transactions which may require considerable knowledge.

Reviews accounts, ledgers, claims, invoices, purchase orders, receipts, or similar materials for completeness, accuracy, and compliance with laws and regulations.
Prepares bank deposits and/or checks.

Makes correcting and/or adjusting entries on ledger.

Examines accounting records to assure adherence to accounting laws and regulations; verifies calculations and ensures accuracy and validity of transactions.

Prepares and illustrates statements and reports which reflect the relationships among accounts and which require occasional searching and analysis.

Performs moderately complex posting, encumbering of funds, and balancing receipts of others.

Maintains accounting records; gathers data and prepares moderate to complex financial statements and reports from records maintained.

May assist supervisor in preparing budget by compiling data, preparing summaries and requests, and developing cost projections.

May train and review work of clerical staff.

CHILD SUPPORT TECHNICIAN 2

Nature of Work

Under general supervision and at full performance level, employee conducts audits of Bureau for Child Support Enforcement (BCSE) cases at either a BCSE field office or the BCSE State Office Financial Adjustment Unit, including advanced analysis of transactions for both the caretakers and obligors. Work is performed in accordance with BCSE policies and procedures, federal and state laws and regulations, and applicable court orders. Employee is responsible for maintaining the integrity of the case financial histories for all cases with orders for support in the assigned region through periodic reviews requested by case managers, supervisors, and BCSE Attorneys. Employee possesses extensive multi-tasking and high level decision making abilities, and the ability to reconcile financial records utilizing independent

judgement to prioritize and process case work by the most efficient means possible. Employee will have developed professional growth in acquiring the skills and knowledge to be able to bring to supervisor's attention changes that may be needed within the program dealing with BCSE financial allocation and distribution processes. Employee must possess problem-solving skills commensurate with the reconciliation of financial data collected from payment histories (recorded and/or supported by affidavit), data records within automated applications, and computer balances in individual and/or collateral cases. Collaterally, the employee must possess the ability to communicate his/her problem solving logic to staff at all levels. Work product promotes and ensures the delivery of quality service to the broad spectrum of BCSE customers. May provide guidance and direction to staff with relation to ensuring the completeness and accuracy of information contained in appropriate cases. Directs others as assigned. Requires strictconfidentiality in regards to BCSE information. Performs related work as required.

Distinguishing Characteristics

Work of the employee in this class is characterized by the ability to perform financial duties at full performance level which require a working knowledge of policy and procedures within federal and state laws and regulations. Employee possesses a working understanding of not only mathematical models but various applications in order to correctly assist the BCSE Attorney and officers of the court in and establishment of support enforcement actions. Employees in this class must have supervisor approval to request funds in excess of $500.00 to be disbursed. Incumbent must have completed one year of employment as a Child Support Technician 1 or the equivalent experience in the area of child support.

Additionally, promotion to the next higher classification within the speciality is determined by satisfactory performance appraisal, two years of employment in this classification, and approval by supervisor.

Examples of Work

Analyzes caretaker and obligor cases to determine the accuracy of the financial histories of the cases.

If appropriate, performs audits to have balances corrected, utilizing several different databases to compile all pertinent data needed to complete the audit.

Verifies the data in the physical case file and automated databases affecting the allocation and distribution of child and spousal support payments by reviewing the data for accuracy, completeness, and compliance to the requirements as set forth by BCSE policies and procedures, federal and state laws and regulations.

Compiles information from public assistance cases including Medicaid services, payments of cash assistance, foster care boarding payments, as it affects the distribution of child and spousal support payments.

Obtains case financial histories maintained by out-of-state child support agencies, if necessary.

Reviews valid legal documents affecting financial history including court orders and

evaluates the accuracy as entered in the Child Support Enforcement's automated system.

Posts moderate to complex financial accounting information to a spreadsheet to determine balances.

Performs caretaker accounting to calculate any amounts owed to the caretaker, overpayments to caretaker, and refunds to obligor.

Forwards audits to state office for review and any manual adjustments to the Child Support Enforcement's automated system.

Communicates and substantiates information necessary to reconcile audits in the field with those at the state office and conveys verbal permission to change any discrepancies found in the review of the audit.

Reviews all manual adjustments to the Child Support Enforcement's automated system and all financial narratives recorded in the system for accuracy, completeness and compliance with state and federal regulations, ensuring all monies due to be distributed have been distributed correctly and reporting all issues to supervisor.

Represents BCSE by testifying in court proceedings as to the accuracy and interpretation of case financial history and policies that affect said history, and prepares case financial history to be entered into evidence in court proceedings.

Provides financial training and direction to new employees as well as case managers, supervisors, and BCSE Attorneys. May also review the work of these individuals to ensure compliance with state and federal child support policy.

May meet with caretakers and obligors to discuss and explain BCSE financial policy and the impact of that policy on the financial history of the cases involved.

Prepares and maintains productivity and status reports and statistics as requested by supervisors.

Completes special projects assigned by supervisors.

Attends ongoing training sessions to maintain a working knowledge of policies and procedures.

13. Like the AT 3, a CSS 2 deals with financial information and automated computer systems. However, the duties of the CSS 2 are more complex and, because of the legal aspects of the BCSE, require more extensive knowledge of various laws, rules and policies.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance 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 footnote 1) *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).

Although Grievant's claim is somewhat unclear, it appears from her testimony that she feels that employees in the CST series have more job opportunities than employees in the AT series. This is somewhat difficult to understand, given that the CST series has only three levels, while the AT series has four. However, the CST classifications are assigned to higher pay grades than the AT positions, which seems to be at the root of Grievant's complaint. She has not argued that she is misclassified or that her duties are not encompassed by her assigned classification. She does contend, however, that her duties are substantially similar to those of the CST 2, allegedly entitling her to similar pay.

The State 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 forequal work. W. Va. Code § 29-6-10(2). (See footnote 2) The State 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 State 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 Res./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).

Additionally, "DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function." *Travis v. Dep't of Health and Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998). As stated by the West Virginia Supreme Court of Appeals, an employee who alleges impropriety regarding a reclassification action or challenges the pay grade to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Bennett v. Dep't of Health and Human Res.*, Docket No. 93-HHR-518 (June 23, 1995); *Johnston v. W. Va. Dep't of Health and Human Res.*, Docket No. 94- HHR-206 (June 15, 1995); *Thibault v. W. Va. Div. of Rehab. Serv.*, Docket No. 94-RS-061(May 31, 1995); *Frame v. W.*

Va. Dep't of Health and Human Res., Docket No. 94-HHR- 140 (Nov. 29, 1994).

As to the assigned pay grades for Grievant's position as opposed to the CST positions, "[t]here 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). The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of DOP. *Moore*, *supra*. Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. If a grievant can demonstrate his or her classification or pay grade was made in an arbitrary and capricious manner or was an abuse of discretion, then he or she has met the required burden of proof. *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)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized asarbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id*. (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Grievant's argument that she is entitled to pay similar to that given to the CST 2 is a comparative worth allegation, as she is not comparing herself to employees within her own classification, but to employees in another classification who she believes perform similar work utilizing a similar skill level within a similar working environment. *See Moore, supra*; *Fike v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-155 (Aug. 28, 1998). Unless a grievant presents sufficient evidence to demonstrate DOP's interpretation 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. *O'Connell v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-251 (Oct. 13, 1995).

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 Circ. 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 haveexpressly rejected claims brought under a pure comparative worth theory absent a showing of intentional discrimination. *See Pleme v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983); *Power v. Berry County*, 539 F.Supp. 721 (W. D. Mich. 1982).

As this Grievance Board observed in *Delauder v. Dep't of Health and Human Resources*, Docket No. 01-HHR-152 (Jan. 27, 2004),

> This Grievance Board has followed the direction taken by the federal courts, and others, in refusing to decide misclassification cases on the basis of comparative worth. While it certainly is apparent that the [other] employees perform some similar duties as Grievants, and that Grievants' positions are much more demanding and complex than [those other] employees, the fact remains that Grievants are properly classified . . . , and are paid within the pay scale for that classification.

Grievant has failed to demonstrate that she is incorrectly classified or that her classification should be assigned to a higher pay grade. Moreover, as the testimony of Lowell Basford of DOP's Classification and Compensation Unit demonstrates, comparison of Grievant's duties to those of the CST 2 leads only to the conclusion that the CST 2s are performing very different duties requiring different types of knowledge and skill. This is not to say that Grievant's services are less valuable, but only that they are vastly different, and, as explained by Mr. Basford, Grievant's duties simply are not as complex and do not require the extent of knowledge and experience that the child support positions do. Grievant's duties, while requiring a level of independence and responsibility, are far more straightforward and automated than those of the CST 2, who must deal with far more complex transactions and financial information from a variety of state and federal sources.

In the absence of sufficient evidence demonstrating that DOP's determination of pay grade for her

position was clearly wrong, inappropriate, or the result of an abuse ofdiscretion, deference must be given to DOP's determination. *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994); *O'Connell*, *supra*. The evidence in this case does not support the conclusion that Grievant's assigned pay grade is arbitrary and capricious or constitutes an abuse of DOP's ample discretion in these matters, nor is there evidence that intentional discrimination against Grievant has occurred.

Finally, Grievant's counsel has also alleged that she has been the victim of discrimination and favoritism, by virtue of Respondent's decisions to create new classifications and increased pay for positions within BCSE, benefits which were not given to Grievant. "'Discrimination' means 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 by the employees." (See footnote 3) "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." (See footnote 4) A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Board of Education v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*,Docket No. 03-HE-217R (2004). An employee claiming favoritism must also show he or she is similarly-situated to another employee. *Kincaid v. Div. of Corrections*, Docket No. 98-CORR-144 (1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (1990).

Grievant did not demonstrate she is similarly situated to Child Support Technicians. The West Virginia Supreme Court of Appeals held in *Flint v. Wood County Board of Education*, 207 W. Va. 251, 531 S.E.2d 76 (1999) that to be considered similarly situated, the employees must be in the same classification as the employees to whom they compare themselves. In this education case, the West

Virginia Supreme Court of Appeals dealt with W. Va. Code § 18A-4-15 which requires uniformity in salaries, etc., for those who perform "like assignments and duties." The Court stated "the first prerequisite for establishing . . . discrimination or favoritism is a showing that the grievant is similarly situated, in a pertinent way, to one or more other employees." The Court found the grievants could not make such a showing because they were not in the same classifications as those to whom they compared themselves because "[o]bviously employees who do not have the same classifications are not performing 'like assignments and duties.'" This ruling was confirmed in *Airhart v. Wood County Board of Education*, Docket No. 99-54-419 (May 19, 2000), *aff'd* in part, *rev'd* in part, 212 W. Va. 175, 569 S.E.2d 422 (2002). Here, as in *Flint*, the differences in treatment are related to the job duties of the employees. Grievant is not in the same classification, is employed within a different division of DHHR, and does not perform the same duties as a CST 2.

This same ruling has been applied to state employees. In *Farley v. West Virginia Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA-015(June 22, 2000), the administrative law judge cited to *Flint, supra*, and noted the grievants did not hold the same classifications as any of the employees to whom they compared themselves. As the employees were not similarly situated, no discrimination was found. Additionally, in another decision involving comparisons of compensation in different state classifications, *Aultz v. West Virginia Department of Transportation*, Docket No. 90- DOH-522 (February 28, 1991), this Grievance Board refused to find state salaries can be compared, and equal compensation required, across classification lines. In *Aultz*, the grievants contended they should receive the same salary increase awarded to employees in the Highway Engineer II, Chemist IV, and Geologist IV classifications. This assertion was rejected, and the Administrative Law Judge found the Division of Highways and DOP had not "abused their discretion in upgrading the salary-levels [of these classifications] in light of the recruitment and retention problems."

A review of the case law and facts reveal the actions of HHR and DOP were not discriminatory. The key to this finding is that the actions were taken because of the severe recruitment and retention problems experienced in child support classifications. There is no evidence in the record that any similar issues existed within the Accounting Technician classifications. Additionally, Grievant was not similarly situated because she is not in the same classification as CSTs and does not perform the same job duties. The fact that new classifications were created within the BCSE does not entitle

Grievant to similar relief, nor is there sufficient evidence for the creation of any new classifications for Accounting Technicians. Again, Grievant is paid within her pay grade and no discrimination or favoritism is found with this set of facts.

The following conclusions of law support this Decision.

Conclusions of Law

1. Grievant has the burden of proving her grievance 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 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. An employee who alleges impropriety regarding a reclassification action or challenges the pay grade to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Bennett v. Dep't of Health and Human Res.*, Docket No. 93-HHR-518 (June 23, 1995); *Johnston v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-206 (June 15, 1995); *Thibault v. W. Va. Div. of Rehab. Serv.*, Docket No. 94-RS-061 (May 31, 1995); *Frame v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-140 (Nov. 29, 1994).

3. If a grievant can demonstrate his or her classification or pay grade was made in an arbitrary and capricious manner or was an abuse of discretion, then he or she has met the required burden of proof. *See Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989).

4. "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 implausiblethat 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)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

5. Unless a grievant presents sufficient evidence to demonstrate DOP's interpretation 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. *O'Connell v. W. Va. Dept. of Health and Human Res.*, Docket No. 95-HHR-251 (Oct. 13, 1995).

6. A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Board of Education v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004).

7. An employee claiming favoritism must also show she is similarly situated to another employee. *Kincaid v. Div. of Corrections*, Docket No. 98-CORR-144 (1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (1990).

8. Grievant has failed to prove by a preponderance of the evidence that Respondent's failure to change her job classification and/or pay grade was arbitrary andcapricious, an abuse of discretion, or the result of illegal discrimination or favoritism.

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. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). 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: October 3, 2007

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

Section 5.1 of DOP's Rules notes the purpose and intent of the classification plan is to "[t]o attract qualified employees and retain them in the classified service" and the State Personnel 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 and on comparability to pay rates established in other public and private agencies and businesses."

Footnote: 3

W. Va. Code § 29-6A-2(d) (See Footnote 1, supra).

Footnote: 4

W. Va. Code § 29-6A-2(h) (See Footnote 1, supra).