THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ETHEL BOGGS, et al.,

Grievants,

v. **Docket No. 05-HHR-136**

Janis I. Reynolds

Chief Administrative Law Judge

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 the Department of Health and Human Resources ("HHR") as Adult Protective Service Workers by the Bureau for Children and Families ("BCF"). They filed multiple grievances asserting they are entitled to the same pay increase received by Child Protective Service Workers. Grievant Boggs's Statement of Grievance is typical and states:

> I, Ethel Mae Boggs DHHR employee, Protective Service Worker, have been discriminated against by the State of West Virginia due to the fact Protective Service Workers who work with children were given a 20% salary adjustment effective April 1, 2005. My salary will not be adjusted due to the fact that my clients are adults. The education requirements, duties are the same.

The relief sought was: "1. A Salary Adjust[ment] of 20%, which was given to other Protective Service Workers. 2. Explanation why 20% salary adjust[ment] was given to other Protective Service Workers, but no adjustment was made to my salary, despite the fact I have the same title."

These grievances were heard in separate groups and denied at Levels I and II. At Level III, the Grievance Evaluator found the State Personnel Board had the authority toassign classifications and grant the pay differentials. Additionally, he found no discrimination had occurred, as Adult Protective Service Workers did not have the same level of recruitment and retention problems as Child Protective Service Workers. Also at Level III, a group of HHR employees attempted to join the already filed grievance as Intervenors. The Grievance Evaluator found the interest of these Intervenors was not adverse to Grievants, as required by the definition, and the bid to join the grievance was an attempt to circumvent the time frame for filing. Intervenors appealed this ruling to Level IV, and on October 18, 2005, the undersigned Administrative Law Judge affirmed the order of the Grievance Evaluator.

Grievants appealed to Level IV. These grievances were consolidated, and a Level IV hearing was held on January 16, 2007, in the Grievance Board's Charleston office. Some Grievants represented themselves, and others were represented by Kenneth Ballard, Esq. and Mark Carbonne, Esq. The Division of Personnel was represented by Karen Thornton, Assistant Attorney General, and HHR was represented by Jennifer Akers, Assistant Attorney General. This case became mature for decision on February 26, 2007, after receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants make several assertions. They assert they have been discriminated against, and the equal pay for equal work requirements of W. Va. Code § 29-6-10 have been violated. Some Grievants also argue the recruitment and retention problems for Adult Protective Service Workers are as great or greater than that for Child ProtectiveService Workers. Grievants do not claim they are misclassified, nor do they seek reallocation. (See footnote 1)

Respondents maintain the actions taken by HHR and DOP were necessitated by the urgent need to recruit and retain Child Protective Service Workers. Respondents maintain their actions were correct, and they followed all required statutes, policies, rules, and regulations.

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 employed by HHR as Adult Protective Service Workers in BCF.

2. Originally, HHR employees designated to perform the primary assessments and evaluations in child and adult abuse and neglect cases were classified as Protective Service Workers. This classification had been functionally divided into two categories for many years: Adult Protective Service Workers and Child Protective Service Workers. (See footnote 2) 3. HHR has had a problem in recruiting and retaining Child Protective Service Workers for at least ten to fifteen years.

4. In 1996, HHR gave Child Protective Service Workers, who had three years or more of tenure, a 3% salary adjustment. (This action resulted in the filing of several grievances see pages 22-25.)

5. Much of the funding for the child protective services provided by BCF comes from the federal government.

6. The federal government requires that certain standards be met in the area of child abuse and neglect cases. Timelines are mandatory for delineated actions and failure to meet the standards and deadlines can result in a loss of funding.

7. In 2002, the federal government's review of West Virginia's record in meeting standards and guidelines found this State had not met the stated goals in the areas of permanency, safety, and well-being of the children intrusted into its care. HHR was required to present an Improvement Plan to address these issues. One plan developed was a traveling crisis team to go to the counties with the worst backlogs. (West Virginia has since completed the requirements outlined by the federal government.)

8. In 2004, in order to deal with this problem, the Legislature appropriated money to fill approximately 200 positions in the Child Protective Service Workers area. (It was unclear how many of these positions were designated as Child Protective Service Workers, as some of these positions were for supervisors, case aides and Social Service Workers 3, who were involved in child cases, but the majority of the positions were for Child Protective Service Workers.) 9. HHR had difficulty filling these positions and difficulty retaining employees in these positions. Employees would frequently stay in the position until they completed the training, or for a year or two after that, but then

they would apply for different positions in HHR or with another state.

10. When HHR would request a register of qualified employees to fill Child Protective Service Workers positions, frequently there were no applicants. When HHR would request a register of qualified employees to fill Adult Protective Service Workers positions, there were applicants from which to make a selection. (See footnote 3)

11. In December 2004, the Berkeley County Circuit Court found HHR in contempt for its failure to provide sufficient services to protect the children of the area. The Court ordered HHR to take immediate action to address the severe recruitment and retention problems for the Eastern Panhandle.

12. During the Winter of 2005, the Legislature provided special funding to increase the salaries of Child Protective Service Workers.

13. During this period of time, an extensive amount of interaction between DOP and HHR Secretary Martha Walker took place to arrive at a proposal for the utilization of these funds.

14. On March 9, 2005, Secretary Walker sent a Memo to Willard Farley, Acting Director of DOP. She requested his approval and recommendation to the State PersonnelBoard for her proposal "to address critical manpower needs in child protective services." She made the following requests:

> Create a classification of child protective services worker trainee assigned to pay grade 13 with employees who will be assigned to this classification to receive a minimum salary increase of 15%.
>
> Create a classification of child protective services worker assigned to pay grade 15 with employees who will be assigned to this classification to receive a minimum salary increase of 20%.
>
> Reassign the classification of child protective services supervisor from a pay grade 15 to a pay grade 17 with affected employees to receive a salary increase of 20%.
>
> Reassign the classification of social service coordinator from a pay grade 16 to a pay grade 18 with affected employees to receive a salary increase of 20%.
>
> Rename the classifications of protective services worker trainee and protective services worker to adult protective services worker trainee and adult protective

services worker, respectively.

15. The March 9, 2005 memo noted this separation of Adult Protective Service Workers and Child Protective Service Workers "simply formalizes a division of duties that has been recognized and applied within the protective services worker class series for many years."

16. The March 9, 2005 memo outlined the number of allocated positions in the Child Protective Service classification, the number of vacancies by region, the percentage of staff with less than one year of tenure and the percentage of vacancy rate plus staff with less than one year of tenure. (A Child Protective Service Worker Trainee does not carry a full caseload.) The memo also listed four district offices that were currently experiencing a severe manpower crisis in Child Protective Services.

17. Secretary Walker noted in the March 9, 2005 memo that there were many factors that had contributed to the current crisis. The key factor was the low salary levels. Additionally, she identified the work was stressful and required long hours, including evenings and weekends, and being on call.

18. The March 9, 2005 memo also noted the West Virginia's salary levels were not competitive with the surrounding states, and that Maryland was currently offering a $3,000 signing bonus for Child Protective Service Workers.

19. Secretary Walker stated West Virginia was currently not meeting the minimum requirements necessary to assure the safety, permanency, and well-being of children who have been reported as abused or neglected, and she requested the proposals be approved and made effective on April 1, 2005.

20. On March 21, 2005, Mr. Farley wrote Secretary Walker informing her that the State Personnel Board had approved her proposal with some modifications. The State Personnel Board did not grant the 20% increase to Social Service Coordinators and retained the 3% increase to Child Protective Service Workers after three years of tenure in the position. At that meeting, separate classifications for Adult Protective Service Worker Trainees, Adult Protective Service Workers, Child Protective Service Worker Trainees, and Child Protective Service Workers were approved, with the latter two classifications receiving the requested increase in pay grade and salary.

21. On March 22, 3005, Secretary Walker informed all HHR employees of the increases and changes. She pointed out the severe recruitment and retention problems with the Child Protective Service Worker classification, and reported they had reached "acrisis point in recent months." She also noted the increases were the solution worked out by HHR Leadership Team.

22. While there may be some sporadic retention and recruitment problems among Adult Protective Service Workers, the majority of these positions are filled, and the statewide vacancy rate of Child Protective Service Workers at the time of the reclassification was twice that of Adult Protective Service Workers - 14.9% as compared to 7.9%. (See footnote 4) (In some counties the rates were much higher.)

23. The pertinent sections of the classification specifications at issue are written below:

CHILD PROTECTIVE SERVICES WORKER TRAINEE

Nature of Work

Under close supervision, performs in a training capacity for approximately one year learning the techniques of social casework in the area of Child Protective Services. Work is characterized by cases involving abuse/neglect/exploitation of children. The nature of the situations requires judgment to deal with problems that are potentially dangerous to the client and the worker. Work requires the use of personal automobile for extensive travel. May be subject to being on-call during non-business hours and must be available or be accessible by telephone. Requires extensive training to be fully accountable for a high volume of demanding and time-restricted cases. Performs related work as required.

Examples of Work

Learns to work within a caseload that crosses program lines into adoption, foster care, legal guardianship, and others.

Learns to conduct investigations concerning allegations of abuse by talking with and visually observing affected individual; talks with immediate family, relatives, neighbors, teachers, doctors, and relevant others and reviews any pertinent records. Learns to make initial assessment of validity of the allegation and the degree of danger that the child is in; learns to document the results of the investigation of the parent and/or caretaker.

Learns to complete family assessment to determine dynamics and problems that may be precipitating an abusive situation.

Learns to develop effective interventions to strengthen family that address safety, well being, and permanency of children.

Learns to prepare safety, service, and/or treatment plans to remedy contributing problems and stop behavior patterns of abuse/neglect/exploitation and solicits family cooperation.

Learns to engage family in counseling to solve problems, refers them to other available resources, and learns to monitor safety and risk of further abuse to prevent a reoccurrence of abuse.

Learns to file petition with the court as needed to ensure safety of the child, testify before the court, and learns to make appropriate placement of child, including but not limited to staying with relatives, in foster homes, residential treatment facilities, or in an emergency shelter.

Learns to evaluate the progress of the family or living environment towards meeting objectives of the safety/service/treatment plans, the need to modify the plans, and the eventual disposition of the case.

Learns to maintain detailed case records and extensive documentation, prepare specialized reports, and composes correspondence.

Attends extensive, ongoing training to develop comprehensive knowledge of State and Federal social welfare laws, rules, regulations, and evolving protocols regarding child abuse and neglect.

Learns to conduct and facilitate Multi-Disciplinary Team Meetings.

Learns to conduct validating interview of sexual abuse investigations.

Knowledge, Skills and Abilities

Knowledge of social work theory, casework methods, and community organization.

Knowledge of human behavior and the behavioral sciences, particularly concerning child development, family dynamics, and interpersonal relationships.

Ability to learn State and Federal social welfare laws, rules, and regulations, particularly those concerning child abuse and neglect policy (i. e. Gibson, ASO, ASFA, Title IV E, Chapter 49, Chapter 9000).

Ability to learn to assess emotional states, behavioral indicators, family dynamics, and overt signs of abuse in order to evaluate safety and risk and determine whether an abusive situation exists.

Ability to develop client safety, service, and treatment plans.

Ability to learn to influence people to engage in problem-solving activities and to change attitudes and behavior.

Ability to learn to work effectively with judges, law enforcement officials, and other professionals.

Ability to communicate with individuals who have emotional or mental problems, substance abuse issues, and/or domestic violence situations. Ability to communicate both orally and in writing.

Ability to learn to maintain detailed case records and extensive documentation, prepare specialized reports, and compose correspondence both in written and database format.

Ability to operate a computer.

Ability to pass competency testing.

Minimum Qualifications

Training: Bachelor's degree in Social Work from an accredited four-year college or university.
Substitution: Bachelor's degree in Sociology, Psychology, Counseling, Criminal Justice, Behavioral Science, Interpersonal Communications, Human Services, Education, Special Education, Elementary Education, or Secondary Education from an accredited four-year college or university may be substituted for the degree in Social Work.
OR Current West Virginia Social Work License.

Special Requirement:
Eligible for Temporary Social Worker License OR Licensed as a Social Worker, Graduate Social Worker, or Certified Social Worker by the West Virginia Board of Social Work Examiners.
NOTE: Applicants may be appointed for a period not to exceed sixty (60) days from date of hire pending verification of licensure. Applicants must agree in writing to verify licensure within sixty days or be terminated. Employees working under this restriction shall not perform any social work duties until license is verified.

Established: 03/17/05
Effective: 04/01/05

CHILD PROTECTIVE SERVICES WORKER

Nature of Work

Under general supervision, performs advanced and complex social casework in the area of Child Protective Services. Work is characterized by cases involving abuse/neglect/exploitation

of children. The nature of the situations requires expertise and judgment to deal with problems that are potentially dangerous to the client and the worker. Work requires the use of personal automobile for extensive travel. Employee is subject to being on-call during non-business hours and must be available and have access to a telephone. Requires ongoing training to be fully accountable for a high volume of demanding and time-restricted cases. Performs related work as required. (Emphasis added). (The underlined portions are not included in the Adult Protective Service Workers class specification).

Examples of Work

Works within a caseload that crosses program lines into adoption, foster care, legal guardianship, and others. Conducts investigations concerning allegations of abuse by talking with and visually observing affected individual; talks with immediate family, relatives, neighbors, teachers, doctors, and relevant others and reviews any pertinent records.

Makes initial assessment of validity of the allegation and the degree of danger that the child is in; documents the results of the investigation of the parent and/or caretaker.

Completes family assessment to determine dynamics and problems that may be precipitating an abusive situation.

Develops effective interventions to strengthen family that address safety, well being, and permanency of children.

Prepares safety, service, and/or treatment plans to remedy contributing problems and stop behavior patterns of abuse/neglect/exploitation and solicits family cooperation.

Engages family in counseling to solve problems, refers them to other available resources, and monitors safety and risk of further abuse to prevent a reoccurrence of abuse.

Files petition with the court as needed to ensure safety of the child, testifies before the court, and makes appropriate placement of child, including but not limited to staying with relatives, in foster homes, residential treatment facilities, or in an emergency shelter.

Evaluates the progress of the family or living environment towards meeting objectives of the safety/service/treatment plans, the need to modify the plans, and the eventual disposition of the case.

Maintains detailed case records and extensive documentation, prepares specialized

reports, and composes correspondence.

Attends extensive, ongoing training to develop comprehensive knowledge of State and Federal social welfare laws, rules, regulations, and evolving protocols regarding child abuse and neglect.

Conduct and facilitate Multi-Disciplinary Team Meetings.

Conducts validating interview of sexual abuse investigations.

Knowledge, Skills and Abilities

Knowledge of State and Federal social welfare laws, rules, and regulations, particularly those concerning child abuse and neglect policy (i. e. Gibson, ASO, ASFA, Title IV-E, Chapter 49, Chapter 9000).

Knowledge of social work theory, casework methods, and community organization.

Knowledge of human behavior and the behavioral sciences, particularly concerning child development, family dynamics, and interpersonal relationships.

Ability to assess emotional states, behavioral indicators, family dynamics, and overt signs of abuse in order to evaluate safety and risk and determine whether an abusive situation exists.

Ability to formulate client safety, service, and treatment plans.

Ability to influence people to engage in problem-solving activities and to change attitudes and behavior.

Ability to work effectively with judges, law enforcement officials, and other professionals.

Ability to communicate with individuals who have emotional or mental problems, substance abuse issues, and/or domestic violence situations. Ability to communicate both orally and in writing.

Ability to maintain detailed case records and extensive documentation, prepare specialized reports, and compose correspondence both in written and database format.

Ability to operate a computer.

Ability to pass competency testing.

Minimum Qualifications

Training: Bachelor's degree in Social Work from an accredited four-year college or university.

Substitution: Bachelor's degree in Sociology, Psychology, Counseling, Criminal Justice, Behavioral Science, Interpersonal Communications, Human Services, Education, Special Education, Elementary Education, or Secondary Education from an accredited four-year college or university may be substituted for the degree in Social Work.

OR Current West Virginia Social Work License

Experience: Two years of full-time or equivalent part-time paid experience in adult or children's services in a public or private health and human services agency.

Substitution: A Master's degree in Social Work may substitute for the required experience.

Special Requirement: Eligible for Temporary Social Worker License OR Licensed as a Social Worker, Graduate Social Worker, or Certified Social Worker by the West Virginia Board of Social Work Examiners.

NOTE: Applicants may be appointed for a period not to exceed sixty (60) days from date of hire pending verification of licensure. Applicants must agree in writing to verify licensure within sixty days or be terminated. Employees working under this restriction shall not perform any social work duties until license is verified.

Established: 03/17/05

Effective: 04/01/05

CHILD PROTECTIVE SERVICES SUPERVISOR

Nature of Work

Under general supervision, performs complex supervisory work in the provision of child protective services. Plans, assigns and reviews the work of employees performing child protective services; performs related supervisory functions. Coordinates the work of the unit with inter- and intra governmental units, community organizations and advocacy groups. Work may require the use of personal automobile for travel. Employee is subject to on-call status during non-business hours. May be required to deal with situation which are potentially dangerous to client and worker. Performs related work as required.

Distinguishing Characteristics

This class is intended for positions which are assigned duties predominantly in the supervision of child protective services.

Examples of Work

Plans, develops, and executes a primary mission of child protective services in a county or multi-county area through professional and para-professional staff.

Supervises daily work of the staff.

Develops and implements services and support programs, within regulatory and statutory guidelines.

Maintains liaison with appropriate allied agencies and organizations.

Serves as consultant in area of responsibility.

Studies and recommends policy, procedures, standards and operational methods for consideration by agency administration.

Prepares necessary reports and records to reflect operation status of the program.

Directs staff development activities within area of assignment.

Evaluates effectiveness of child protective services.

Counsels and guides professionals in the development of individual or group programs for the rehabilitation of customers.

ADULT PROTECTIVE SERVICES WORKER TRAINEE

Nature of Work

Under close supervision, performs in a training capacity for approximately one year learning the techniques of social casework in the area of Adult Protective Services. The primary function of the class is to apply the training received in the specialized techniques of protective service casework; however, the employee is expected to bring social casework knowledge and experience to the job. The nature of the situations requires judgment to deal with problems that are potentially dangerous to the client and the worker. Work requires the use of personal automobile for travel. May be subject to being on-call during non-business

hours and must be available and have access to a telephone. Performs related work as required.

Examples of Work

Learns the techniques of conducting investigations concerning allegations of abuse, including sexual abuse, by talking with and visually observing affected individual; talks with immediate family, relatives, neighbors, teachers, doctors, and relevant others and reviews any pertinent records.

Learns to defuse possibly hostile situations wherein a person may be a threat to self or others.

Learns to make initial assessment of validity of the allegation and the degree of danger that the adult is in; documents the results of the investigation.

Learns to assess family and/or residential dynamics and problems that may be precipitating an abusive situation.

Learns to prepare a complete client service plan to remedy contributing problems and stop behavior patterns of abuse/neglect/exploitation and solicits family/caregiver cooperation. Learns to engage family or caretaker in methods to solve problems, refers them to available resources, and monitors situation to prevent a reoccurrence of abuse.

Learns to file petition with the court when the adult is judged to be in imminent danger and testifies before the court in order to remove an adult from the family and/or residential situation; learns to make appropriate placement of adult with relatives, in Adult Family Care homes, nursing homes, residential boarding care, personal care homes, or in an emergency shelter.

Learns to offer alternatives to living environment if the client has been deemed incapacitated or incompetent; arranges placement of the adult client in an alternative living environment.

Evaluates periodically the progress of the adult or living environment towards meeting objectives of the service plan, the need to modify the plan, and the eventual closing of the case.

May learn to complete and participate in court processes, including but not limited to

guardianship/conservatorship hearings, mental hygiene petitions, and mental hygiene orders following the execution of an Order of Attachment as dictated by the client's circumstances. May learn to complete annual court reports for guardianship cases.

May learn to monitor Health Care Surrogate and guardianship cases according to policy, including end-of-life decision making.

Knowledge, Skills and Abilities

Knowledge of social work theory, casework methods, and community organization/resources.

Knowledge of human behavior and the behavioral sciences, particularly concerning human development, aging, family dynamics, and interpersonal relationships.

Ability to gain an extensive knowledge of the Code of Ethics to make required ethical decisions.

Ability to learn State and Federal social welfare laws, rules, and regulations.

Ability to learn to assess emotional states, behavioral indicators, family dynamics, and overt signs of abuse in order to determine whether an abusive situation exists.

Ability to formulate client service and treatment plans.

Ability to learn to influence people to engage in problem-solving activities and to change attitudes and behavior.

Ability to work effectively with judges and law enforcement officials.

Ability to communicate with individuals who have emotional or mental problems.

Ability to communicate both orally and in writing.

Ability to maintain case records and documentation, prepare reports, and compose correspondence both in written and database format.

Ability to operate a computer.

Minimum Qualifications (these are the same as for the Child Protective Service Workers Trainee.)

ADULT PROTECTIVE SERVICES WORKER

Nature of Work

Under general supervision, performs advanced and complex social casework in the area of Adult Protective Services. Work is characterized by cases involving abuse/neglect/exploitation of adults. The nature of the situations requires expertise and judgment to deal with problems that are potentially dangerous to the client and the worker. Work requires the use of personal automobile for travel. Employee is subject to being on-call during non-business hours and must be available and have access to a telephone. Performs related work as required.

Examples of Work

Conducts investigations concerning allegations of abuse, including sexual abuse, by talking with and visually observing affected individual; talks with immediate family, relatives, neighbors, teachers, doctors, and relevant others and reviews any pertinent records.

Defuses possibly hostile situations wherein a person may be a threat to self or others.

Makes initial assessments of validity of the allegation and the degree of danger that the adult is in; documents the results of the investigation.

Assesses family and/or residential dynamics and problems that may be precipitating an abusive situation.

Prepares a complete client service plan to remedy contributing problems and stop behavior patterns of abuse/neglect/exploitation and solicits family/caregiver cooperation.

Engages family or caretaker in methods to solve problems, refers them to available resources, and monitors situation to prevent a reoccurrence of abuse.

Files petition with the court when the adult is judged to be in imminent danger and testifies before the court in order to remove an adult from the family and/or residential situation; makes appropriate placement of adult with relatives, in Adult Family Care homes, nursing homes, residential boarding care, personal care homes, or in an emergency shelter.

Offers alternatives to living environment if the client has been deemed incapacitated or incompetent; arranges placement of the adult client in an alternative living environment.

Evaluates periodically the progress of the adult or living environment towards meeting

objectives of the service plan, the need to modify the plan, and the eventual closing of the case.

May complete and participate in court processes, including but not limited to guardianship/conservatorship hearings, mental hygiene petitions, and mental hygiene hearings following the execution of an Order of Attachment as dictated by the client's circumstances. Completes annual court reports for guardianship cases.

May monitor Health Care Surrogate and guardianship cases according to policy, including end-of-life decision making.

Knowledge, Skills and Abilities

Extensive knowledge of the code of Ethics to make required ethical decisions.

Knowledge of State and Federal social welfare laws, rules, and regulations, particularly those concerning adult abuse and neglect.

Knowledge of social work theory, casework methods, and community organization/resources.

Knowledge of human behavior and the behavioral sciences, particularly concerning human development, aging, family dynamics, and interpersonal relationships.

Ability to assess emotional states, behavioral indicators, family dynamics, and overt signs of abuse in order to determine whether an abusive situation exists.

Ability to formulate client service and treatment plans.

Ability to influence people to engage in problem-solving activities and to change attitudes and behavior.

Ability to work effectively with judges and law enforcement officials.

Ability to communicate with individuals who have emotional or mental problems.

Ability to communicate both orally and in writing.

Ability to maintain case records and documentation, prepare reports, and compose correspondence both in written and database format.

Ability to operate a computer.

Minimum Qualifications (These are the same as for a Child Protective Service Worker.)

24. While the "Knowledge, Skills and Abilities" and "Minimum Qualifications" for Child Protective Service Workers and Adult Protective Service Workers are similar, or in many instances the same, these are not the criteria by which positions are classified. DOP classifies positions by job duties and responsibilities.

25. The training of Adult Protective Service Workers and Child Protective Service Workers is different. Adult Protective Service Workers receive three days of training about the position and another day on the computer system. Child Protective Service Workers receive nineteen days of classroom training and an additional four days throughout the year. The training for Child Protective Service Workers is longer because of the numerous federal and state laws that must be observed in the completion of their duties. Additionally, these cases are more complex, requiring a Child Protective Service Worker to beknowledgeable about the actions and steps that can and must be taken to resolve the issues and protect the child. Test. O'Connell, Level IV Hearing.

26. The cases assigned to Adult Protective Service Workers are short-term. If the actions taken are preventative, the Worker has ninety days to resolve the case, and if there is evidence of abuse and neglect, the Worker has six months to resolve the issues. Frequently, the adult involved has the capacity to chose whether or not to receive services and also to have input into his placement. If the adult is not able to participate in these decisions, the work is more involved, and the key issue is the safety of the client. The action typically taken is removal of the client from the current situation and placement in an appropriate care setting. Test. O'Connell, Level IV Hearing.

27. The cases assigned to Child Protective Service Workers are usually long- term and involve many federal guidelines. A Child Protective Service Worker is required to meet with her supervisor within 24 hours of initial contact. The families involved in these cases are not there voluntarily, and the issues of child abuse and neglect typically require lengthy monitoring, court appearances, and interactions with a multi-disciplinary team. Necessary actions to protect a child can include: frequent visitations, evaluation of custody issues, and specification of needed services, such as, parenting classes and therapy. Of course, a Child Protective Service Worker may need to remove the child from the home.

28. Child Protective Service Workers are required to perform a variety of tasks with set

time constraints for their completion, many of which are set by the federal government. Adult Protective Service Workers do not have as many time constraints, and these are not set by the federal government. Test. O'Connell, Level IV Hearing. 29. The initial assessment performed by Child Protective Service Workers involves an examination of the family and significant others and is due in forty-five days. Other assessments are due at specified intervals. The initial assessment performed by Adult Protective Service Workers involves an examination of the adult's current status and surroundings and is due in thirty days. Test. O'Connell, Level IV Hearing.

30. While some of the "Examples of Work" of the two classifications are the same or similar, the Child Protective Service Workers classification identifies: 1) increased interaction with other professionals, including conducting and facilitating a Multi-disciplinary Team; 2) counseling of family members; 3) maintenance of detailed and extensive documentation; and 4) attendance at extensive, ongoing training that the Adult Protective Service Workers classification does not. Further, the Child Protective Service Workers classification details court activities, such as filing petitions and testifying, including making recommendations for the appropriate placement of child. The Adult Protective Service Worker's classification only states the worker "[m]ay complete and participate in court processes. . . ."

31. While HHR and DOP did not present vacancy rates for the Child Protective Services Supervisor, it was noted through testimony that these people only supervise Child Protective Service Workers, are frequently on call, and must be available for consultation within the first 24 hours of contact with a child and family.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v.W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

I. Background and standard of proof

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.

Additionally, the State 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). (See footnote 5) 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 unreasonableor 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). 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).

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).

This standard of entitlement to substantial weight applies when an employee grieves DOP's interpretation of its own regulations, classification specifications, and pay grades. Farber v. W. Va. Dep't of Health and Human Res./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). 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 reclassification was made in an arbitrary and capricious manner or was an abuse of discretion, then he or she has met his/her burden of proof. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., No. 29066 (W. Va. 2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

"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." Eads, supra (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.

A DOP Rule applicable to the issue raised here is 143 C.S.R. 1 § 5.4(f)2c4, "Pay Differentials" which states:

> The Board, by formal action, may approve the establishment of pay differentials to address circumstances such as class-wide recruitment and retention problems, regionally specific geographic pay disparities,, shift differentials for specified work periods, and temporary upgrade programs. In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc.), not individual employees.

II. Equal pay for equal work

One of Grievants' main assertions is that the actions of HHR and DOP violated W. Va. Code § 29-6-10(1) & (2). As previously stated, this Code Section gives the State Personnel Board the authority to implement both a classification and pay plan for all employees in the classified service.

The holding of the West Virginia Supreme Court of Appeals in Largent v. West Virginia Division of Health and Division of Personnel, 192 W. Va 239, 452 S.E.2d 42 (1994), is instructive in examining the issues raised by Grievant. Largent noted W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification. Largent at Syl. Pts. 3 and 4. Specifically, Largent held "employees who are performing the same tasks with the same responsibilities should be placed within the same job classification," but a state employer is not required to pay these employees at the same rate. Id. at Syl. Pts. 2 & 3. The requirement is all classifiedemployees must be compensated within their pay grade. See Nafe v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-386 (Mar. 26, 1997); Brutto v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-076 (July 24, 1996); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Res., Docket No. 91-H-177 (May 29, 1992). See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that

advance the interest of the employer." Id. at 246. (Emphasis added).

The issue of equal pay for equal work has been previously addressed by the Grievance Board on several occasions in very similar circumstances. The first case in this series was Travis v. Department of Health and Human Resources, Docket No. 96-HHR- 518 (January 12, 1998). In Travis, nine employees, who were Investigator 2's in the Office of Inspector General, grieved when the Investigator 2's in the Medical Fraud Unit received a 25 percent "special hiring rate" due to severe recruitment and retention problems. Administrative Law Judge Lewis Brewer found there was no violation of the equal pay for equal work provisions of W. Va. Code § 29-6-10. He held "[a] preponderance of the credible evidence of record indicates that DOP properly acted within its discretion in [the] interpreting and applying of its Administrative Rule pertaining to pay differentials." He noted the Medical Fraud Unit Investigator 2's comprised "a reasonably defined group of employees," § 5.04 authorized special treatment in appropriate circumstances, and he was"unable to substitute his judgment for that of the State Personnel Board and DOP where the decision at issue has a rational basis."

In Pishner v. Department of Health and Human Resources, Docket No. 97-HHR-478 (May 21, 1998) aff'd Kanawha County Circuit Court, Civil Action Number 98-AA-93 (December 10, 2001), Protective Service Workers, who worked with adults, filed a grievance over the 3% pay increase received by Protective Service Workers, who worked with children. The grievants maintained the disparate treatment by HHR and DOP to approve a 3 percent salary increase, pay differential to Protective Service Workers, who worked with children, but not to them, was arbitrary and capricious and a violation of equal pay for equal work. Both groups were then classified as Protective Service Workers, but were functionally divided by job duties.

Administrative Law Judge Mary Jo Swartz ("ALJ Swartz") found HHR continually had "recruitment and retention problems for Child Protective Service Workers," and the West Virginia Legislature directed HHR and DOP to resolve turnover problems among Child Protective Service Workers.

ALJ Swartz reviewed the general rules and standards governing DOP's authority and noted DOP's had broad discretion as long as it did not exercise this discretion in an arbitrary or capricious manner. Crowder v. W. Va. Dep't of Tax & Revenue, Docket No. 94-T&R-545 (Feb.

28, 1995). See Smith v. W. Va. Div. of Corr., Docket No. 94- CORR-624 (Feb. 27, 1995). She noted that rules promulgated by DOP were given "the force and effect of law, and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation." See Callaghan, supra. DOP's determinations regarding matters within its expertise are entitled to substantial weight and are examinedunder the "clearly erroneous" standard. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp., supra. See Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc., 166 W. Va. 775, 277 S.E.2d 613 (1981), appeal dismissed, 454 U.S. 1131 (1982). ALJ Swartz found the actions were within DOP's and HHR's authority, were not arbitrary and capricious, had a rational basis, and should be upheld.

ALJ Swartz also noted W. Va. Code § 29-6-10 generally embraced the concept of "equal pay for equal work," but 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, supra. She found the grievants were "paid in accordance with the pay scale for Protective Service Worker; thus, there has been no violation of the equal pay for equal work doctrine" when a pay increase was granted to those Protective Service Workers who worked with children.

The third case that is instructive is Kincaid v. Department of Health and Human Resources, Docket No. 01-HHR-246 (June 14, 2002). In Kincaid, Social Service Supervisors grieved the pay increase given to Child and Adult Protective Service Workers, and the reallocation of Child Protective Service Supervisors to a higher pay grade with an attendant increase. ALJ Swartz found these action were related to the actual job responsibilities of the employees, were not arbitrary and capricious, and cited to Pishner, supra. ALJ Swartz also cited to Travis, supra, and noted the Grievance Board had held "the granting of a pay differential in order to address recruitment and retention problems, which is limited to a specific group of employees in a specific program, is within DOP's discretion and authority." After reviewing the holdings in Travis, Pishner, and Kincaid, it is clear there has been no violation of the equal pay for equal work provision of W. Va. Code § 29-6-10 with this set of facts. As noted in Travis, there was a severe recruitment and retention problem within one portion of a classification. The actions taken by HHR and DOP in granting an increase to one group, but

not the other, did not violated any statute, policy, rule, or regulation. The same reasoning applies here. The actions taken to resolve the recruitment and retention problem in the Child Protective Service Workers classification, separate classification, was not arbitrary and capricious, had a rational basis and did not violate equal pay for equal work provisions. Accordingly, Grievants have not proven a violation of the equal pay for equal work policy, as they are properly classified in another and paid within their pay grade.

Although not clearly pled, it appears Grievants may also assert their class specification should have been placed in a higher pay grade. Again, Grievants did not demonstrate that formalizing the division that had existed within the Protective Service Worker classification for many years was arbitrary and capricious. Grievants' pay grade was not changed, and their duties have not changed. Nor did Grievants establish that their job duties were as complex and intensive as Child Protective Service Workers so as to warrant an increase in pay grade.

III. Discrimination

Grievants also argue they were discriminated against when their salaries were not increased. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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 by the employees. Administrativenotice is taken that the West Virginia Supreme Court of Appeals revised the legal test for discrimination claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 6)

> (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.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievants have not met their burden of proof and established a case of discrimination, as

they are not similarly situated to the employees to whom they compare themselves. The key issue is that Grievants simply do not have similar recruitment and retention problems. It must not be forgotten in all the legal issues raised by Grievants, that the reason for the pay increase was because West Virginia could not hire or keep enough Child Protective Service Workers to keep the children of this state safe. The Findings of Fact are clear. The vacancy rate of Child Protective Service Workers was double that ofAdult Protective Service Workers, many surrounding states had higher salaries, the hiring registers were empty, and active recruitment had not resolved the problem.

Additionally, Grievants did not demonstrate they are similarly situated to Child Protective Service Workers. 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 a prima facie case of 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 affirmed in Airhart v. Wood County Bd. of Educ., 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, or based at least in part, on the job duties of the employees.

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 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 previous decision involving comparisons of compensation in 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 the Child Protective Service Workers classification. Adult Protective Service Workers were not similarly situated because they did not experience similar recruitment and retention problems. Additionally, Grievants were not similarly situated because they were not in the same classification as Child Protective Service Workers and did not perform the same job duties. An increase given to one classification does not require the same increase to be given to another classification. Aultz, supra.

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 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); Howellv. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

2. Grievants have the burden of proof in this case to establish, by a preponderance of

the evidence, that the separation of the two positions, assignment to different pay grades, and granting of retention and recruitment increases was clearly wrong, arbitrary, capricious, contrary to regulation, or otherwise illegal and improper. W. Va. Code § 29-6A-6; Bennett v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 94-HHR-206 (June 15, 1995).

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

4. 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).

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 classifiedState 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 State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Moore v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 94-HHR-126 (Aug. 26, 1994).

7. "[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. Dep't of Health and Human Res./Div. of Personnel, Docket No. 95-HHR-052 (July 10, 1995). See Callaghan v. W. Va. Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va. 1980).

8. 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. Dep't 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).

9. An employee, who alleges the actions of the DOP and HHR were in violation of statute, policy, rule, or regulation, bears the burden of proving this claim by a preponderance of the evidence. This is a difficult undertaking. Blankenship, supra; Bennett, supra; Johnston, supra; Thibault v. Div. Rehab. Serv./Div. of Personnel, Docket No. 94-RS-061 (May 31, 1995); Frame, supra; See O'Connell v. W. Va. Dep't of Health and Human Res./Div. of Personnel, Docket No. 95-HHR-251 (Oct. 13, 1995). 10. "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 as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (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.

11. 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).

12. W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification. Largent v. West Virginia Div. of Health and Div. of Personnel, Syl. Pts. 3 and 4, 192 W. Va 239, 452 S.E.2d 42 (1994),

13. "[E]mployees who are performing the same tasks with the same responsibilities should be placed within the same job classification," but a state employer is not required to pay these employees at the same rate. Id. at Syl. Pts. 2 & 3. 14. The requirement is all classified employees must be compensated within their pay grade. See Nafe v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-386 (Mar. 26, 1997); Brutto v. W. Va. Dep't of Health

& Human Res., Docket No. 96-HHR-076 (July 24, 1996); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Res., Docket No. 91-H-177 (May 29, 1992). See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989).

15. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." Largent at 246. (Emphasis added).

16. No violation of the equal pay for equal work provisions of W. Va. Code § 29- 6-10 occurs when "[a] preponderance of the credible evidence of record indicates that DOP properly acted within its discretion in [the] interpreting and applying of its Administrative Rule pertaining to pay differentials." Especially when "a reasonably defined group of employees" is used, as this follows § 5.04 authorized special treatment in appropriate circumstances. Travis v. Dep't of Health and Human Res., Docket No. 96-HHR-518 (Jan. 12, 1998).

18. An Administrative Law Judge is "unable to substitute his judgment for that of the State Personnel Board and DOP where the decision at issue has a rational basis." Id.

19. When employees are paid in accordance with the pay scale for their classification, there is no violation of the equal pay for equal work doctrine when a payincrease is granted to other employees within the same classification, who do not have the same severe recruitment and retention problem. Pishner v. Dep't of Health and Human Res., Docket No. 97-HHR-478 (May 21, 1998) aff'd Kanawha County Circuit Court, Civil Action Number 98-AA-93 (Dec. 10, 2001).

20. "[T]he granting of a pay differential in order to address recruitment and retention problems, which is limited to a specific group of employees in a specific program, is within DOP's discretion and authority." Kincaid v. Dep't of Health and Human Res., Docket No. 01-HHR-246 (June 14, 2002).

21. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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 by the employees."

22. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held 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.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

23. To be considered similarly situated, the employees must be in the same classification as the employees to whom they compare themselves. Flint v. Wood County Bd. of Educ., 207 W. Va. 251, 531 S.E.2d 76 (1999); Airhart v. Wood County Bd. of Educ., Docket No. 99-54-419 (May 19, 2000), aff'd in part, rev'd in part, 212 W. Va. 175, 569S.E.2d 422 (2002). See also Farley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 00-PEDTA-015 (June 22, 2000); Aultz v. W. Va. Dep't of Transp., Docket No. 90-DOH-522 (Feb. 28, 1991); Travis, supra; Pishner, supra; Kincaid, supra.

24. Grievants have failed to establish they have been discriminated against. They have not demonstrated they are similarly situated to Child Protective Service Workers because they do not have severe recruitment and retention problems, and they are not in the same classification as the Child Protective Service Workers. See Emigh v. Dep't of Health and Human Res./Bureau of Public Health and Div. of Personnel, Docket No. 99- HHR-408 (May 31, 2000).

25. Grievants have failed to prove a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work in relation to their compensation. They are properly classified, and they are compensated within the pay scale for their position.

26. Grievants have failed to prove HHR or DOP acted arbitrarily or capriciously, abused their discretion, or their actions did not have a rational basis.

27. Respondents did not exceed their statutory authority in their development and

implementation of the HHR job classifications and pay grade plans at issue in this case. Nelson v. Dep't of Health and Human Res./Office of Inspector General and Div. of Personnel, Docket No. 05-HHR-315 (May 16, 2006).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. Va. Code § 18-29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). Neither theWest 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

Chief Administrative Law Judge

Date: July 31, 2007

Footnote: 1

During the presentation of evidence, Grievants compared their classification and job duties to those of the Child Protective Service Workers to demonstrate their work had the same degree of complexity. Attorney Carbonne mentioned misclassification and reallocation his proposed Findings of Fact and Conclusions of Law. It was clarified at the start of the Level IV hearing that the issues of misclassification and reallocation were not before the undersigned Administrative Law Judge. As the parties agreed this was not a misclassification case, the duties of the classifications will only be addressed as they pertain to the issues of discrimination and equal pay for equal work.

Footnote: 2

The reason why these two groups of workers were originally grouped together was not explained. It was clear from testimony that occasionally, when they were grouped together, Protective Service Worker, who did adult work, as well as Social Service Workers, etc., were pulled to help with the child abuse and neglect cases due to the difficulties with recruitment and retention. Additionally, while some districts have what they call a "Worker of the Day", a person who takes intake calls for that time period, this worker does not handle Child Protective Service Worker cases, only takes basic information, and passes it on to the correct worker. See Grt. Exhs. 7 & 8

at Level III.

Footnote: 3

Although offered as anecdotal testimony, Director Louis Palma, a long term employee and manager, noted he had been to many retirement parties for Adult Protective Service Workers, but had never been to a retirement party for a Child Protective Service Worker.

Footnote: 4

The undersigned Administrative Law Judge agrees with Grievants that the high number of Child Protective Service Workers with less than a year of service is influenced, in part, by the additional 200 positions funded by the Legislature in early 2004. However, it was clear from the testimony that HHR was never able to fill some of these positions, and some were filled only to have the employee leave, and the position had to be reposted.

Footnote: 5

143 C.S.R. 1 § 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: 6

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).