WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MARGARET POSEY, et al.,

Grievants,

v. Docket No. 04-HHR-149(A)

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, alleging entitlement to a "career ladder" similar to that which was implemented for the Child Support Specialist job series in 2003. As relief, Grievants request that a "series" be created for their classifications, that their classifications be placed in higher pay grades, and that they be awarded back pay and attorney's fees. (See footnote 1)

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 atlevel 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 matter includes DHHR employees classified as Economic Service Workers, and a level four hearing was held on August 21, 2006. Most Grievants were represented by counsel, Christopher G. Moffatt; (See footnote 2) DHHR was represented by B. Allen Campbell, Senior Assistant Attorney General; and DOP was represented by Karen O'Sullivan Thornton, Assistant Attorney General. (See footnote 3) Initial fact/law proposals were filed on October 10, 2006; however, after various hearings were conducted in the other related grievances in March and April of 2007, the parties were afforded the opportunity to file additional proposals, which Grievants' counsel filed on April 27, 2007. 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 somewhat higher pay grade assignments. Grievants, Economic Service Workers in the Bureau for Children and Families, asserted that they should also have a “career ladder,” or series of classifications, created for their positions, along with higher pay. Evidence established that, within Grievants' classification, all employees perform the same function, so a series would not be appropriate. Also, Grievants failed to prove that they were improperly classified, evidence established that they are compensated within the appropriate pay grade assigned to their classification, and they failed to demonstrate that the problems affecting the child support positions existed within their division. The decisions of Respondents regarding the child support positions, vis-a-vis Grievants' positions, were not proven to be arbitrary and capricious, an abuse of discretion, or the result of discrimination or favoritism.

Findings of Fact

1. Grievants are employed by the BCF as Economic Service Workers ("ESW"). There is only one class of ESWs, and it is assigned to Pay Grade 10, with a salary range of $19,392 to $35,892.

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 newclassifications, including Child Support Technician 1 and 2, Child Support Paralegal, Child Support Specialist 1, 2, and 3 ("CSS"), 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 Virginia program's performance. These federal funds are only to be used by BCSE and cannot be "shared" with any other division of DHHR.

5. Grievants believe that their job duties overlap with those of CSS 2. The classifications of CSS 1, 2, and 3 are in Pay Grades 11, 12, and 13, respectively. The salary range for Pay Grade 12 is $22,224 to $41,112.

6. The CSS classifications were determined by the relative complexity of duties and level of expected responsibility at each level, as related to the other classifications within the series.

7. The CSS 1 is an entry level position, whose duties are intended to provide formal and on-the-job training, so that the employee can eventually reach the full- performance level of case management responsibilities. These employees are expectedto perform beginning level child support case work by processing cases through location, case development, initial notice to non-custodial parents regarding obligation and child support enforcement involvement.

8. The CSS 2 is a full-performance level position who performs independent case management duties with limited supervision. Employees in this position are expected to perform any activity

needed in the collection of child support in West Virginia, have full knowledge of all applicable policies, laws and procedures, and make recommendations to the BCSE attorneys for legal action.

9. The CSS 3 must have three years of experience working with child support, is expected to serve as a mentor and trainer for CSS 1s and 2s, and assists BCSE attorneys in complex litigation. These employees also have the authority to make decisions regarding the release of additional child support funds to caretakers, without a superior's approval.

10. ESWs determine the eligibility of individuals for the various forms of financial assistance offered by the state and federal government, such as Food Stamps, Medicaid, and Emergency Assistance. They maintain a caseload of clients whose continued eligibility they must monitor and evaluate on a regular basis.

11. The duties of ESWs “interface” with those of CSSs, due to paternity and child support issues that may arise when clients are screened for eligibility for financial assistance. It is the ESW's responsibility to refer the client to BCSE or other agencies, if necessary. 12. Many years ago, the ESW classification was divided into a series. However, during the 1980s, a series of lawsuits was filed, entitled “AFSCME I-IV,” (See footnote 4) in which the West Virginia Supreme Court determined that a multi-level series was not legally appropriate for the classification, because all ESWs were performing the same duties.

13. BCF continues to expect all ESWs to perform the same duties, although entry-level employees may require some experience working in the position before reaching a full-performance level. However, once that level is achieved, all ESWs perform the same functions.

14. Both the ESW and CSS 2 classifications require a four-year college degree; however, a CSS may substitute experience as a paralegal, in debt collection, or as an ESW on a year-for-year basis, in lieu of the college degree.

15. There have not been established recruitment and retention problems with the ESW classification, and, in fact, the turnover rate for these workers in 2002 was only 3.7%.

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* W.Va. Code § 29-6A-6. (See footnote 5) *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).

Grievants are not contending that they are misclassified, although they do contend that their duties have become more complex over the years. They believe that their responsibilities are just as difficult and complex as those of the CSS 2, and that they should be paid the same salaries as those employees.

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 for equal work. W. Va. Code § 29-6-10(2). (See footnote 6) The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary orcapricious 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).

In this case, one of the allegations asserted by these Grievants is that their positions should be assigned to a higher pay grade. "There is no question DOP has the authority to establish pay grades within a pay plan." *Stephenson v. W. Va. Bureau of EmploymentPrograms/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 as arbitrary 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. Although Grievants have not specifically asserted their allegation of entitlement to the same salaries as other classifications as an “equal pay for equal work” argument, case law on that issue is informative and deserving of a cursory discussion. In *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994), the Supreme Court noted that W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, and 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). 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*, 192 W. Va. at 246.

Clearly there has been no violation here of the principle of equal pay for equal work. Grievants are assigned to the correct classification for their duties and are compensated within the pay grade assigned to that classification. However, Grievants' arguments are of comparable worth, as they are not comparing themselves to employees within their own classification, but to employees in another classification who they believe perform similarwork 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 have expressly 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 aremuch 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.

It is beyond refute that Grievants, along with numerous other DHHR employees, perform an invaluable service to this state. Nevertheless, they have failed to demonstrate that they are incorrectly classified or that their classifications 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 CSSs virtually amounts to comparing “apples to oranges.” Grievants determine eligibility for food stamps and medical assistance, while CSSs deal with a myriad of state and federal programs, laws, and policies governing the collection, payment, and enforcement of child support obligations. This is not to say that Grievants' 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. In the absence of sufficient evidence demonstrating that DOP's determination of pay grade for their positions was clearly wrong, inappropriate, or the result of an abuse of discretion, deference must be given to DOP's determination. *Largent*, *supra*; *O'Connell*, *supra*. The evidence in this case does not support the conclusion that Grievants' 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 Grievants has occurred.

Throughout the many hearings in this proceeding, Grievants have repeatedly questioned why their positions were not referred for a study similar to that which was recommended for BCSE positions. As set forth above, severe recruitment and retentionproblems, combined with the rigorous standards imposed upon DHHR within the area of child support, led to the study which resulted in the creation of new classifications. No such issues have been demonstrated in the BCF nor specifically with regard to the ESW classification. Moreover, the rulings in the “AFSCME” cases affirmed that a career ladder was inappropriate for the ESW classification, a determination which Grievants still have not overcome with the evidence introduced in this grievance. Again, the evidence of record does not establish that there were any implications for a study of ESW positions similar to that which occurred within BCSE, so Grievants have not established any entitlement to the relief requested in this case.

Finally, Grievants' counsel has also alleged that they have been victims of discrimination and favoritism, by virtue of their employer's and DOP's decisions to afford a career ladder and increased pay to classifications within BCSE, benefits which were not given to Grievants. "'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 7) "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." (See footnote 8) 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).

Grievants did not demonstrate they are similarly situated to Child Support Specialists. 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 confirmed 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 the job duties of the employees. Grievants are not in the same classification, and do not perform similar duties.

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. Economic Service Workers were not similarly situated because they did not experience similar recruitment and retention problems. Additionally, Grievants were not similarly situated because they are not in the same classification as CSSs and do not perform the same jobduties. Again, Grievants are paid within their 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. 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 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 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).

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 Resources*, 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 he 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. Grievants have failed to prove by a preponderance of the evidence that Respondent's failure to change their job classification and/or pay grade was arbitrary and capricious, 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: September 17, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In July of 2006, when requested by Respondents to provide a "more definitive statement of grievance," Grievants' counsel provided a statement that Grievants believed they have been victims of discrimination and favoritism, in that they were paid less as a class than CSS 2s, and also asserted that they were working out of class. However, Grievants' final

fact/law proposals again requests as relief that a "career ladder" be created for the Economic Service Worker classification.

Footnote: 2

Some Grievants did not have an attorney listed, but they did not appear independently or file separate proposals. Therefore, Mr. Moffatt's assertions, combined with the representations and testimony provided at level three, are considered to encompass the claims of all Grievants.

Footnote: 3

Long after this hearing, it was discovered that Anthony Bohrer had erroneously been separated from this grievance, and his hearing was held separately, on April 17, 2007. It was agreed by the parties at that time that Mr. Bohrer, an Economic Service Worker, should be included in this grievance. He was not represented by counsel at his level four hearing.

Footnote: 4

American Fed'n of State, County & Mun. Employees v. Civil Serv. Comm'n of West Virginia, 174 W. Va. 221, 324 S.E.2d 363 (1984); American Fed'n of State, County & Mun. Employees v. CSC of W. Va., 176 W. Va. 73, 341 S.E.2d 693 (1985) (per curiam); American Fed'n of State, County & Mun. Employees v. Civil Serv. Comm'n of West Virginia, 181 W. Va. 8, 380 S.E.2d 43 (1989).

Footnote: 5

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: 6

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: 7

W. Va. Code § 29-6A-2(d) (See Footnote 4, supra).

Footnote: 8

W. Va. Code § 29-6A-2(h) (See Footnote 4, supra).