WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

RICKY BOSTIC and JEFF POMEROY,

Grievants,

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

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

Respondents.

DECISION

This grievance was filed by numerous employees of the Department of Health and Human Resources' ("DHHR"), Bureau for Children and Families ("BCF"), as a result of new classifications and pay grade assignments which were implemented for positions within the Bureau for Child Support Enforcement ("BCSE") in 2003. Many employees of BCF have requested that a "series" be created for their classifications and that their classifications be placed in higher pay grades, similar to the benefits conferred upon the newly-created BCSE classifications. Grievants are Child Protective Services Supervisors ("CPS Supervisor") and believe that their classification should be given a "career ladder," or series, similar to that created for the classifications of Child Support Supervisor 1 and 2.

Procedural History

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

Upon appeal to level four, these cases were ultimately divided into separate grievances, according to job classifications. A level four hearing was conducted in Charleston, West Virginia, on March 13, 2007, at which Grievants were represented by counsel, Christopher Moffatt; DHHR was represented by B. Allen Campbell, Senior Assistant Attorney General; and DOP was represented by Karen O. Thornton, Assistant Attorney General. Although given the option to file fact/law proposals at the conclusion of all of these related grievances, Respondents elected to rely upon the proposals filed on October 10, 2006, after the conclusion of the initial level four hearing in *Posey v. Dep't of Health and Human Res.*, Docket No. 04-HHR-149(A) (Sept. 17, 2007). Grievants' counsel's proposals were received by this Grievance Board on May 1, 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

Grievants are employed as a Child Protective Services Supervisors. (See footnote 1) They contend that their classification should be divided into a series, or "career ladder," similar to that which was created within the BCSE for Child Support Supervisor 1 and 2. Evidence in thiscase established that the supervisors in the child support division perform different duties and supervise different job classifications, while all CPS Supervisors supervise CPS Workers. In addition, the changes within the BCSE were implemented because of severe recruitment and retention problems in that division. Grievants are not similarly situated to the child support employees, are employed in a different

division, and have failed to prove entitlement to the relief requested.

Findings of Fact

1. Grievants are employed by the BCF as CPS Supervisors.

2. There is only one classification for all CPS Supervisors, and it is assigned to Pay Grade 17, with a salary range of $31,200 to $57,720 annually.

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

4. 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. 5. 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.

6. All CPS Supervisors perform the same job function, which is to supervise CPS Workers, who investigate and process child abuse and neglect cases. Although the number of employees supervised, along with assigned support staff, may vary from region to region, the predominant responsibilities of all CPS Supervisors are related to the supervision of CPS Workers.

7. Child Support Supervisors ("CSS") are divided into two classifications. CSS 1s supervise Child Support Technicians, who perform financial duties and handle the accounting aspects of child support collection. CSS 2s supervise Child Support Specialists, who work alongside attorneys and perform duties associated with child support casework.

8. CSS 1 is assigned to Pay Grade 13, and CSS 2 is assigned to Pay Grade 15.

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 2) *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 claiming misclassification, nor are they alleging entitlement to a pay increase. They only contend that they should also be given the benefit of the “career ladder” which was created for Child Support Supervisors. Accordingly, a review of the applicable standard of review of state pay grade and classification decisions is required.

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 3) 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). 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 andcapricious or an abuse of discretion. *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.

Grievants allege that it is discriminatory and constitutes favoritism for the CSSs to receive a benefit which was not conferred upon CPS Supervisors. "'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 4) "'Favoritism' means unfair treatment of an employee as demonstrated by preferential,exceptional or advantageous treatment of another or other employees." (See footnote 5) 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 are not similarly situated to CSSs. The West Virginia Supreme Court of Appeals held in *Flint v. Wood County Board of Education*, 207 W. Va. 251, 531 S.E.2d 76 (1999) that to be considered similarly situated, the employees must be in the same classification as the employees to whom they compare themselves. In this education case, the West Virginia Supreme Court of Appeals dealt with W. Va. Code § 18A-4-15 which requires uniformity in salaries, etc., for those who perform "like assignments and duties." The Court stated "the first prerequisite for establishing . . . discrimination or favoritism is a showing that the grievant is similarly situated, in a pertinent way, to one or more other employees." The Court found the grievants could not make such a showing because they were not in the same classifications as those to whom they comparedthemselves, because "[o]bviously employees who do not have the same classifications are not performing 'like assignments and duties.'" This ruling was confirmed in *Airhart v. Wood County Board of Education*, Docket No. 99-54-419 (May 19, 2000), *aff'd* in part, *rev'd* in part, 212 W. Va. 175, 569 S.E.2d 422 (2002).

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. Here, as in *Flint*, the differences in treatment are related to the job duties of the employees. Grievants are not in the same classification, are employed within a different division of DHHR, and do not perform the same duties as Child Support

Supervisors.

Respondents have provided uncontroverted evidence that establishes that the so- called career ladder for CSSs was created only to address the specific job duties assigned to those classifications. Each classification of supervisors is responsible for supervising a specific group of employees, who perform different functions within the area of child support. No such situation exists with regard to CPS Supervisors, so there is no evidence that such a series would be appropriate or necessary. Grievants have failed to prove discrimination or favoritism.

Similarly, the undersigned finds that Grievants have failed to prove that Respondents' actions with regard to the CSS series were arbitrary and capricious or an abuse of discretion. Because of the differing job duties and types of employeessupervised, it was appropriate to specify separate classifications for the supervisors within the child support division. There is no evidence that similar actions are necessary within BCF.

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 hasmet 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. 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).

6. 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).

7. Grievants have failed to prove by a preponderance of the evidence that the creation of a class series for Child Support Supervisors, but not for their classifications,was arbitrary and capricious, an abuse of discretion, or the result of discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007).

Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: October 10, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Mr. Bostic did not appear at the hearing, so it is assumed that Mr. Pomeroy and Mr. Moffatt spoke on his behalf, although this was not discussed on the record.

Footnote: 2

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: 3

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: 4

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

Footnote: 5

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