WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

KAY JORDAN and JUDY DARLINGTON,

Grievants,

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

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 Supervisors in DHHR's Operations Unit and allege that their positions do not provide the opportunities for advancement which are afforded the BCSE positions.

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 28, 2007, at which Grievant Jordan was represented by counsel, Christopher Moffatt; Grievant Darlington represented herself; 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. Department of Health and Human Resources*, Docket No. 04-HHR-149(A) (Sept. 17, 2007). Grievants' counsel's proposals were received by this Grievance Board on May 1, 2007, and Grievant Darlington did not file proposals.

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 by the BCF as Supervisors in the Operations Unit, which provides support and clerical services to other divisions. Grievants claimed that the newly- created positions within BCSE provided "advancement opportunities" for those employees,which Grievants did not have in their positions. Grievants failed to prove any entitlement to different classifications as a result of the changes made within BCSE, and they did not prove that they are similarly situated to any of those employees, nor that their classification assignments are arbitrary and capricious. 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.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Prior to her retirement on August 1, 2005, Grievant Jordan was employed in DHHR's Operations Unit as a Supervisor 1.

2. Grievant Darlington is employed in the Operations Unit as a Supervisor 2.

3. The Operations Unit provides support services to the various county offices of the BCF. The Unit's employees answer telephone calls, greet customers, take payments, and handle records management and filing. Grievant Jordan supervised clerical employees in her office, kept personnel records, approved leave, scheduled employees, and ordered and managed supplies. The record does not discuss Grievant Darlington's supervisees or their specific duties.

4. 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.

5. 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.

6. 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.

7. The classification specification for Supervisor 1 states that this individual "[oversees] the activities of clerical support staff, semi-or-fully-skilled trade workers, or inspectors. Completes annual

performance appraisals, approves sick and annual leave, makes recommendations and is held responsible for the performance of the employees supervised." A Supervisor 1 is "usually a working supervisor who makes work assignments, reviews employees' work, and compiles reports on section activities in addition to performing tasks similar to their employees."

8. A Supervisor 2 "[oversees] a section of employees engaged in technical work requiring advanced training" and "is distinguished from Supervisor 1 by the nature of thework supervised and by the level of collateral work assigned to the position. The nature of work supervised is typically of a technical nature as opposed to clerical at the Supervisor 1 level."

9. The final classification in the Supervisor series is Supervisor 3, a position which typically supervises technical or administrative employees, as opposed to clerical, and an individual in this position is typically in charge of multiple units.

10. 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. (See footnote 1)

10. The Child Support Specialist ("Specialist") job series includes three classifications of employees who are responsible for various aspects of managing cases which have been referred for child support collection. Employees begin as a Child Support Specialist 1 and are considered to be "in training," become a Child Support Specialist 2 when they have attained full performance level abilities, and can move into the Child Support Specialist 3 classification with three years of experience. (See footnote 2)

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 3) *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).

Unlike many previous grievants classified as supervisors, Grievants in this case have not compared themselves to any particular classification within the BCSE. Rather, Grievants contend that, although there is a series of Supervisor classifications, there are no opportunities for advancement within the Operations Unit, and they believe that such opportunities have been provided to employees in the newly-classified positions in BCSE. However, they have not identified any specific classification of BCSE employees who have received such benefits.

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 v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). 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. *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 theDeaf 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 have provided little explanation regarding why they believe the series of three classifications for Supervisors is arbitrary and capricious. The classification specifications for Supervisor 1 and 2 indicate that assignment of a position to each class is based upon the type of employees supervised, indicating that Grievant Jordan oversaw the work of clerical support staff, consistent with her testimony, and that Grievant Darlington likely worked with employees performing more technical work. The evidence of record does not establish that Grievants' classifications are improper in any respect.

As to Grievants' allegations that they are not being provided “advancement” opportunities within their unit, the same may be said of some of the newly-created BCSE classifications, specifically Child Support Supervisors. They, like Grievants, are assigned to their classifications based upon the type of employees supervised, not as a reward for advancing within a career ladder. Although it is true that the Child Support Specialist classifications advance to each higher classification in the series, after obtaining increasedexperience and skills, there is no evidence that Grievants' jobs are comparable to those of the CSSs in any aspect.

Grievants' arguments in this regard have been asserted as allegations of discrimination and favoritism. West Virginia Code § 29-6A-2(d) defines “'discrimination'” 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.” “'Favoritism'” is defined by Code § 29-6A-2(h) as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm., Nos. 32163 and 33296 (W.Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e. that the elements of discrimination and favoritism are essentially identical. *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corrections*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.,* Docket No. 90-50-281 (Jan. 28, 1990). As in previous related grievances, Grievants cannot establish discrimination or favoritism, because they have not identified any employees to whom they are similarly situated and who have received disparate treatment. *See Belmont v. Dep't of Health and Human Res.*, Docket No. 04-HHR-149(I) (Nov. 9, 2007) and *Bostic/Pomeroy v. Department of Health and Human Resources*, Docket No. 04-HHR-149(D) (Oct. 10, 2007). 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. 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." (See footnote 4) The Court found the grievants could not make such a showing because they were not in the same classifications as those to whom they compared themselves, because "[o]bviously employees who do not have the same classifications are not performing 'like assignments and duties.'" This ruling was confirmed in *Airhart v. Wood County Board of Education*, 212 W. Va. 175, 569 S.E.2d 422 (2002), and has similarly been applied to state employees. *See Farley v. West Virginia Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA-015 (June 22, 2000). Grievants have failed to establish discrimination or favortiism. Likewise, Respondents have proven by a preponderance of the evidence that the underlying reasons for the changes made in the BCSE did not exist in other divisions of DHHR, werenecessary to address the problems specific to that unit, and the failure to implement similar changes throughout the Department was not arbitrary and capricious or an abuse of discretion.

The following conclusions of law are appropriate in this matter.

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 determined in an arbitrary and capricious manner or was an abuse of discretion, then heor 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. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm., Nos. 32163 and 33296 (W.Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

6. Grievants have failed to prove by a preponderance of the evidence that their assigned classifications are 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 Public 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: December 7, 2007

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

This evidence was obtained from testimony presented in Bostic/Pomeroy v. Dep't of Health and Human Res., Docket No. 04-HHR-149(D). As in many of these related grievances, Respondents elected to rely on evidence introduced in previous grievance hearings, rather than present the same testimony in each individual grievance.

Footnote: 2

This information was obtained from the record in Posey, supra.

Footnote: 3

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 and rules, which continue to control the proceedings in this case.

Footnote: 4

Although the White decision partially overruled the discrimination test as set forth in Flint and Airhart, infra, the only portion of the test which was declared invalid was the final prong, which allowed an employer to attempt to justify the difference in treatment.