WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

SHERI BAKER, et al.,

Grievant,

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

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. Grievant is employed as an Adult Protective Service Worker/Social Service Worker 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 DavidM. 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 April 17, 2007, before Chief Administrative Law Judge Paul Marteney. Grievant was 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). Grievant's counsel's proposals were received by this Grievance Board on May 1, 2007.

Due to the resignation of Judge 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

Grievant is employed by DHHR as an Adult Protective Service Worker/Social Service Worker 2. She brought this grievance pursuant to new classifications and pay grades granted to employees of the Bureau for Child Support Enforcement, alleging she was entitled to a similar "class series." Grievant's classification of Social Service Worker 2 is part of such a series, and her other classification of Adult Protective Service Workerdoes not consist of employees performing different duties or duties of different levels of complexity and responsibility. In addition, the changes within the BCSE were implemented because of severe recruitment and retention problems in that division. Grievant is not similarly situated to the child support employees, is employed in a different division, and has failed to prove entitlement to the relief requested.

Findings of Fact

1. Grievant is employed by the BCF with the dual classification of Adult Protective Service Worker/Social Service Worker 2. Her duties involve providing protective services to incapacitated adults, and she performs such tasks as making medical and personal decisions for clients, arranging needed medical evaluations, and organizing information needed for mental hygiene hearings which must be conducted in order to determine guardianship for such individuals.

2. Pursuant to a request from its former commissioner, and as the result of severe recruitment and retention problems, DOP conducted a classification study of various positions within the Bureau of Child Support Enforcement ("BCSE"). As a result of the study, in January of 2001, DOP recommended the creation of several new classifications, including Child Support Technician 1 and 2, Child Support Paralegal, Child Support Specialist 1, 2, and 3 ("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 thefunds 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. The classifications of Child Support Specialist ("CSS") 1, 2, and 3 are in Pay Grades 11, 12, and 13, respectively.

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 expected to 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 fullknowledge 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. Grievant's classification of Adult Protective Service Worker ("APSW") does not have a series, because all APSWs are expected to perform the same duties, which include investigating and taking action regarding cases of adult abuse, neglect, or exploitation, and they are compensated at Pay Grade 13 after a 12-month probationary period.

11. Grievant's other classification of Social Service Worker 2 ("SSW 2") is part of a class series, which is determined by the program areas in which the employee provides services. The SSW 2s deal with adult care, nursing homes, group homes, and the mentally ill and are compensated at Pay Grade 11. (See footnote 1)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W.Va. Code § 29-6A-6. (See footnote 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).

Grievant is not claiming misclassification, nor is she alleging entitlement to a pay increase. She only contends that she should also be given the benefit of the "career ladder" which was created for

child support employees. She has specifically compared the difficulty of her work to that of CSSs, whom she alleges have an easier job because “the attorney goes to court for them.” (See footnote 3) Conversely, she claims, she must prepare a petition for an incompetency proceeding and contact the parties who must attend the hearing, which she contends is more difficult than the work of the CSSs.

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 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.

Grievant's claim is somewhat unclear. While she claims that she has not received the benefit of the tier system granted to child support employees, one of her classifications, SSW 2, is part of such a series. While the APSWs do not have such a system, the evidence does not indicate the need for one, nor has Grievant explained her basis for thisallegation. However, Grievant did attempt to compare the difficulty level of her duties to those of the CSS 2.

Like many others involved in these related grievances, Grievant has alleged discrimination and favoritism. 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). Grievant is not similarly situated to Child Support Specialists and is consequently unable to establish discrimination or favoritism. 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).

Here, as in *Flint*, the differences in treatment are related to the job duties of the employees. The CSS series of classifications is divided according to the relative complexity of duties and level of responsibility of the position. There is no evidence of record indicating that all APSWs are not expected to perform the same duties. As to Grievant's comparison of her own duties to those of the CSS 2s, there are very few similarities. Moreover, the entire focus of the CSS positions involve the collection of childsupport and the legal processes connected therewith, while Grievant has a myriad of duties which do not involve legal proceedings. This is not to say that Grievant's services are less valuable, but only that they are different.

While unclear, it may be that Grievant believes her pay grade and/or salary should be increased as a result of the child support reorganization. As with classification issues, deference must be given to DOP's determination as to the appropriate salary range for each classification. *See Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994); *O'Connell v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-251 (Oct. 13, 1995). 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 discrimination or favoritism has occurred.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89- DHS-72 (Nov. 29, 1990). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988).

2. 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 substituteits 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).

3. "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).

4. 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). 5. Grievant has failed to prove by a preponderance of the evidence that the creation of a class series for child support employees, but not for her classification, 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 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: January 23, 2008

_____

DENISE M. SPATAFORE

Acting Deputy Chief

Administrative Law Judge

Footnote: 1

Although Grievant's actual salary was not discussed during her testimony, it is presumed that she is compensated within the higher pay grade.

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

Grievant's level four testimony.

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.