WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LINDA A. SMITH,

Grievant,

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

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.

Procedural History

In October of 2003, approximately 250 individuals, in various classifications, 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. Grievant is classified as a Social Service Supervisor. Her grievance statement, as filed by Grievant and other employees from Webster County, was as follows:

> This is in response to the recently revised job class specifications posted 08- 29-03 and effective 9-01-03 on the West Virginia Division of Personnel official website.
>
> We WV DHHR employees, Child and Adult service unit (Protective Service Workers, and Social Service Supervisor) have been discriminated against by the State of West Virginia. A career ladder and equitable pay have not been established by the State of West Virginia for our positions, but have been established and granted to other DHHR employees with equal or less complex duties.

A hearing was conducted by Chief Administrative Judge Paul Marteney, during which Grievant appeared by telephone, on March 28, 2007, and represented herself. Respondents appeared by counsel, B. Allen Campbell, Senior Assistant Attorney General, for DHHR, and Karen O. Thornton, Assistant Attorney General, for DOP. 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 did not file proposals.

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 hasreviewed, the entirety of the level three record, along with the recordings of the proceedings conducted at level four.

Synopsis

Grievant is employed by DHHR's Bureau for Children and Families as a Social Service Supervisor. She contends that, because funding was made available to the BCSE to create new classifications and provide salary increases to employees of that division, all DHHR employees

should have received pay increases. The changes within BCSE were caused by severe recruitment and retention issues in that division, and the funding used to provide pay increases was largely from federal sources and earmarked only for use in child support services. Grievant established no legal right to a pay increase as a result of these events.

Findings of Fact

1. Grievant is employed by DHHR as a Social Service Supervisor. All employees in Grievant's classification are compensated within Pay Grade 14, with a salary range of $25,452 to $47,088 annually.

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 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.

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 1) *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).

At level four, Grievant testified that she believed the funding DHHR granted to BCSE should have been distributed among all of the employees of the entire Department, which she alleged had occurred in the past when money was given to other divisions. It appears that Grievant does not claim to be misclassified, nor has she compared herself, or her job duties, to any particular classification of BCSE employees.

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 theGrievance 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 introduced very little evidence at level four. Unlike the grievants in other related cases, such as *Posey*, *supra*, and *Mathes v. Dep't of Health and Human Res.*, Docket No. 04-HHR-149(B) (October 3, 2007), Grievant did not compare herself to any particular child support employees who allegedly perform similar duties. Like the grievants in *Myers v. Department of Health and Human Resources,* Docket No. 04-HHR-149(C) (Oct. 5, 2007) and *Myers/Rhodes v. Department of Health and Human Resources,* Docket No.04-HHR-149(E) (Oct. 17, 2007), it appears that Grievant believes that, since the BCSE employees received a pay increase in conjunction with the reclassification project, she also should have received one. In *Aultz v. West Virginia Department of Transportation*, Docket No. 90-DOH-522 (February 28, 1991), this Grievance Board refused to find that 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."

The evidence at level three established severe recruitment and retention issues, along with BCSE's difficulties in complying with various federal requirements, which led to the changes in that division. The reclassifications and pay grade assignments were related only to those issues, and they do not entitle Grievant to a pay increase. Moreover, undisputed testimony both at levels three and four established that the funding was earmarked only for child support services and could not be “shared” with other divisions, as Grievant has alleged. Grievant has failed to meet her burden of proof.

The following conclusions of law support this Decision.

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. 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. State salaries cannot be compared, nor equal compensation required, across classification lines. *See Aultz v. West Virginia Dep't of Transp*, Docket No. 90-DOH-522 (February 28, 1991).

6. Grievant has failed to prove by a preponderance of the evidence that it was arbitrary and capricious or an abuse of discretion for Respondents not to grant her a pay increase as a result of the changes made within BCSE in 2003.

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, *See Footnote 1, supra)*. Neither the West 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 9, 2007

_____

DENISE M. SPATAFORE

Acting Deputy Chief

Administrative Law Judge

Footnote: 1

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.