WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

GENEVIEVE WILEY,

Grievant,

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

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. At the time this grievance was filed, Grievant was employed as a Social Service Supervisor (See footnote 1) and believed that her classification should be given a "career ladder," or series, similar to that created for the classifications of Child Support Supervisor ("CSS") 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, 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 was employed as a Social Service Supervisor. She contends that her 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 this case established that the supervisors in the child support division perform different duties and supervise different job classifications. Grievant compared her duties supervising Adult Protective Service Workers to those of the Child Support Supervisor 2s, who supervise workers who are involved in the legal processes associated with the collection of child support through court action. Employees in Grievant's classification are not

similarly situated to these employees. 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. At all times pertinent to this grievance, Grievant was employed as a Social Service Supervisor, which is assigned to Pay Grade 14. She was assigned to the Adult Services unit, supervising Adult Protective Service Workers (“APSWs”).

2. Social Service Supervisors work in various DHHR program areas and supervise the employees assigned to their particular unit.

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 resultof 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. As a supervisor in the Adult Services unit, Grievant was responsible for supervising APSWs, who must investigate and take action when allegations of abuse, neglect or exploitation of incapacitated adults arise. These employees often become involved in court proceedings regarding guardianship and involuntary commitment and are sometimes witnesses in such cases.

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 SupportSpecialists, who work alongside attorneys and perform many duties associated with court proceedings and preparation of legal documents.

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, 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 "careerladder" which was created for Child Support Supervisors. She also has compared her duties to those of the Child Support Supervisor 2, whose supervisees perform legal work.

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.

Grievant alleges that it is discriminatory and constitutes favoritism for the CSSs to receive a benefit which was not conferred upon Social Service Supervisors. 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 Supervisors 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 3) 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 TourismAuthority*, 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. 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.

Moreover, 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. Moreover, Grievant has specifically attempted to compare her supervision of APSWs to the duties of the CSS 2, who supervise employees who are involved in legal proceedings. Involvement with the court system is the only similarity between the duties of an APSW and a Child Support Specialist; however, the extent and nature of the work is vastly different for each classification of employees. While legal proceedings are only one aspect of the work of APSWs, the entire focus of the work of the Child Support

Specialists supervised by the CSS 2 is the collection of child support through legal proceedings, and these employees work directly alongside attorneys within their office. Accordingly, the employees supervised by Grievant and those supervised by CSS 2s are sufficiently different that discrimination/favoritism cannot be established under these facts. Also, Grievant has failed to establish why--even if sufficient similarities did exist--this would entitle Social Service Supervisors to a tiered system.

Similarly, the undersigned finds that Grievant has 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 employees supervised, it wasappropriate 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. 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. 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (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. Grievant has failed to prove by a preponderance of the evidence that the creation of a class series for Child Support Supervisors, 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 16, 2008_____

DENISE M. SPATAFORE

Acting Deputy Chief

Administrative Law Judge

Footnote: 1

Subsequently, Grievant applied for a different position and became classified as a Health and Human Resources Specialist Senior. Therefore, her testimony focused on her job duties and claims which existed at the time her grievance was filed.

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

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.