# WEST VIRGINIA PUBLIC EMPLOYEES

# GRIEVANCE BOARD

**VICTORIA CARUTHERS, et al.,**

**Grievants,**

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

**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. Grievants are classified as Social Service Workers. A hearing was conducted by Chief Administrative Judge Paul Marteney, on April 17, 2007. Grievants were represented by counsel, Christopher Moffatt; 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). Grievants' 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

In response to recruitment and retention problems, along with federal requirements in the area of child support, new classifications were created within the Bureau for Child Support Enforcement, along with somewhat higher pay grade assignments. Grievants are Social Service Workers and alleged that they should be compensated at the same rate as the Child Support Specialist classifications. Grievants are assigned to a different divisionof the Department of Health and Human Resources, are in a different classification, and perform completely different duties from the employees to whom they compared themselves. They failed to prove that their assigned pay grade/salary was arbitrary and capricious, an abuse of discretion, or the result of unlawful discrimination or favoritism.

## Findings of Fact

1. Grievants are employed as Social Service Workers. Grievant Caruthers is a Social Service Worker 3 (“SSW 3") in the Adult Homefinding unit. (See footnote 1) Social Service Workers are divided into a class series, determined chiefly by program area, and the SSW 3s are also distinguished from SSW 2s by the fact that they perform a significant amount of protective services work.

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. As an adult homefinder, the primary focus of Grievant Caruthers' duties is to find suitable homes for incapacitated elderly and disabled adults. An attorney and a paralegal work in the Adult Services unit, preparing legal documents and attending mental hygiene hearings for clients. SSWs often attend and testify at such hearings, but much of their work is not legal in nature.

6. The CSS classification is divided into a series. 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. (See footnote 2)

7. CSSs work in an environment that is entirely legal in its function and purpose, and they work alongside and assist attorneys in their office. Most of the work which is assigned to CSSs is preceded by legal action of some sort, and the financial aspects of the collection and payment of child support

are complex and subject to various rules and regulations. 8. The classifications of CSS 1, 2, and 3 are assigned to Pay Grades 11, 12, and 13, respectively. The Social Service Worker classifications are assigned to Pay Grades 10, 11, and 12.

**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).

Grievants here are not claiming misclassification. However, they contend that their positions should have a “tier system” similar to that of the child support employees, alongwith the same pay structure. They compare their duties to those of the CSSs and contend that theirs are more difficult and complex.

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. Grievants contend that they should have the same pay scale as the CSSs. However, 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). Grievants' contentions in this case constitute a “comparable” or “comparative” worth argument, as they are not comparing themselves to employees within their own classification, but to employees in another classification whom they believe perform similar work utilizing a similar skill level within a similar working environment. *Fike v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-155 (Aug. 28, 1998). Nevertheless, unless a grievant presents sufficient evidence to demonstrate DOP's interpretation of pay grade is clearly wrong, or the result of an abuse of discretion, an administrative law judge must give deference to DOP and find that the pay grade assignment was correct. *O'Connell, supra*.

Most comparative worth litigation concerning an employer's establishment of pay scales has been handled by federal courts in cases brought by employees within the context of discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2a. *See IUE v. Westinghouse Electric Corp*., 631 F.2d 1094 (3rd Cir. 1980), cert. denied, 452 U.S. 967 (1981); *Gunther v. County of Washington*, 602 F.2d 882 (9th Circ. 1979), *reh'g denied with supplemental opinion*, 623 F.2d 1303 (9th Cir. 1980), aff'd 452 U.S. 161 (1981); *Gerlach v. Michigan Bell Tel. Co.*, 501 F. Supp. 1300 (E. D. Mich. 1980); *Taylor v. Charley Brothers Co.*, 25 F.E.P. 602 (W. D. Pa. 1981). Most federal courts haveexpressly rejected claims brought under a pure comparative worth theory absent a showing of intentional discrimination. *See Pleme v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983); *Power v. Berry County*, 539 F.Supp. 721 (W. D. Mich. 1982).

As this Grievance Board observed in *Delauder v. Dep't of Health and Human Resources*, Docket No. 01-HHR-152 (Jan. 27, 2004),

> This Grievance Board has followed the direction taken by the federal courts, and others, in refusing to decide misclassification cases on the basis of comparative worth.

> While it certainly is apparent that the [other] employees perform some similar duties as Grievants, and that Grievants' positions are much more demanding and complex than [those other] employees, the fact remains that Grievants are properly classified . . . , and are paid within the pay scale for that classification.

In order to prove their point, Grievants offered the testimony of Georgia Hess, a 28- year employee of the BCSE, who is currently classified as a Child Support Supervisor 2. Ms. Hess testified as to the duties of CSSs and her perception of their complexity. She stated that most of the petitions, motions, and other legal documents which CSSs are responsible for “drafting” are merely forms which are accessible on the computer system. She also explained that, in her office, CSSs rarely testify in court; however, she further stated that she only knows what occurs in her particular county office and acknowledged that situations do vary throughout the state.

Grievants' evidence does not establish that the pay grade to which their classification is assigned is improper. As explained by Lowell Basford, of DOP's Classification and Compensation Division, CSSs perform a vastly different function from that which Grievants perform, resulting in a slightly higher pay grade assignment. Classification specifications are created with extensive input from the agency and the employees who are performing the duties of the position at issue. Once the specificationhas been finalized, salary surveys are conducted to determine the appropriate salary range and pay grade assignment for the type of position involved. In this case, the evidence simply does not establish that a different pay grade assignment would be appropriate for the SSW classification, nor that Grievants' duties are sufficiently similar to those of the child support employees to warrant the same salary. In addition, the undersigned finds that the pay grade assignment for Grievants' position was not arbitrary and capricious, an abuse of discretion, or the result of intentional discrimination on the part of Respondents.

Like many others involved in these related grievances, Grievants allege 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. ofCorr.,* 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).

Grievants are not similarly situated to Child Support Specialists and are 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. Moreover, the entire focus of the CSS positions involve the collection of child support and the legal processes connected therewith, while

Grievants have a myriad of duties which do not involve legal proceedings. This is not to say that Grievants' services are less valuable, but only that they are different in focus and function. Accordingly, Grievants have not proven discrimination or favoritism.

**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. 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). 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. Grievants have failed to prove by a preponderance of the evidence that the salary assigned to their job classification was arbitrary and capricious, an abuse of discretion, or the result of discrimination or favoritism, or that the pay grade assignments for child support employees entitled Grievants to a salary increase.

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 30, 2008**

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**DENISE M. SPATAFORE**

**Acting Deputy Chief**

**Administrative Law Judge**

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Footnote: 1

*Although these grievances were divided into classification groups, there is no discussion in the record of the exact titles of the other grievants in this group, and they did not appear for the level four hearing. Therefore, it can only be assumed that they share Grievant Caruthers' Social Service Worker 3 classification.*

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Footnote: 2

*As with many of these related grievances, the parties relied upon the evidence they introduced in the level four hearings of previous grievances*

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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, which continue to control the proceedings in this case.*

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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.*