THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHASITY RANEA MOORE,
Grievant,

v. **DOCKET NO. 2009-0693-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant Chasity Ranea Moore filed this grievance on November 17, 2008, stating, "Request for reinstatement of previous salary denied." Her stated relief sought is "Reinstatement to former salary with back pay and interest and otherwise to be made whole."

A level three hearing was held in the Grievance Board's Charleston office on October 8, 2009, before Administrative Law Judge Mark Barney. Grievant was represented by Gordon Simmons of West Virginia Public Workers Union, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. The matter became mature for decision on November 2, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law, and was re-assigned to the undersigned Administrative Law Judge on January 6, 2010, due to the resignation of ALJ Barney.

Synopsis

Grievant, a former State employee, was re-hired by Respondent after she was laid off from her position at Workforce West Virginia. Grievant's starting salary was the base salary for the position, with no credit based on her prior employment that would require

Respondent to offer her a higher starting salary. Grievant requested a higher starting salary, but accepted the new position without when it was offered at a lower salary. Grievant proved neither that the salary decision was discriminatory nor that it was arbitrary and capricious, and proved no violation of any law, rule or policy. The grievance is therefore denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant has been employed by Respondent in Calhoun County as an Economic Service Worker (ESW) since October 16, 2008.

2. Grievant had been previously employed by Respondent as a Child Protective Services Worker (CPSW) from April 2002 to July 2006, when she resigned to accept a position with a private company, APS Healthcare.

3. Grievant only worked for APS Healthcare for approximately 6 months, then returned to State employment for Workforce West Virginia. She was laid off from that position eighteen months later, and then applied for her current position.

4. Grievant was interviewed for her position by three people, including Community Services Manager Richard Westfall, and asked about her starting salary and benefits, considering her prior State employment.

5. Mr. Westfall stated she would retain her lost sick leave, and that her salary could come in at a higher rate than the minimum for the position.

6. Mr. Westfall called Grievant on October 15, 2008, and told her she was hired and that she should report to work the following day. Grievant did not ask about her starting salary, and the topic was not discussed at that time.

7. Grievant accepted the position and started work without further discussion of her salary.

8. Grievant was hired at the base rate for ESW's, which are in a lower pay grade than her former CPS worker position. The record does not reflect what Grievant's salary or class title was at Workforce West Virginia.

9. After she was hired, Grievant inquired about having her salary raised in consideration of her prior experience as a CPS worker.

10. Grievant's experience as a CPSW did not prepare her for her job as an ESW. The two jobs are dissimilar, use different computer systems and have different clients. She did not gain experience as a CPSW worker that was relevant to her ESW job.

11. The ESW classification is pay grade 10 ($23,724 to $43,896 per year) and the CPSW classification is in pay grade 15 ($31,164 to $57,660 per year).

12. The CPSW job is very complex and crosses many different disciplines. Workers must have a technical knowledge of the legal system, and workers use a different computer system than ESW's.

13. The duties of the ESW classification are complicated, but not as complex as those of the CPSW class.

14. Grievant required extensive retraining for the ESW job, and did not assume a full case load until January 2009.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence.[1] Here, Grievant does not actually allege a violation of any law, rule or policy covering her employment, but appears to contend that the decision to hire her at the base salary for her position was arbitrary and capricious, or discriminatory.

Grievant was hired at the base salary for her ESW position, which salary was considerably lower than the salary she earned when she left work as a CPSW. She did not negotiate her starting salary, and began work with no idea what her salary was. She was offered a job, took it, and then attempted to negotiate the terms. She places much emphasis on the distinction between an employee who starts as a new hire and one who is "reinstated." Under the Division of Personnel Administrative Rule, 143 C.S.R 1 § 3.79. "Reinstatement" is defined as "A type of re-employment of a former permanent classified employee." Section 5.8 of that Rule addresses pay on reinstatement:

> Pay on Reinstatement - The salary for an employee who is reinstated shall be at the minimum salary for the class including any applicable Board approved pay differential. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the market rate of the salary range, unless otherwise prescribed by the Board. For each pay increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training. The Director may authorize reinstatement at a rate above the market rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class, or where the reinstated employee's last salary as a classified employee was above the market rate.

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[1]Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008).

The Administrative Rule also states:

> A former employee who had attained permanent status under the Division of Personnel who has resigned or who has been laid off is eligible for reinstatement, provided that he or she has been certified by the Director as meeting the current minimum qualifications as to training and experience of the class of position to which he or she is being appointed. Prior to making the certification, the Director may require the employee to pass a qualifying examination. The Director may refuse to reinstate a former employee for any of the causes stipulated in subdivision 6.4.(a) of this rule.

143 C.S.R 1 § 12.6(a).

Nothing in the Administrative Rule requires an agency to reinstate a former employee at a higher salary than a new employee. However, Grievant's argument entirely ignores two important aspects of her situation: she was being reinstated not from a position with DHHR as a CPSW, but as a former employee of Workforce West Virginia, which was her most recent State employment before this job. Secondly, her prior work as a CPSW did not gain her relevant experience or training as an ESW. There is no evidence that Grievant's salary in her last job was above the market rate, and no evidence that the Director of the Division of Personnel had granted the DHHR dispensation to hire at a higher-than-minimum salary due to recruiting difficulties.

Grievant contends that the decision to employ her at the lower salary was arbitrary and capricious. "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."[2]

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[2] *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

Grievant did not prove that her starting salary was arbitrary and capricious. She was hired in at the standard rate for a new hire in that classification, which befits her status. She does not complain that she was not given her accrued sick leave back, so it may be inferred that she was reinstated rather than classed as a new hire; however, her status as a reinstated employee does not automatically grant her a higher salary.

Although Grievant attempted to show there was a shortage of ESW workers and a retention problem for Respondent in that classification, this fact alone does not justify Grievant's request. Per the rule cited above, the Division of Personnel still has the final say in whether an appointing authority may offer a higher starting salary based on that need, and in any event, that decision needs to be made before the employee is hired, and evidently was, although it was not communicated.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees."[3] In order to establish a discrimination 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.[4]

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[3]W. VA. CODE § 6C-2-2(d).

[4]*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.,* Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant has failed to establish by a preponderance of the evidence that she was treated differently from any other similarly situated employee. She testified that someone told her that another employee, Ben Roberts, had transferred from a CPSW position to ESW without loss of pay, sometime in 2000. She also provided evidence that another worker had been voluntarily demoted in 1992, and had not had her salary reduced. Neither situation is analogous to Grievant's, and of the former, the anecdotal, vague hearsay is simply not substantial enough to be credible. Neither employee cited by Grievant changed positions through reinstatement, the principal Grievant relies on in this case. Grievant was not similarly situated, and therefore did not prove she was a victim of discrimination.

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008).

2. 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).

3. Grievant did not meet her burden of proving that Respondent's actions were arbitrary and capricious.

4. Discrimination is defined 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." W. VA. CODE § 6C-2-2(d). In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). *See Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.,* Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant did not meet her burden of proving Respondent's actions were discriminatory.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

February 16, 2010

M. Paul Marteney
Administrative Law Judge