THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SELENA STRAUGHN and SANDRA WALLACE,
Grievants,

v. **Docket No. 2011-0054-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT and DIVISION OF PERSONNEL,
Respondents.

DECISION

Selena Straughn and Sandra Wallace, Grievants, filed this grievance on July 13, 2010, alleging that "Marshall County Child Support has lost two CSS III positions in past 6 months. When employees left these III positions they were posted as CSS I positions, thereby keeping any CSS II's from advancement to the III position . . ." The relief sought by both Grievants is to be promoted to a CSS III position. This grievance was denied at level one by letter dated July 20, 2010. The Division of Personnel was joined as a party to this grievance by order dated July 23, 2010. Level two mediation was conducted on September 20, 2010. Appeal to level three was perfected on September 27, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on March 2, 2011, at the Grievance Board's Westover office location. Grievants appeared *pro se*. The Department of Health and Human Resources appeared by its counsel, Harry C. Bruner, Jr., Assistant Attorney General. The Bureau For Child Support Enforcement appeared by its counsel, David Alter. The Division of Personnel appeared by its counsel, Karen Thornton, Assistant Attorney General. The matter became mature for consideration upon receipt of the Department of Health and Human Resources' proposed findings of fact

and conclusions of law. Grievants and the Division of Personnel did not file proposals in this grievance.

Synopsis

The Bureau For Child Support Enforcement experienced a vacancy for two Child Support Specialist III positions in 2010. Grievants complain that when these Child Support Specialist III employees left, the Bureau For Child Support Enforcement posted the vacant positions as Child Support Specialist I positions rather than Child Support Specialist III positions. Grievants claim they are being denied any possibility of advancement to the Child Support Specialist III positions because of the Bureau For Child Support Enforcement's decision to post the vacancies as Child Support Specialist I positions. When an agency has a vacancy, it has discretion to post the vacancy for the position within the classified service necessary in management's assessment to accomplish the work of the agency as long as they do not exercise that discretion in an arbitrary and capricious manner. Grievants failed to meet their burden of proof to establish that the posting decision was somehow arbitrary and capricious. This grievance is denied.

The following findings of facts are based upon the record of this grievance.

Findings of Fact

1. Grievants are employed as Child Support Specialist II's for the Bureau For Child Support Enforcement located in Marshall County.

2. The Bureau For Child Support Enforcement in Region One experienced a vacancy for two Child Support Specialist III positions in 2010. Region One includes Marshall, Ohio, Hancock, Brooke, Wetzel, and Tyler Counties.

3. Grievants point out that when these Child Support Specialist III employees left, Bureau For Child Support Enforcement posted the vacant positions as Child Support Specialist I positions rather than Child Support Specialist III positions.

4. Grievants believe that they are being denied any possibility of advancement to the Child Support Specialist III positions due to the Bureau For Child Support Enforcement's management decision to post the vacancies as Child Support Specialist I positions.

5. Grievants are free to apply for vacant Child Support Specialist III positions in the other Bureau For Child Support Enforcement Regions throughout West Virginia; however, they have chosen not to do so. Grievants are only interested in being a Child Support Specialist III in Region 1 and not in other Bureau For Child Support Enforcement Regions in West Virginia.

6. Erin R. Cain, Bureau For Child Support Enforcement Manager for Region 1 indicated that management has the flexibility and discretion that when a Child Support Specialist III retires, the vacancy can be posted as a Child Support Specialist I based upon the needs of the region. Ms. Cain further indicated that Region 1 has been operating satisfactorily without Child Support Specialist III positions based upon its current needs.

7. Debbie Anderson, longtime employee of the Division of Personnel, made clear that her agency does not dictate to state agencies what positions an agency must post when filling vacancies.

8. Ms. Anderson went on to state that there is no Division of Personnel policy, regulation, or requirement that the Bureau For Child Support Enforcement post a Child Support Specialist III position when a Child Support Specialist III leaves employment. An

agency has the flexibility to post a vacancy based upon its needs to accomplish the overall mission of the unit.

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

The posting of a position within the classified service necessary to accomplish the work of the agency is a management decision, and this type of decision is judged by the arbitrary and capricious standard. "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, 474S.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." *Eads, supra* (*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.

This Grievance Board has frequently ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997); *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

Historically, many state agencies do not automatically post a position when an employee retires, resigns, or is promoted. *See Smith v. Parkways Economic Dev. and Tourism Auth.,* Docket No. 00-PEDTA-133 (July 7, 2000); *Staggers v. Div. of Highways*, Docket No. 98-DOH-505 (Apr. 30, 1999); *Law/Bragg v. W. Va. Dep't of Health and Human Res.*, Docket No. 95-HHR-452 (July 17, 1997). “Frequently, the agency examines whether the specific position needs to be filled, whether the assigned duties can be assumed by a current employee, and whether other areas have more pressing needs that require the

shifting of the position to another section[,] . . . [and] it is up to the administration of [the agency] to make these decisions." *Mikles v. Dep't of Environmental Protection*, Docket No. 06-DEP-320 (March 30, 2007).

The undersigned is sympathetic to the argument of Grievants in that it just seems unfair to do away with these positions in Marshall County; however, that is not enough to satisfy their burden of proof. The Grievants did offer anecdotal evidence concerning a break down of the number of Child Support Specialist III's in other counties. While there does appear to be a number of these positions in other counties, that does not speak to the central issue of whether or not they are needed in Marshall County. The available evidence to the undersigned demonstrated that the posting decision was made because of the lack of need in Marshall County for the position of Child Support Specialist III. The undersigned is bound to adhere to the record of the case and, accordingly, Grievants have failed to demonstrate that the decision of the Bureau For Child Support Enforcement was an abuse of discretion.

The following conclusions of law support the decision reached.

Conclusions of Law

1. 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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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. "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).

3. A [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997); *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

4. The posting of a position within the classified service necessary to accomplish the work of the agency is a management decision, and Grievants have failed to prove Respondent's decision in this case was arbitrary and capricious or a violation of any law, rule, or regulation.

Accordingly, this grievance is **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).

Date: May 6, 2011

Ronald L. Reece
Administrative Law Judge