BONNIE PISHNER, et al.,

Grievants,

v.

DOCKET NO. 97-HHR-478

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants, Bonnie Pishner, Karol Payne, Linda Bittinger, and Ethel Murray (See footnote 1), filed the following grievance against their employer, West Virginia Department of Health and Human Resources ("HHR") and the Division of Personnel ("DOP") on January 6, 1997:

> CPS [Child Protective Service] workers are receiving a 3% pay raise Jan. 1, 1997 - my personnel title is the same as CPS workers - I do the same type of work as CPS, except for a different population - adults, rather than children. I want a 3% raise effective Jan. 1, 1997.

The grievance was denied at levels one and two, due to lack of authority to grant the relief requested, and a level three hearing was held on May 30, 1997. The grievance was again denied by Barbara Wheeler, level three Grievance Evaluator, by decision dated October 17, 1997. Grievants appealed to level four on October 30, 1997, and a level four hearingwas held on February 3, 1998. The grievance became mature for decision on March 30, 1998, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 2)

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

West Virginia Administrative Rule 5.08 entitled “Salary Advancements.”

Ex. 2 -

December 31, 1996 letter from BG (Ret.) Robert L. Stephens to Calvin Robbins.

Ex. 3 -

State Personnel Board Proposal Review Summary/Proposal No. 1817.

HHR's Exhibits

Ex. 1 -

West Virginia Administrative Rule, Section 3 defining “Pay Differential.”

Ex. 2 -

Travis v. W. Va. Dept. of Health and Human Resources (Level III Decision).

DOP's Exhibits

Ex. 1 -

West Virginia Administrative Rule 5.04(d) entitled “Additional Pay.”

Level Four Grievant's Exhibits

Ex. 1 -

Portion of Fiscal Year 1997 Digest.

Ex. 2 -

Tenure and Turnover Rate charts November 1995-October 1996.

Ex. 3 -

Division of Personnel Reports of Personnel Changes for HHR November 1995-October 1996.

Ex. 4 -

Miscellaneous Correspondence and Documents from HHR regarding Protective Services.

HHR's Exhibits

Ex. 1 -

Enrolled Senate Bill No. 1007.

Ex. 2 -

October 10, 1996 letter from Scott R. Boileau to The Hon. A. Keith Wagner and The Hon. Joe Martin.

Ex. 3 -

November 13, 1996 memorandum from Calvin Robbins to BG (Ret.) Robert L. Stephens, Jr.

Testimony

Grievants testified in their own behalf and presented the testimony of Mary Moore, Apacha Spencer, Scott Boileau, Lowell Basford, and Allen Pyles. HHR presented the testimony of Mary Shrader, Michael McCabe, Tom Gunnoe, Margaret Weybright, and Louis Palma.

FINDINGS OF FACT

1. Grievant Pishner is employed by HHR as an Adult Protective Service Worker, servicing Raleigh County.
2. Grievant Payne is employed by HHR as an Adult Protective Service Worker, servicing Wood County since October 1994.
3. Grievant Bittinger is employed by HHR as an Adult Protective Service Worker, servicing Marion County for three years.
4. Grievant Murray is employed by HHR as an Adult Protective Service Worker, servicing Preston, Taylor, and Barbour Counties.

5. Grievants are responsible for receiving referrals and conducting investigations of abuse and neglect of adults in their respective counties.

6. Adult Protective Service Workers and Child Protective Service Workers are sub-classifications falling under the single Division of Personnel classification of Protective Service Worker.

7. Adult Protective Service Workers and Child Protective Service Workers perform the same duties and functions, the only difference being their respective populations of adults and children.

8. HHR has continually had recruitment and retention problems for Child Protective Service Workers. 9. HHR does not have the same recruitment and retention problems for Adult Protective Service Workers.

10. During the period November 1995 through October 1996, HHR experienced a 20% turnover rate in the Child Protective Services classification. LIII G. Ex. 2.

11. The backlog and personnel problems in Child Protective Services attracted the attention of the West Virginia Legislature, resulting in a legislative mandate encompassed in Senate Bill No. 1007 directed to HHR and DOP, passed on March 18, 1994, and effective ninety days from passage, to provide their best efforts to increase staffing in the children services area and to resolve turnover problems among CPS staff within the civil service system. LIV HHR Ex. 1.

12. Correspondence and meetings ensued with representatives of the Legislature, HHR and DOP to develop a proposal which would comply with the Legislative mandate of Senate Bill No. 1007.

13. On November 13, 1996, HHR presented a proposal to the State Personnel Board, Proposal 1817, requesting a 3% salary increase for Child Protective Service Workers upon completion of three (3) years of service in that area. LIV HHR Ex. 3.

14. Based upon the Legislative mandate, specific retention problems identified with Child Protective Service Workers, and the authority provided by West Virginia Administrative Rule 5.04(f)(4), the State Board of Personnel approved Proposal 1817, and it became effective January 1, 1997.

DISCUSSION

Grievants allege that it was arbitrary and capricious, and discriminatory, for HHR and DOP to

award a pay differential to Child Protective Service Workers and not AdultProtective Service Workers, despite the fact that both sub-classifications fall under the Protective Service Worker civil service title.

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

This Grievance Board has previously recognized that DOP has broad discretion to perform its administrative functions so long as it does not exercise this discretion in an arbitrary or capricious manner. Crowder v. W. Va. Dept. of Tax & Revenue, Docket No. 94-T&R-545 (Feb. 28, 1995). See Smith v. W. Va. Div. of Corrections, Docket No. 94- CORR-624 (Feb. 27, 1995). Further, the rules promulgated by DOP pursuant to its delegated authority are given the force and effect of law, and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. See Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Moreover, a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc., 166 W. Va. 775, 277 S.E.2d 613 (1981); appeal dismissed, 454 U.S. 1131 (1982). This principle has been specifically extended to DOP's exercise of its discretionary judgment in matters involving classification and compensation. See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993). Indeed, DOP's interpretations in such matters as compensation and classification must be reviewed undera "clearly erroneous" standard. Blankenship, supra. See, e.g., Shahan v. W. Va. Bureau of Commerce, Docket No. 95-DNR-146 (Aug. 31, 1995); Page v. W. Va. Dept. of Transp., Docket No. 94-DMV-240 (Nov. 23, 1994); Arthur v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 93-BEP-527 (July 13, 1994).

The undersigned administrative law judge is unable to substitute her judgment for that of the State Personnel Board and DOP where the decision at issue has a rational basis. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994). See generally Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

Grievants have maintained that their disparate treatment by HHR and DOP, in regard to selective application of DOP's pay differential authority to award a 3 percent salary increase to their Child Protective Service Worker counterparts, but not to them, is arbitrary and capricious, a violation of equal pay for equal work, and constitutes discrimination prohibited under W. Va. Code § 29-6A-2(d).

W. Va. Code § 29-6-10 generally embraces the concept of "equal pay for equal work." See AFSCME v. Civil Service Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). However, employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent, supra; W. Va. Univ. v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992). Grievants are paid in accordance with the pay scale for Protective Service Worker, thus there has been no violation of the equal pay for equal work doctrine.

Discrimination is defined therein 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 § 29-6A-2(d). This Grievance Board has determined that grievants, seeking to establish a prima facie case (See footnote 3) of discrimination under § 29-6A-2(d), must demonstrate the following:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once the grievants

establish a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievants may show that the offered reasons are pretextual. Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH- 435 (Feb. 28, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept.24, 1996); Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Applying this prima facie analysis to the facts presented here, the undersigned finds that Grievants established a prima facie case of discrimination by demonstrating that they are similarly situated to other HHR employees in the Protective Service Worker classification, that those other employees received a significant benefit (See footnote 4) in the form of a 3% pay differential, a benefit which was not extended to Grievants, and that this differential was not directly related to any differences in their job responsibilities. See Morris v. W. Va. Dept. of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997).

HHR and DOP argue that due to a 20% turnover rate within the Child Protective Service Worker sub-classification, a mandate by the Legislature via Senate Bill No. 1007, and specific authority granted to the State Personnel Board by W. Va. Admin. Rule 5.04(f)(4), they were justified in their proposal and ultimate decision to grant a salary increase to those employees whose duties primarily consist of providing services to protect children from abuse, neglect and exploitation. This proposed solution was related to the actual job responsibilities of the employees, not arbitrary and capricious, nor was it discriminatory.

W. Va. Code § 49-6-1a, entitled “Minimum staffing complement for child protective services,” states in relevant part:

> For the sole purpose of increasing the number of full time front line child protective service case workers and investigators, the secretary of the department of health and human resources shall have the authority to transfer funds between all general revenue accounts under the secretary's authority and/or between personnel and nonpersonnel lines within each account under the secretary' authority: Provided, That nothing in this section shall be construed to require the department to hire additional child protective service workers at any time if the department determines that funds are not available for such workers. . . .

West Virginia Division of Personnel Administrative Rule 5.04(f)(4), Pay Differentials, provides that:

> [t]he [State Personnel] Board, by formal action, may approve the establishment of pay differentials to address circumstances such as class- wide recruitment and retention problems, regionally specific geographic pay disparities, apprenticeship program requirements, shift differentials for specified work periods, and temporary upgrade programs. In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc), not by individual employees.

This Grievance Board has held that the granting of a pay differential in order to address recruitment and retention problems which are limited to a specific group of employees in a specific program is within DOP's discretion and authority. Travis v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-518 (Jan. 12, 1998).

With regard to the Child Protective Service Workers turnover and retention issues, HHR and DOP maintain the decision to award a pay differential to this sub-classification was not arbitrary or capricious, but based entirely on the fact that the Bureau was consistently experiencing a 20% turnover rate among Child Protective Services staff during the period of November 1995 through October 1996. In order to address this problem and come into compliance with the Legislative mandate, HHR and DOP sought to increase and/or maintain appropriate staffing levels through a 3% salary increase for all ChildProtective Service Workers upon completion of three years of service in child protective services. HHR and DOP recognize that a 3% salary increase will not solve the problems it faces in child protective services, however, it is a concrete demonstration to those workers that efforts are being made to improve their situation. Given these facts, HHR and DOP have successfully presented a legitimate, nondiscriminatory reason for awarding a 3% salary increase to Child Protective Service Workers, while not doing the same for Adult Protective Service Workers. Further, Grievants have not shown that this reason was pretextual or an abuse of DOP's authority under Section 5.04(f)(4) of the Administrative Rules.

This finding is no way infers that the work Grievants perform is not as complex or important as the work performed by Child Protective Services staff. However, the Legislature chose to place sole emphasis on the fight to decrease and deter child abuse in our society. Given the Bureau's limited fiscal resources, it's and DOP's approval of a 3% pay differential constitutes a good faith effort to attract and retain qualified Child Protective Service case workers.

CONCLUSIONS OF LAW

1. In non-disciplinary matters, Grievants must prove all of the allegations constituting the grievance by a preponderance of the evidence. W. Va. Code § 29-6A-6; Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. W. Va. Administrative Rule 5.04(f)(4), Pay Differentials, provides that:

> [t]he [State Personnel] Board, by formal action, may approve the establishment of pay differentials to address circumstances such as class- wide recruitment and retention problems, regionally specific geographic pay disparities, apprenticeship program requirements, shift differentials for specified work periods, and temporary upgrade programs. In all cases, paydifferentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc), not by individual employees.

3. The granting of a pay differential in order to address recruitment and retention problems which is limited to a specific group of employees in a specific program is within DOP's discretion and authority. Travis v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-518 (Jan. 12, 1998).

4. DOP has broad discretion to perform its administrative duties as long as these duties are not exercised in an arbitrary or capricious manner. Crowder v. W. Va. Dept. of Tax & Revenue, Docket No. 94-T&R-545 (Feb. 23, 1995).

5. An agency's action is arbitrary and capricious if it did not rely on factors intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Sheppard/Gregory v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-186/187 (Dec. 29, 1997).

6. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow and an administrative law judge may simply substitute her judgment for that of DOP. Trimboli v. W. Va. Dept. of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

7. In order to establish a prima facie case of discrimination as defined in W. Va. Code § 29-6A-2(d), Grievants must demonstrate that:

a. they are similarly situated, in a pertinent way, to one or more other employee(s);

b.

they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant way,; and

c. such differences were unrelated to the actual responsibilities of the Grievants and/or the other employee(s) and were not agreed to in writing by the Grievants.

Parsons v. W. Va. Dept. of Highways, Docket No. 91-HHR-246 (Apr. 30, 1992); Holcomb v. W. Va. Dept. of Highways, Docket No. 89-DOH-389 (Oct. 21, 1989).

8. While Grievants established a prima facie case of discrimination with regard to the award of a 3% pay differential to Child Protective Service Workers, HHR and DOP established legitimate, nondiscriminatory reasons for their actions. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

9. DOP acted within its authority in applying Rule 5.04(f)(4) and requesting that the State Personnel Board award a pay differential to address HHR's recruitment and retention problems with Child Protective Service Workers. Grievants failed to prove by a preponderance of the evidence that DOP or HHR acted outside their scope of authority or based their decision on factors other than the necessity to hire and retain sufficient personnel to carry out the difficult duties of a Child Protective Service Worker.

10. DOP and HHR presented legitimate, nondiscriminatory reasons for awarding a 3% salary increase to Child Protective Service Workers. Grievants failed to present any evidence to establish that DOP's or HHR's reasons were pretextual or violated any statute, policy, rule or regulation.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate

court.

MARY JO SWARTZ

Administrative Law Judge

Dated: May 21, 1998

Footnote: 1

Gary Hamrick, Russell Tucker, Terri Mills and Teresa Bates were part of the original grievance, but were dismissed at level four by agreement of the parties.

Footnote: 2

HHR filed a Motion to Dismiss based on timeliness, which was withdrawn at level four.

Footnote: 3

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 4

Although it could be argued that such favorable treatment might more appropriately be categorized as "favoritism" prohibited by W. Va. Code § 29-6A-2(h), such treatment would not affect the outcome of this grievance, as the analysis applied is essentially the same. See, e.g., Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996).