

**EDWIN BENNETT, et al.,**

**Grievants,**

**v. Docket No. 99-HHR-517**

**WEST VIRGINIA DEPARTMENT**

**OF HEALTH AND HUMAN RESOURCES/**

**BUREAU FOR CHILDREN AND FAMILIES,**

**Respondent.**

### **DECISION**

Edwin Bennett, Tara Brumit, Kira LeBlanc, Michelle Massaroni, Amy Huddle Morehead, Ethel Musick, and Cristal Tabor (Grievants), are employed as Child Protective Service (CPS) Workers at the West Virginia Department of Health and Human Resources/Bureau for Children and Families' Mercer County office (DHHR). Grievants filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that their caseloads are excessive. The grievance was denied at Level I by Child Protective Service Supervisor Donna McDaniel Heatherly on October 22, 1999; and at Level II, by Community Service Manager John J. Najmowski, on November 9, 1999. A Level III hearing was held on December 2, 1999. Grievants represented themselves at this hearing, and DHHR was represented by Margaret Waybright. On December 7, 1999, the grievance was denied at Level III by Commissioner Jack Frazier.

A Level IV hearing was held on February 22, 2000, before the undersigned administrative law judge, at the Grievance Board's Beckley office. Grievants again represented themselves, and DHHR was represented by Dennise Smith, Esq. The parties were given until March 22, 2000, to submit proposed findings of fact and conclusions of law. DHHR did so, and this grievance became mature for decision on that date.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

### **FINDINGS OF FACT**

1. Grievants are employed as Child Protective Service (CPS) Workers at the West Virginia Department of Health and Human Resources/Bureau for Children and Families' Mercer County office.
2. Grievants maintain caseloads that are approximately triple recommended guidelines.
3. Grievants are dedicated and hardworking employees.

### DISCUSSION

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 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is 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." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievants contend that DHHR should transfer or hire sufficient additional CPS Workers so that their individual caseloads can be reduced from an average of 34 per worker per month to the recommended number of ten, so that the children of West Virginia can be better protected from abuse and neglect.

DHHR clearly has authority to transfer or hire such workers. W. Va. Code § 49-6- 1(a) provides that:

[f]or 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's authority[.]

However, this same statute does not mandate that any such workers be transferred or hired. W. Va. Code § 49-6-1(a) conveys a discretionary power upon DHHR, and not a mandatory duty, as shown by this language: "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.”

DHHR responds that this Grievance Board is without authority to order it to make such a discretionary change its policy. DHHR is correct. The Board does not have authority to second guess a state employer's employment policy, or substitute its management philosophy for DHHR's. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997), Kincaid v. W. Va. Div. of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998).

The undersigned is similarly without authority to command the West Virginia Legislature to better fund the Bureau for Children and Families, although this would clearly be desirable. See Toth v. W. Va. Div. of Corrections, Docket No. 98-CORR-344D2 (Feb. 2, 1999).

All parties to this grievance agree that Grievants are dedicated and hardworking employees, who did not file this grievance for personal gain, but rather to ensure better protection for our state's abused and neglected children. The undersigned sincerely regrets that he is not permitted, by law, to provide the relief requested.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

### CONCLUSIONS OF LAW

1..

In a non-disciplinary grievance, 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 § 4.19 (1996); 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. This Grievance Board is without authority to order a state agency to make a discretionary change in its policy. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997), Kincaid v. W. Va. Div. of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998).

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. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State

**EmployeesGrievance 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.**

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**ANDREW MAIER**

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**ADMINISTRATIVE LAW JUDGE**

**Dated April 26, 2000**