SANDRA WALLACE, et al.,

Grievants,

v.

DOCKET NO. 01-HHR-319

WEST VIRGINIA DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU FOR CHILD

SUPPORT ENFORCEMENT and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants (See footnote 1) filed the following grievance against their employer, the West Virginia Department of Health and Human Resources ("DHHR")/Bureau for Child Support Enforcement ("BCSE") on or about April 12, 2001:

> We, the above named Grievants, feel we have been treated unfairly and unjustly inasmuch as the Bureau for Child Support Enforcement has changed the Title, Paygrade and Rate of pay for its employees in the Customer Service Unit to that of an HHR Specialist which is five (5) levels above the Secretary I, seven (7) levels above the Accounting Technician II, and eight (8) levels about(sic) the Office Assistant II paygrades. We feel that the action taken to upgrade and change the titles of the positions in the BCSE Customer Service Unit is an unfair and discriminatory action which violates our rights as employees of the BCSE to be getting equal pay for equal work.
>
> The BCSE Customer Service Unit employees' responsibilities are the very minimum of those required of a Secretary I, Accounting Technician II, andOffice Assistant II, yet they are being paid at a rate significantly higher than that of the aforementioned Titles within the BCSE. To the best of our knowledge and belief we, as Secretaries, Accounting Technicians, and Office Assistants, have more complex job duties and are required to perform various tasks such as preparation of legal documents, filing of legal documents, and, as pertaining to the Accounting Technician, evaluate and maintain the financial screens and perform audits which entail detailed case reviews

and double checking the Legal Assistants research, interaction with customers, employers and attorneys, as well as the minimum investigation and research involved in the customer service unit's daily responsibilities.

On a daily basis we are required to exercise and demonstrate as much skill in dealing with hostile or irate customers and providing excellent customer service to the same individuals and organizations as do the Customer Service Unit employees. Additionally, the aforementioned Titles often perform tasks which are outside the scope of their assigned job duties and often are called upon to go above and beyond the call of duty on a day to day basis.

We were made aware of the fact that the BCSE employees of the Customer Service Unit are HHR Specialists on March 15, 2001.

Relief sought: We request that:

(1) Our paygrades be upgraded to properly reflect the degree of responsibility associated with our position title and/or be upgraded and re- classified to be at least equal to that of the employees of the BCSE Customer Service Unit.

(2) That we be treated fairly and equitably and that our salaries be retroactively modified to at least the minimum of the paygrade associated with the Customer Service Unit position title, bearing in mind that each of us have different tenure and believe that our pay should be adjusted accordingly to the effective date of the change in the Title of the Customer Service Unit's positions and that we receive back-pay; and

(3) That, in the event the paygrade and salaries cannot be modified, then our job responsibilities should be reduced to sufficiently accommodate the difference between our paygrade and that the BCSE Customer Service Unit,considering that their job responsibilities are substantially less than ours and we complete more complex tasks on a daily basis. (See footnote 2)

The West Virginia Division of Personnel ("DOP") was joined at level four by Order dated November 5, 2001. This matter came on for hearing directly at level four on December 5, 2001, in the Grievance Board's Westover, West Virginia office, and became mature for decision on January 29, 2002, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievants appeared pro se, DHHR was represented by Jon R. Blevins, Esq., Assistant Attorney

General, and DOP was represented by Robert D. Williams, Esq., Assistant Attorney General. (See footnote 3)

SUMMARY OF EVIDENCE

Grievants' Exhibits

Ex. 1 -

May 9, 2001 memorandum from Susan Shelton Perry to BCSE Regional Managers, State Office Management Team and BCSE Attorneys re: Proposed Reclassifications.

Ex. 2 -

January 24, 2001 memorandum from Lowell D. Basford to Virginia Tucker re: Bureau for Child Support Classification Study.

Ex. 3 -

May 15, 2001 memorandum from Lowell D. Basford to Susan Perry re: BCSE Classification Study Material.

Ex. 4 -

BCSE Organization Charts.

Ex. 5 -

April 17, 2000 memorandum from Lena S. Hill to Virginia Tucker re: Review/Audit Request - Accounting Technician II.

Ex. 6 -

Classification Specification for Accounting Technician II.

DHHR Exhibits

None.

DOP Exhibits

None.

Testimony

Grievants presented the testimony of Deborah Hamner, Sarah Montello, Sandra Wallace, and Lowell D. Basford. DHHR and DOP presented no additional witnesses.

FINDINGS OF FACT

1. This grievance was filed by nine (9) employees of BCSE. Lorrie Yoho, Mary Oiler, Deborah Hamner, Linda Knight, and Lillian Smith are classified as Accounting Technician II, paygrade 6. Sandra Wallace and Anita Sleime are classified as Office Assistant II, paygrade 5. Valarie McKeebe and Patricia Roque are classified as Secretary I, paygrade 8. Grievants are housed in the Marshall, Ohio, and Lewis County BCSE field offices.

2. DOP conducted a Job Classification Study for BCSE from June, 2000 to August, 2000, at the request of then Bureau Commissioner, Lena Hill, and with the concurrence of the Secretary, DHHR. See G. Ex. 5. The results of that study were presented to Virginia Tucker, Assistant Secretary for Operations, DHHR, by Lowell D. Basford, Assistant Director, Classification and Compensation, DOP, on January 24, 2001. G. Ex. 2.

3. The study recommended a new series of classifications and increased paygrades for some positions within BCSE. According to the study, an AccountingTechnician II would become a Child Support Technician II, paygrade 9; a Secretary I would become a Child Support Paralegal, paygrade 10. The Office Assistant II is not mentioned in the study.

4. This study was merely a recommendation, and BCSE was in no way required to implement it. See G. Exs. 2, 3.

5. Due to budgetary constraints, BCSE has not adopted the new classifications and paygrades.

6. Prior to the aforementioned study, BCSE created a Customer Service Unit, housed in its central office in Charleston. At that time, Mr. Basford evaluated the job duties of the Customer Service Unit employees, and determined that Health and Human Resources Specialist was the proper classification for these positions.

DISCUSSION

In non-disciplinary matters, Grievants must prove all the allegations constituting their grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievants allege their paygrades are discriminatory when compared to the paygrades of the employees in the Customer Service Unit. Grievants are not seeking reclassification. DHHR and DOP deny they have discriminated against Grievants in any way.

W. Va. 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." In order to establish a claim of discrimination, an employee must establish a prima facie case ofdiscrimination by a preponderance of the evidence. In order to meet this burden, Grievants must show:

(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 Grievants and/or the other employee(s) and were not agreed to by Grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In the present case, Grievants put forth no evidence regarding the duties of the Customer Service Unit. Therefore, one cannot conclude that Grievants and the employees of the Customer Service Unit are similarly situated. Furthermore, based on the evidence introduced, it is equally impossible to conclude that the difference in paygrade between the Grievants and the Customer Service Unit is

unrelated to the employees' actual job duties and responsibilities. DHHR maintains that employees in the Customer Service Unit are in paygrade 13 because DOP, after evaluating their duties, determined that the best fit for their positions is the Health and Human Resources Specialist classification. Grievants' claim seems to be based on the fact that DOP's Job Classification Report recommendedthat the paygrades for their classifications be raised. If Grievants had shown that the Customer Service Unit paygrade was raised as a result of the study, perhaps they could have succeeded in making a prima facie case of discrimination, but the evidence shows that the Customer Service Unit paygrade was established before DOP undertook the Job Classification Study, and the Study itself does not recommend a paygrade increase for those positions. See G. Ex. 2. The fact is, no BCSE employee was upgraded as a result of the Study, because BCSE did not have the funds to go through with the recommendations. Therefore, BCSE did not discriminate against Grievants by failing to implement the Study.

Finally, to the extent Grievants are alleging a violation of equal pay for equal work, they have failed to demonstrate they perform duties equal to, or similar to, the duties of the Customer Service Unit employees.

CONCLUSIONS OF LAW

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

2. W. Va. 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.”

3. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievants must show: (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 Grievants and/or the other employee(s) and were not agreed to by Grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

4. Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

5. Grievants have failed to establish they are similarly situated to, or that their duties are equal or similar to, the Customer Service Unit. Therefore, Grievants have failed to establish a prima facie case of discrimination.

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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MARY JO SWARTZ

Administrative Law Judge

Dated: January 31, 2002

Footnote: 1

Grievants are Sandra Wallace, Valarie McKeebe, Lorrie Yoho, Anita Sleime, Mary Oiler, Deborah Hamner, Linda Knight, Patricia Roque, and Lillian Smith.

Footnote: 2

The grievances of Wallace, McKeebe, Yoho, and Sleime were originally joined with a grievance filed by several legal assistants, styled Delauder, et al. v. W. Va. Dept. of Health and Human Resources, Docket No. 01-HHR-152. By Order dated November 5, 2001, the Grievance Board severed these four Grievants from Delauder, and also granted a request by Mary Oiler, Deborah Hamner, and Linda Knight to join the Wallace grievance at level four. By Orders dated November 29, 2001 and December 3, 2001, the Grievance Board granted the requests of Patricia Roque and Lillian Smith to join also.

Footnote: 3

Mr. Blevins assumed responsibility for this case on January 4, 2002, in substitution for former Assistant Attorney General Anthony D. Eates, II, Esq.