LARRY KINCAID, et al.,

Grievants (See footnote 1) **,**

v.

DOCKET NO. 01-HHR-246

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES and WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants are all classified as Social Service Supervisors, and all filed similar grievances on or about January 16, 2001, against their employer, the West Virginia Department of Health and Human Resources/Bureau for Children and Families ("DHHR"). They allege that, (1) protective service workers assigned to adult protective services are to receive a 3% pay increase that supervisors are not to receive; and (2) some supervisors that were classified in the same pay grade during the pay equalization and reclassification that took place during September 1999, have again been upgraded to a higher pay grade during June of 2000 in violation of equal pay for equal work. As relief, Grievants request a reallocation to the protective service classification and an upgrade from pay grade 14 to 15, and/or an increase similar to other supervisors who supervise workers receiving a 3%incentive pay. The grievances were denied at levels one and two due to lack of authority to grant the relief requested. The matters were appealed to, and consolidated at, level three, and the West Virginia Division of Personnel ("DOP") was joined as an indispensable party, after which a hearing was held before Grievance Evaluator Robert P. Rodak on April 26, 2001. The grievance was denied by Frederick Boothe, Commissioner of the Bureau of Children and Families, on May 3, 2001.

Thereafter, Grievants appealed to level four on or about May 9, 2001, and following several continuances for good cause, this matter came on for hearing at the Grievance Board's Charleston, West Virginia, office on May 23, 2002. Grievants Kincaid, Bennett, Ice, Elliot, and MacPhail were represented by Arianna Kincaid, Esq., and Grievants Hudnall and Woodford were represented by Kevin Church. DHHR was represented by Jon Blevins, Esq., Assistant Attorney General, and DOP was represented by Robert Williams, Esq., Assistant Attorney General. The parties declined the option of submitting proposed findings of fact and conclusions of law, and this matter became mature for decision on May 23, 2002.

SUMMARY OF EVIDENCE

LIII Grievants' Exhibits

Ex. 1 -

December 31, 1998 letter from BG (Ret) Robert L. Stephens, Jr. to Calvin Robbins.

Ex. 2 -

Classification Specifications for Children Services Supervisor; Child Welfare Supervisor; and Child Protective Services Supervisor.

Ex. 3 -

September 22, 1999 memorandum from Michael F. McCabe to DHHR Administrative Staff re: Pay Grade Revisions - Health and Human Services Occupational Group, with attachments.

Ex. 4 -

January 16, 2001 memorandum from Mary Shrader to John Hammer, Louis Palma, Margaret Waybright, and Thomas Gunnoe re: Supervisors of Adult Protective Services Workers.

Ex. 5 -

Undated handwritten list of supervisors.

Ex. 6 -

Grievance Form of Larry Kincaid, level one and two responses.Ex. 7 -
Employee Performance Appraisal of Larry Kincaid, dated September 21, 2000.

Ex. 8 -

December 27, 2000 letter from Joe E. Smith to Virginia Tucker.

LIII DOP Exhibit

Ex. 1 -

Position Description Forms for Carla Jean Harper, Lenese Lynn Hickman, Lisa Marie McMullen, and Linda Louise Dorsey.

LIV Grievants' Exhibits

Ex. 1 -

December 5, 2000 memorandum from Virginia Tucker to Joe E. Smith re: Protective Service Worker Classification Pay Differential.

LIV DHHR Exhibits

Ex. 1 -

November 13, 1996 memorandum from Calvin Robbins to BG (Ret) Robert L. Stephens, Jr., re: New Classification and Pay Differential - Child Protective Services, with attachments.

Testimony

Grievants all testified in their own behalf, and presented the testimony of Michael McCabe, Allen Pyles, Larry Kelly, Margaret Waybright, Virginia Tucker, and Lowell D. Basford. Respondents presented the testimony of Margaret Waybright.

FINDINGS OF FACT

After a careful review of the testimony and evidence of record in this matter, I find the following facts have been proven by a preponderance of the evidence.

1. Grievants are employed by DHHR in various DHHR offices throughout West Virginia.

2. Grievants are all classified as Social Service Supervisors, and are compensated at pay grade 14.

3. As Social Service Supervisors, Grievants supervise employees classified as Protective Service Workers, Social Service Workers, and other staff providing services in the area of adult services and other social services, such as day care. In general, AdultProtective Service Workers do not constitute a majority of the staff under Grievants' supervision.

4. In December 1996, the State Personnel Board approved a request from DHHR to establish a new classification of Children Services Supervisor (presently titled Child Protective Service Supervisor) as a separate classification from the more generic Social Service Supervisor classification. The classification was established for the allocation of positions providing supervision to Protective Service Workers and Protective Service Worker Trainees who provided *child protective services* to clients.

5. The State Personnel Board action of December 1996 also approved DHHR's request to grant a three percent (3%) salary differential for Child Protective Service Workers who had three or more years of experience as a Child Protective Service Worker.

6. Incumbent Social Service Supervisors who supervised Child Protective Service Workers were reallocated to the newly established classification in January 1997, and were granted an eight percent (8%) salary increase with the reallocation to pay grade 13 (from pay grade 12), or five percent (5%) for the pay grade increase, plus three percent (3%) for the salary differential.

7. The DHHR proposal to the State Personnel Board and corroborating testimony cited a mandate from the State Legislature to address case load and staffing level problems relating to the Child Protective Service Workers. A DHHR study also showed a problem with retention and indicated that a significant number of Child Protective Service Workers were leaving employment after about three years.

8. In October 1999, the State Personnel Board approved pay grade revisions for all job classifications in the health and human services occupational group. This waspart of a plan to upgrade the salary ranges for all job classifications in the state classification and compensation plan. As a result of that action, the Social Service Supervisor was changed from a pay grade 12 to pay grade 14, and the Child Protective Service Supervisor was changed from a pay grade 13 to 14.

9. The assignment of the Social Service Supervisor and Child Protective Service Supervisor to the same pay grade was an oversight, as the Child Protective Service Supervisor should have been upgraded by two pay grades as was the Social Service Supervisor. This oversight was corrected by the State Personnel Board, raising the pay grade to 15. There currently exists a one pay grade differential between the Child Protective Service Supervisor classification and the Social Service Supervisor classification, as was the case when the Child Protective Service Supervisor classification was established.

10. In December 2000, the State Personnel Board approved a special salary differential of three percent (3%) for Adult Protective Service Workers.

11. Although the nature of job duties and responsibilities of supervisors of Adult Protective Service Workers and Child Protective Service Workers are quite similar, they obviously work with different programs and clientele.

12. DHHR has not experienced the same level of retention and recruitment problems among its Adult Protective Service Workers as it has with Child Protective Service Workers.

13. Both “Adult” and “Child” Protective Service Workers, which are working titles, are classified as Protective Service Workers. Child Protective Service Supervisors supervise a majority of Child Protective Service Workers, while Grievants, althoughreferred to as Adult Protective Service Supervisors, supervise an assortment of personnel, the majority of which are not Adult Protective Service Workers.

DISCUSSION

In non-disciplinary matters the 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 it was discriminatory and arbitrary and capricious for DHHR and DOP to award both Child and Adult Protective Service Workers a three percent (3%) salary differential, and Child Protective Services Supervisors an eight percent (8%) salary increase upon a reallocation to a newly established classification at a higher pay grade. Additionally, Grievants allege a new classification should be established for them as Adult Protective Service Supervisors at pay grade 15.

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

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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the employer. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., No. 29066 (W. Va. 2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)). Pursuant to W. Va. Code § 29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or

appeal legislative rules governing the preparation, maintenance and review of a position classification plan for all positions within the classified service based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for, and the same schedule of pay may be equitably applied to, all positions in the same class.

The Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board 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. Moore v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-126 (Aug. 26, 1994). See, Callaghan v. W. Va. Civil Service Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hospital v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

When a grievant attempts to review DOP's interpretation of its own regulations and classification specifications to determine if DOP's decision was arbitrary and capricious or an abuse of discretion, the “entitled to substantial weight” standard applies. Farber v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-052 (July 10, 1995). “There is no question DOP has the authority to establish pay grades within a pay plan.” Stephenson v. W. Va. Bureau of Employment Programs, Docket No. 92-BEP-447 (Aug.12, 1993). An employee who alleges impropriety regarding a reclassification action or challenges the pay grade to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Bennett v. Dept. of Health and Human Resources, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-206 (June 15, 1995); Thibeault v. W. Va. Div. of Rehabilitation Services, Docket No. 94-RS-061 (May 31, 1995); Frame v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR- 140 (Nov. 29, 1994). See O'Connell v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-251 (Oct. 31, 1995).

Assuming that Grievants establish a prima facie case of discrimination by demonstrating they were or are similarly situated to Child Protective Service Supervisors, the analysis under both the

discrimination and arbitrary and capricious arguments are essentially the same: Is the differential treatment afforded Child Protective Service Supervisors rationally related to legitimate business reasons substantiating the disparate actions or treatment?

DHHR and DOP argue that due to a 20% turnover rate within the Child Protective Service Worker area, a mandate by the Legislature via Senate Bill 1007, and specific authority granted to the State Personnel Board by West Virginia Administrative 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, was not arbitrary and capricious, nor was itdiscriminatory. See Pishner v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-478 (May 21, 1998).

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's 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 specific 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 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).

With regard to the Child Protective Service Workers and Supervisors, DHHR and DOP maintain

the decision to award a pay differential to these sub-classifications was not arbitrary or capricious, but based entirely on the fact that DHHR was consistentlyexperiencing 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, DHHR and DOP sought to increase and/or maintain appropriate staffing levels and to recognize the complexity of the Child Protective Service supervisory positions by establishing a new classification for Child Protective Service Supervisors with a revised pay grade. Given these facts, DHHR and DOP have successfully presented a legitimate, nondiscriminatory reason for the salary increase awarded Child Protective Service Supervisors, while not doing the same for Adult Protective Service Supervisors. 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.

With regard to Grievants' claims of discrimination vis-a-vis the Adult Protective Service Workers' three percent (3%) salary increase, Grievants have not established a prima facie case by demonstrating they are similarly situated to the Adult Protective Service Workers. Those employees are classified as Protective Service Workers and work exclusively with adult protective service programs and clients. Grievants are classified as Social Service Supervisors, and while they supervise a number of Adult Protective Service Workers, they also supervise other Social Service Workers and staff not involved with protective services.

CONCLUSIONS OF LAW

1. In non-disciplinary matters the 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 § 29-6-10 authorizes the State Personnel Board to promulgate rules for the implementation and administration of the classified State employees' job classification and pay plans. Frame v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-140 (Nov. 29, 1994). W. Va. Code § 29-6-10 also vests the responsibility for preparing, maintaining, and revising classified State employees' job classification and pay plans in the State Personnel Board.

3. The State Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Moore v. W. Va. Dept. of Health and

Human Resources, Docket No. 94-HHR-126 (Aug. 26, 1994).

4. "[T]he rules promulgated by the Personnel Board 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." Farber v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-052 (July 10, 1995). See, Callaghan v. W. Va. Civil Service Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980).

5. 143 C.S.R. 1-4.01 requires DOP to confer with the "appointing authority" when adopting and implementing a job classification plan for classified State employees, and requires DOP to base its job classification plan upon "an investigation and analysis of the duties and responsibilities of each position." DOP assigns pay grades to class titles so that equity is achieved within a "family" of class titles, as well as within the agency as a whole.

6. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. Pt. 3, W. Va. Dept. of Health v.Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985); Dillon v. Bd. of Educ. of County of Mingo, 171 W. Va. 631, 301 S.E.2d 588 (1983).

7. 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

8. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., No. 29066 (W. Va. 2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

9. Grievants have failed to prove DHHR or DOP acted arbitrary or capriciously in assigning the Child Protective Services Supervisors to pay grade 15. Additionally, Grievants have failed to prove

their duties are as complex as the Child Protective Services Supervisor assigned to a higher pay grade. See, Tomlinson v. W. Va. Dept. of Transp., Docket No. 94-DMV-209 (Oct. 20, 1994); Frame, supra. 10., 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."

11. 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, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his 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 grievant and/or the other employee(s) and were not agreed to by the grievant 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).

12. Once the grievant establishes 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).

13. Grievants have not established they are similarly situated to the Adult Protective Service Workers who received a 3% salary differential, and thus have failed to establish a prima facie case of discrimination. 14. DHHR and DOP did not exceed their statutory authority in the development and implementation of the DHHR job classifications and pay grade plans at issue in this case or the award of a 3% pay differential to Adult Protective Service Workers to the exclusion of Grievants.

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 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 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: June 14, 2002

Footnote: 1

Grievants are Larry Kincaid, Richard F. Ice, Jr., John Woodford, Genevieve Bennett, Joan Hudnall, Kimberly MacPhail, and Doug Elliot.