JANET BISHOP, et al.,

Grievants,

v. **Docket No. 03-HHR-289**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT and DIVISION OF PERSONNEL,

Respondent.

DECISION

Grievants (See footnote 1), employed throughout the state as Child Support Technicians, initiated this grievance on June 9, 2003, alleging entitlement to back pay as a result of implementation of their reclassification. The record does not reflect what proceedings occurred at levels one and two. A level three hearing was conducted on July 21, 2003, and the grievance was denied in a decision dated September 15, 2003. Grievants appealed to level four on September 19, 2003. A hearing was held in Westover, West Virginia, on December 16, 2003. Grievants were represented by Grievant Deborah Hamner; the Department of Health & Human Resources ("DHHR") was represented by B. Allen Campbell, Senior Assistant Attorney General; and the Division of Personnel ("DOP") was represented by Karen O. Thornton, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on January 26,2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed throughout the state of West Virginia by DHHR's Bureau for Child Support Enforcement ("BCSE"). Until September of 2003, they were classified as Accounting Technician IIs.

2. On January 24, 2001, after conducting desk audits and reviews of all positions within BCSE, DOP recommended new classifications and pay grades for several positions. The proposal included the reclassification of Accounting Technicians to Child Support Technicians, and placement of the new positions in a higher pay grade.

3. In May of 2001, the new classification plan proposal was received by newly- appointed Commissioner of BCSE Susan Shelton Perry. In response to DOP's suggestion that the Bureau carefully review the plan and offer suggestions, Commissioner Perry appointed a task team to review the recommendations and their impact upon all BCSE classifications.

4. BCSE submitted a budget for the fiscal year beginning July 1, 2002, which included money to implement all the classification changes recommended by DOP. Due to a severe budget shortfall and resulting budget cuts, DHHR Secretary Paul Nusbaum denied funding for the reclassification proposal.

5. On February 13, 2002, a group of Accounting Technician IIIs filed a grievance requesting that they be reclassified in accordance with the original proposal from DOP. That grievance was granted at level four, where it was concluded that the grievants hadproven entitlement to creation of a new classification in a higher pay grade, as had been recommended in DOP's 2001 proposal. Those grievants were not granted back pay, but the new classification was to take effect as of the date of the decision on April 8, 2003. See Skiles v. Dep't of Health & Human Resources, Docket No. 02-HHR-111 (Apr. 8, 2003).

6. On July 17, 2003, the State Personnel Board approved a new classification plan for BCSE, including reclassification of Grievants from Accounting Technician II to Child Support Technician II in pay grade 9. The reclassification plan also included a pay increase of 5% for each pay grade by which the employees' classification increased. The classification and pay changes took effect September 1, 2003.

7. From early 2001 to September of 2003, DOP had not moved forward with its recommendation to create new classification specifications for the Accounting Technicians, because Secretary Nusbaum had not signed off on the recommendations, nor had a certificate been prepared for the State Personnel Board that HHR had the necessary funds available to implement the classification changes.

8. The estimated cost of granting back pay to Grievants, based upon implementing the

reclassification plan in 2001, would be approximately $600,000.

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. Of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

Grievants' only claim in this grievance is that they are entitled to back pay prior toSeptember 1, 2003, when the reclassification plan was finally implemented. They have asserted two alternative theories for this back pay. First, they allege they are entitled to back pay to January of 2001, when DOP made its initial proposal for reclassification of their positions, because DOP could have moved forward with the plan without DHHR's approval. Second, they allege that they are entitled to back pay to at least April 8, 2003, the date of the Skiles decision.

As in the two prior cases which have dealt with this situation, Respondents contend that DOP did not have the authority to proceed with an extensive reclassification plan without approval from the affected agency, along with certification of funding. However, as was determined in Skiles, supra, and again in Delauder v. Dep't of Health & Human Resources, Docket No. 01-HHR-152 (Jan. 27, 2004), “nothing in the plain language of W. Va. Code § 29-6-10 or DOP's Rules requires the approval of an affected agency's appointing authority before a recommendation that a new classification be created is presented to the State Personnel Board for its approval.” The ALJ further found that DOP's belief that it had to have the appointing authority's approval before going forward with its recommendation that a new classification be created was “based upon a mistaken belief as to the law, and therefore, was arbitrary and capricious.” Skiles, supra.

This Grievance Board adheres to the doctrine of stare decisis (See footnote 2) in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources,Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). See also Belcher v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 94-DOH-341 (Apr. 27, 1995). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides

for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error.

Accordingly, as determined by the administrative law judge in Delauder, supra, "DOP, in this instance, did not have to wait for DHHR's approval of its classification recommendations, nor did it have to have certification that funding was available, before presenting its recommendations for reclassification of BCSE to the State Personnel Board." Because insufficient reasons for overruling these two prior Grievance Board decisions have been presented, the same conclusion must be reached here.

However, the Delauder case differed from Skiles in one important respect, regarding evidence to support the conclusion that DHHR could afford the recommended classification and pay grade changes prior to September of 2003. In denying Grievants back pay prior to September of 2003, the administrative law judge in Delauder stated:

> There is simply no evidence that, had DOP gone ahead and presented its recommendations to the State Personnel Board in 2001 or 2002, as it could have done under the reasoning in Skiles, that the recommendations would have been approved by the State Personnel Board without the requisite funding certification. There is no showing that Secretary Nusbaum wouldhave certified funding was available. Without that certification, it must be concluded that DOP's recommendations would have been denied by the State Personnel Board, and the Grievants would be in the same position as they found themselves prior to the 2003 implementation of the plan. Thus, without evidence to demonstrate otherwise, the undersigned must conclude that, even had DOP presented its recommendations to the State Personnel Board, the result would have been the same, i.e., the recommendations would have been denied due to the lack of funding certification from the appointing authority.

Accordingly, it was concluded in Delauder, supra, that the grievants had failed to meet their burden of proving that it was arbitrary and capricious for Respondents to fail to reclassify them prior to September of 2003. The instant case presents a very similar situation. DHHR's estimated cost of $600,000 to grant Grievants back pay to 2001 has not been refuted. Therefore, the undersigned must also conclude that, even had DOP proceeded with the reclassification plan, it would not have been approved in 2001, due to the lack of funding.

Alternatively, Grievants contend that they are entitled to back pay to the date of the Skiles

decision. Grievants have provided a cost estimate of this projected back pay at approximately $32,000. However, Grievants' reasoning for their entitlement to back pay to the date of the Skiles decision is unclear. It is undisputed that Grievants were not parties to that grievance, and they are in a different classification from those employees. Moreover, the basis for the grievants' victory in that case was that they met their burden of proving that DOP abused its discretion by failing to create the new classifications prior to 2003. It has been held that, within the state classification system, this Grievance Board has jurisdiction to determine whether a classification should have been created that would more closely fit the duties and responsibilities of a grievant. Pridemore v. West Va. Bureau of Employ. Programs, Docket No. 92-BEP-435 (Aug. 17, 1993). Compare AFSCME v. CivilService Comm'n of W.Va., 380 S.E.2d 43 (W.Va. 1989). The standard under which such a case should be decided is whether the Division of Personnel abused its broad discretion in not creating an additional classification. Nida v. W. Va. Dep't of Health and Human Resources, Docket No. 93-HHR-240 (Aug. 20, 1993). This analysis was reaffirmed in Travis, et al., v. West Virginia Department of Health and Human Resources, Docket No. 95-HHR-359 (March 24, 1997), Blake, et al., v. West Virginia Department of Health and Human Resources, Docket No. 95-HHR-043 (April 30, 1996), and Johnston v. West Virginia Department of Health and Human Resources, Docket No. 94-HHR-206 (June 15, 1995).

An agency which has acted in an arbitrary and capricious manner has abused its discretion. "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). "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 Resources, 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, 474 S.E.2d 534 (1996).

In the instant case, Grievants have provided no comparison of their actual duties to those of the classification of Accounting Technician II prior to September 1, 2003, which would support such a determination. Accordingly, they have failed to prove that Respondent's failure to reclassify them previously was arbitrary and capricious, and their request for back pay cannot be granted on the evidence of record.

Conclusions of Law

1. This Grievance Board has jurisdiction to determine whether a classification should have been created that would more closely fit the duties and responsibilities of a grievant. Pridemore v. West Va. Bureau of Employ. Programs, Docket No. 92-BEP-435 (Aug. 17, 1993). Compare AFSCME v. Civil Service Comm'n of W.Va., 380 S.E.2d 43 (W.Va. 1989). The standard under which such a case should be decided is whether the Division of Personnel abused its broad discretion in not creating an additional classification. Nida v. W. Va. Dep't of Health and Human Resources, Docket No. 93-HHR-240 (Aug. 20, 1993).

2. An action is arbitrary and capricious if the agency making the decision 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 is 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). 3. Neither W. Va. Code § 29-6-10 nor DOP's Rules applicable to the development and implementation of its classification and compensation plan require the approval of an affected agency before DOP can move forward with implementation of a new classification. DOP is only required to consult with the affected agency. Skiles v. W. Va. Dept. of Health and Human Res., Docket No. 02-HHR-111 (Apr. 8, 2003).

4. Grievants have failed to prove that it was arbitrary and capricious for Respondents not to reclassify them between 2001 and September 1, 2003.

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 grievanceoccurred. 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.

_____

DENISE M. SPATAFORE

Administrative Law Judge

Dated: February 13, 2004

Footnote: 1

Grievants are Janet Bishop, Deborah Hamner, Lillian Smith, Linda Knight, Mary Oiler, Hazel Banks, Kimberly Thomas, Pamela McCloud, Jennifer Frye, Nancy Cox, Gay Weaver, Walker Evans, III, Marsha Evans, Margaret Sue Davis, Lorrie Yoho, William Patrick McGhee, Diana Jenkins, Charles Stanley, Marla Jennings, Barbara Holbert, Gretchen Derfler, George Altizer, Dotty Carter, and Drema Johnson.

Footnote: 2

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dept. of Admin. V. W. Va. Dept. of Health & Human Resources, 451 S.E.2d 768, 771 (W. Va. 1994).