GARRETT JACOBS and

DAVID WELKER,

Grievants,

v. **DOCKET NO. 03-HHR-342**

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants Garret Jacobs and David Welker filed separate but identical grievances against their employer, Department of Health and Human Resources (DHHR) on May 23, 2003, stating:

> On May 9, 2003, I learned that the Division of Personnel had, without notice to me or my employer, upgraded the Attorney Supervisor classification from Paygrade 22 to Paygrade 24. In my position, HHR Office Director III, I supervise an Attorney Supervisor. The job description for my position contains the same education and experience requirements as the Attorney Supervisor specifically 7 years of full-time employment in the practice of law, two years of which must be in a supervisory capacity. Unlike the Attorney Supervisor, my position is additionally responsible for overseeing and managing several major program components that impact the Bureau state- wide.

Grievants stated the relief sought as:

> For a new position to be created within the Civil Service Classification of "Deputy Commissioner" for the BCSE, with a Paygrade of 26. This is based in part upon the job description contained in the Civil Service Classification of "Director, Legal Division" with a Paygrade of 26 because, in addition to those duties, I am responsible for supervising several other major program functions. With the new classification, there would be a 15% pay differential. Consequently, I would expect a 15% pay increase, and request retroactive pay to the time of the filing of this grievance.

The Division of Personnel (DOP) was joined as an indispensable party. Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on January 26,

2004. Grievants represented themselves, DHHR was represented by Allen Campbell and DOP was represented by Karen Thornton. This matter became mature for decision on February 26, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant Garrett Jacobs is an attorney employed by the DHHR, Bureau for Child Support Enforcement (BCSE), with the functional titles of Deputy Commissioner and General Counsel. He is classified as an HHR Office Director 3, pay grade 22.

2. In addition to his duties as General Counsel of BCSE, Mr. Jacobs supervises the Central Legal Unit, which consists of an Attorney Supervisor and two other attorneys. He also oversees the Central Financial Adjustment Unit, Customer Service Unit, Central Registry Unit and the Policy and Training Unit. He reports to the Commissioner for the BCSE.

3. Grievant David Welker is an attorney employed by the DHHR, BCSE, with the functional title of Deputy Commissioner. He is classified as an HHR Office Director 3.

4. Mr. Welker is responsible for the "field attorneys" for BCSE, including the Child Advocate Attorneys and the Attorney Supervisors who supervise them. He also supervises the Director of Field Operations, who in turn supervises all of the non-attorneypersonnel in the field, and he supervises the Chief Technical Officer, who is in charge of all computer operations, programming and training. He prepares legislation and is a contact person when legislators need information about the BCSE.

5. Mr. Welker also carries his own caseload, and in that respect is a "working" supervisor of the field attorneys.

6. Both Mr. Jacobs and Mr. Welker direct the work products of their subordinate attorneys, and are responsible for the same duties as well as their broader, programmatic duties.

7. Grievant Jacobs supervises, directly and indirectly, a total of about 80 employees, four of whom are also attorneys. Mr. Welker has approximately 270 subordinate employees, 29 of whom are attorneys.

8. Grievants' positions overlap somewhat, and each cover for the other when they are not available due to hearings, meetings or leave.

9. The Classification Specification for Health and Human Resources Office Director 3 is as follows:

HEALTH AND HUMAN RESOURCES OFFICE DIRECTOR 3

Nature of Work

Under general direction, performs complex administrative and professional work at the advanced level with responsibility for a large complex office in the Department of Health and Human Resources. Responsibilities include formulating plans, programs, systems and procedures for a variety of highly complex programs; directing the work of a large staff of expert level professional and administrative employees; overseeing the preparation and execution of large and complex budgets; representing the state and department to national, state and local agencies and advocacy groups on important issues affecting large client populations; serves as a key congressional and legislative liaison for departmental programs. Performs related work as required.

Distinguishing Characteristics

Positions representative of the kind and level of work intended for this class include the Office of Behavioral Health Services, Office of Social Services,Office of Child Advocacy, and other organizational units with similar size, scope or complexity. Positions typically assigned to this class involve large, complex budges [sic] and staff, and programs of a wide variety and complexity relative to positions typically assigned to the Health and Human Resources Office Director 2 class.

Examples of Work Directs the work of managers, professional, technical and clerical staff; makes assignments, conducts staff meetings, review and approves plans of operation. Develops, plans, evaluates and implements complex statewide health and human services program through managers and program administrators. Directs the development of office standards, policies and procedures. Oversees the compliance of office programs with state and federal rules, policies and standards. Directs the preparation and execution of the office budget; plans and presents budget requests as required. Serves in a primary liaison role with national, state and local agencies, advocacy groups, educational institutions, clients and service providers. Oversees the monitoring and evaluation of program administra tion and the delivery of services to clients. Provides technical consultation and policy interpretation to subordinates, supervisor, public officials and advocacy groups. Oversees the preparation of periodic and special reports on the status of agency programs.

Knowledge, Skills and Abilities Knowledge of the theories, principles and techniques of the area of assignment. Knowledge of federal and state statutes, regulations and program standards in the area of assignment. Knowledge of state and federal fiscal regulation, policies and procedures. Knowledge of the principles of management. Ability to develop, plan, coordinate and evaluate statewide health and human services programs in the area of assignment. Ability to work effectively with coworkers, the public, advocacy groups, federal and state agencies in the area of assignment. Ability to direct the preparation and execution of large and complex office budgets. Ability to establish program standards and control, monitor and evaluate program administration and the delivery of services to clients. Ability to provide technical consultation and policy interpretation in the area of assignment. Ability to communicate effectively, orally and in writing. Ability to supervise the work of others.

Minimum Qualifications Training: Master's degree from an accredited college or university in the area of assignment. **Substitution:** One year full-time or equivalent part-time paid experience as described below may substitute for the Master's degree. **Experience:** Seven years of

full-time or equivalent part-time paid professional experience in the area of assignment, four years of which must have been in a program administration capacity. **Substitution:** Post-graduate training in the area of assignment may substitute through an established formula for the non-supervisory experience.

AREAS OF ASSIGNMENT:

Behavioral Health Community Health Emergency Medical Services Environmental Health General Administration Health Health Facilities Licensure and Certification Health Planning Health Promotion Investigation Legal Rural Health Social Services Volunteer Services

10. Lowell D. Basford, DOP's assistant director for classification and compensation, reviewed Grievant's positions and determined that they were properly classified.

DISCUSSION

Since this grievance does not challenge a disciplinary action, Grievants bear the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work. Their claim must be proven by a preponderance of the evidence, which means they must provide enough evidence for the undersignedAdministrative Law Judge to decide that their claims are more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievants contend that a new classification should be created to encompass their specific jobs, and argue that the facts that they have lower pay grades than their supervisees, are required to be members of the bar and that they direct the work of attorneys distinguishes their positions from those of other Deputy Commissioners within the DHHR. Respondents maintain that Grievants are properly classified.

While not requesting to be reclassified to an existing classification (See footnote 1), Grievants argue that their jobs are similar to those of a Director, Legal Division, a classification in pay grade 26, as justification for placing the new classification they want to be created in pay grade 26. The Classification Specification for Director, Legal Division is as follows:

DIRECTOR, LEGAL DIVISION

Nature of Work Under administrative direction, performs complex legal work in the direction of the Legal Division for the agency. Responsible for planning, organizing and directing the activities of the division which will administer and formulate legal policy for the agency. May serve as the agency head's chief legal counsel advising of current status of agency programs and making recommendations for improvements. May represent the agency before public, legislative and executive offices, and court

hearings within limitations of the Code of West Virginia. Performs related work as required.

Examples of Work Supervises and organizes the legal and support staff within the Legal Division of the agency. Directs the preparation of cases for review by administrative law judges, the Appeal Board or Board of Review, personnel grievances, and courts of law. Directs the coordination of legal functions within the agency. Develops and recommends legal policies, statutory changes, and regulatory changes.Reviews and evaluates the work of staff attorneys and support staff. Handle matters personally and through correspondence with other attorneys, employers, and claimants relating to agency legal matters. Directs, coordinates or assists in the preparation of legislation and regulations; may attend legislative sessions and hearings. Renders opinions to the agency head on various legal issues. Serves as principal liaison between the agency and the Office of the Attorney General. Addresses local, state and national associations, civic groups and business and trade associations; may attend program council sessions and hearings. Participates in seminars and public forums regarding state law, regulations, procedure and changes. Prepares the unit's budget request and allocates allotted staff and resources for the most efficient operation of the unit. Administers mediation program of West Virginia's Workers' Compensation law.

Knowledge, Skills and Abilities Knowledge of state and federal laws, regulations and policies as they relate to the operation of the agency. Knowledge of current legal issues concerning the agency including the opinions of the Attorney General and state and federal courts. Knowledge of legislative procedure, bill drafting and the implementation of legislation. Ability to establish and maintain effective working relation ships with other agencies, the public, and federal government. Ability to communicate effectively, both orally and in writing. Ability to supervise and direct the work of subordinate attorneys and other staff members in the conduct of legal affairs. Ability to effectively coordinate staff functions in the provision of competent legal assistance to the agency.

Minimum Qualifications Training: Admission to practice law in the State of West Virginia.

Experience: Nine years of full-time or equivalent part-time paid experience in the practice of law, three years of which must have been in an administrative or supervisory capacity. **Substitution:** One year of full-time or equivalent part-time paid employment as an attorney with the agency assigned shall be considered the equivalent of two years experience, excluding the administrative or supervisory requirement.

Grievants attempt to distinguish themselves from the other Deputy Commissioners of DHHR, also classified as Office Director 3's, by pointing out that their positions require them to be attorneys. Grievants did not address the fact that their positions are dissimilar from each other. This divergence of commonalities creates a particular dependence on Grievants' assertion that only attorneys may direct the work product of other attorneys, hence the requirement that they be members of the bar. Grievants argue this requirement is created by the West Virginia Rules of Professional Conduct (RPC). The RPC contain no such injunction, except that Rule 5.4(d) prohibits practice in a "a professional corporation or association authorized to practice law for a profit" if "a non-lawyer has the right to direct or control the professional judgment of a lawyer." Rule 2.1 does direct that, "In

representing a client, a lawyer shall exercise independent professional judgment and render candid advice," but no mention is made of whether the independence may be influenced by either a lawyer or non-lawyer.

Still, there is no dispute that the positions occupied by Grievants require membership in the State Bar, as this was clearly listed in the job postings for the positions. Grievants' exhibits 2 and 3. However, Grievants presented no authority to support their position that this requirement, of itself, justified an entirely new classification and a two-pay grade jump. The Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. *See*, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 398, 431 S.E.2d 681, 687 (1993). Contrary to Grievants' opinion, DOP finds that their current classification is the best fit, and creation of a new classification is unjustified by the circumstances. The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Personnel job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. Franklin v. W. Va. Dep't of Health and Human Resources/Sharpe Hosp. and Div. of Personnel, Docket No. 02-HHR-316 (Feb. 18, 2003); Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of the Work" section of a classification specification is its most critical section. *See generally*, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989).

In this case, the "Nature of Work" section of the HHR Office Director 3 classification specification is a near-perfect match for Grievants' self-described duties and responsibilities. It should also be noted that the "areas of assignment" section explicitly sets out "Legal" as a programmatic area to be covered by these positions. The Director, Legal Division, on the other hand, encompasses a narrower field of programmatic responsibility, but is higher up on the organizational ladder. As Mr. Basford testified, Grievants oversee a bureau within an agency, the predominate legal aspect of whichprovides services to clients (See footnote 2), but the Director, Legal Division, is in charge of an entire agency's legal division, and there is no more than one such position per agency.

It is within the jurisdiction of the Grievance Board to determine whether a classification should be created that would more closely fit the duties and responsibilities of a grievant. Pridemore v. W. Va. Bureau of Employment Programs, Docket No. 92-BEP- 435 (Aug. 17, 1993). The standard under which such a case should be decided is whether the DOP 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). Skiles v. Dep't of Health and Human Resources/Bureau for Child Support Enforcement and Div. of Personnel, Docket No. 02-HHR-111 (Apr. 8, 2003).

Abuse of discretion is characterized by decisions that are arbitrary and capricious. "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." 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). Grievants did not sustain their burden of proving DOP abused its discretion by arbitrarily deciding a new classification should not be created.

Grievants argued that the fact that Attorney Supervisors under their supervision are in higher pay grades than they themselves are, is evidence that they should be in aclassification with a higher pay grade. Again, they cited no authority to support this contention, and such a pay grade disparity is not contrary to law. Mr. Basford testified it was not uncommon, and represents the solution to a recruitment and retention problem within the legal series that does not exist within the HHR Office Director series. He stated that greater responsibility does not automatically require a higher pay grade under the DOP's classification and compensation plan. This problem justifies paying these classes more than their supervisors. “It is well established that 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* Blankenship, *supra*; Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981). Additionally, where the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22- 494 (June 28, 1996). DOP's unrebutted interpretation, therefore, is entitled to such weight as

to preponderate over Grievants' personal, inexpert opinions of the matter.

Grievants have failed meet their burden of proving they are misclassified. The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance does not challenge a disciplinary action, Grievants bear the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work. Their claim must be proven by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claims are more likely valid thannot. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Boylan v. W. Va. Dep't of Transp., Docket No. 94-DOH-211 (Oct. 25, 1994); Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. Id.

2. Personnel job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. Franklin v. W. Va. Dep't of Health and Human Resources/Sharpe Hosp. and Div. of Personnel, Docket No. 02-HHR-316 (Feb. 18, 2003); Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of the Work" section of a classification specification is its most critical section. *See generally*, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989).

3. The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Importantly, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. *See*, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 398, 431 S.E.2d 681, 687 (1993).

4. “It is within the jurisdiction of the Grievance Board to determine whether a classification should have been created that would more closely fit the duties and responsibilities of a grievant.

Pridemore v. W. Va. Bureau of Employment Programs, Docket No. 92-BEP-435 (Aug. 17, 1993). *Compare* AFSCME v. Civil Serv. 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)." Skiles v. Dep't of Health and Human Resources/Bureau for Child Support Enforcement and Division of Personnel, Docket No. 02-HHR-111 (Apr. 8, 2003). *See also* Travis, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-359 (March 24, 1997); Blake, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-043 (April 30, 1996); Johnston v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-206 (June 15, 1995).

5. "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).

6. “It is well established that 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* W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981). Additionally, where theplain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. *See* Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Thus, the Division of Personnel's interpretation of its rules is entitled to deference, unless it is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. Dyer, supra.

For the foregoing reasons, this grievance is hereby **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, and 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.

Date: March 9, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievants stated at the level four hearing that the Director, Legal Division classification was only being used for comparison purposes, but in the Proposed Findings of Fact and Conclusions of Law, appear to be advocating this classification represents a "best fit" for their duties, rather than a hypothetical new classification.

Footnote: 2

Mr. Jacob's General Counsel duties are a limited exception to the overall function of the legal mission of BCSE, and certainly are not predominate over his other duties.