KEVIN SANSALONE,

Grievant,

v. Docket No. 04-HHR-220

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU FOR CHILD SUPPORT ENFORCEMENT and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Kevin Sansalone ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as a Child Advocate Attorney for the Bureau for Child Support Enforcement ("BCSE"), filed a level one grievance on August 4, 2003, in which he alleged

On July 30, 2003, I learned that the Division of Personnel had previously reviewed the civil service classifications for attorneys at the request of the Bureau of Employment Programs. As a result, the Division of Personnel advanced the pay grade of the classifications Attorney 1(9505); Attorney 2(9506); Attorney 3(9507) and Attorney Supervisor (9504). It is my understanding that each classification was advanced two pay grades. . . I am further informed that no prior notification of the advancements was provided to the Commissioner for the Bureau of child Support Enforcement and she was not provided with an opportunity to request the advancement of the classification Child Advocate Attorney (9508). The position of Child Advocate Attorney has historically been two pay grades higher than that of an Attorney 2(9506). . . The reclassification of the positions, Attorney 1, 2, 3 and Attorney Supervisor without notice to the BCSE and without a corresponding reclassification of the position of Child Advocate Attorney constitutes a denial of due process and equal protection of the law; has resulted in inequality and unfairness in the application of the Classification and Compensation Plan; and violates the stated purpose of said plan.

For relief, Grievant requested reallocation of the position of Child Advocate Attorney from pay grade 21 to at least pay grade 23, with a corresponding pay increase of at least 10%, with back pay to the date the grievance was filed. The relief was amended uponappeal to level four

to include additional compensation for work assigned in Barbour County. The grievance was denied at all lower levels, and appeal to level four was made on June 7, 2004. A hearing was conducted in the Grievance Board's Westover office on August 27, 2004, to supplement the level three record. Grievant appeared pro se, DHHR was represented by Landon R. Brown, Senior Assistant Attorney General, and the Division of Personnel ("DOP) was represented by Lowell D. Basford, Assistant Director. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by Grievant and DHHR on or before September 20, 2004.

The essential facts of this matter are undisputed, and may be set forth as follows.

Findings of Fact

1. Grievant has been employed by DHHR as a Child Advocate Attorney by the BCSE since October 1986.

2. Grievant served Marion and Taylor Counties from 1986 until 1994, when the service region was revised pursuant to an Order issued by the U.S. District Court for the Southern District of West Virginia in the matter of Brinkley v. Hill, Civil Action No. 88-1502. In this Order the Court determined that to achieve a more equitable distribution of caseloads among Child Advocates, an immediate adjustment was necessary "until a more reasonable configuration is developed by the parties or prescribed by the legislature and approved by the Court . . . ." As a result of this Order the twenty service regions were reconfigured into ten regions. Region 9 includes Barbour, Doddridge, Harrison, Marion, Monongalia, Preston and Taylor counties. A fourth Attorney was recommended for Region 9, but was never provided. Upon implementation of the revised region, Grievant was additionally assigned to Barbour County, for which he has received no additional salary. 3. In 2002 the Bureau for Employment Programs ("BEP"), acting in response to recruitment and retention problems in the Attorney classification, submitted a proposal to DOP to revise the pay plan for these classifications and to offer a Special Implementation of the revised plan to grant salary advancements to employees in those classifications. DHHR Secretary Paul Nusbaum did not object, and effective November 2002, the State Personnel Board approved two-step pay grade increases for the Attorney series and the Special Implementation for BEP Attorneys was granted.

4. BCSE Commissioner Susan Perry was not notified of the BEP proposal submitted to

DOP prior to its approval.

5. Child Advocate Attorney is a classified-exempt position, compensated at pay grade 21. DOP pay grades for the Attorney classification series are presently: Attorney 1 - pay grade 19; Attorney 2 - pay grade 20; Attorney 3 - pay grade 22; and Supervising Attorney - pay grade 24.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va.Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met its burden. Id.

Grievant argues that he has been permanently assigned Barbour County in violation of W. Va. Code § 48-19-102(a), which provides in part:

(a) The bureau for child support enforcement shall employ twenty-one employees in the position of bureau for child support enforcement attorney, and the offices of the bureau for child support enforcement attorneys shall be distributed geographically so as to provide an office for each of the following areas of the state:

(16) The counties of Marion and Taylor . . .

(18) The counties of Barbour, Randolph and Tucker

Specifically, Grievant argues that the use of the word “shall” in this section establishes the legislative designations of county assignments are mandatory. Grievant further asserts that since the dismissal and vacation of the District Court's Orders in Brinkley on October 15, 1997, the Commissioner for BCSE lacked any authority to permanently assign him to fill the position in Barbour County. Grievant opines that Section 102 provides a framework within which to organize the work for attorneys and for directing and administering their daily tasks,

and that the Commissioner must work within the confines of said framework. He concludes that the violation of the statutory assignment entitles him to reasonable compensation for the work he performed in Barbour County from 1997 through the present.

Grievant also argues that the Commissioner of BCSE was entitled to notice regarding BEP's classification and compensation proposal, and that DOP's failure to provide said notice denied him due process and equal protection under the law. Grievantconcludes that the subsequent approval of the proposal and plan of special implementation, which did not apply to BCSE Attorneys, has resulted in inequality and unfairness in the application of the classification and compensation plan, and violates its stated purpose. He concludes that he is entitled to equal pay for equal work.

Respondents argue that Child Advocate Attorney is a classified exempt position, and is not subject to the compensation plan established by DOP's Administrative Rule 5.4. (See footnote 1) Respondents argue that Grievant is properly compensated as provided by W. Va. Code § 48-19-105 which states, "[t]he salary of a bureau for child support enforcement attorney shall be not less than thirty-five thousand dollars per year, and shall be fixed by the commissioner, who shall take into consideration ability, performance of duty and experience." Respondents deny any wrongdoing relating to the BEP proposal, noting that as the appointing authority, DHHR Secretary Paul Nusbaum did not object to the proposal, nor did he request a special implementation for Child Advocate Attorneys.

Respondents also assert that the redistricting of the Child Advocate Regional Offices was originally completed in compliance with the Federal Court Order, but continues, to maintain a more equitable distribution of caseloads and agency resources. Respondents argue that the realignment is permissible under the provisions of W. Va. Code § 48-18-103(a), which states, "[t]he commissioner shall organize the work of the bureau in such offices or other organizational units as he or she may determine to be necessary for effective and efficient operation." Respondents suggest that Grievant's strictinterpretation of Section 102 was never intended by the Legislature, but rather, it was only intended to be a framework to ensure that all areas of the state were served. Respondents conclude that a strict application of Section 102 would severely hamper the Commissioner's abilities to administer the agency's directive.

Grievant mistakenly perceives Commissioner Perry to be the appointing authority for

BCSE. The Grievance Board has previously determined that "[t]he Secretary of the DHHR is the Appointing Authority for all agencies, bureaus and divisions of the DHHR, unless he has specifically delegated that authority. He has not delegated that authority to the Commissioner for the Bureau of Child Support Enforcement." Bentley v. Dep't of Health & Human Res./Div. of Personnel, Docket No. 03-HHR-251 (Apr. 1, 2004). (See footnote 2) Secretary Nusbaum was aware of BEP's compensation/classification proposal and did not request that the BCSE Child Advocate Attorneys be included. Of course, Commissioner Perry may discuss forwarding such a proposal with the Secretary at any time. Grievant has failed to prove any violation of statute, rule, policy, or regulation regarding this issue.

A strict application of W. Va. Code § 48-19-102(a) would support Grievant's claim that he had improperly been assigned Barbour County. The criteria considered by the Legislature when determining the geographic divisions for the BCSE are unknown. However, the Brinkley case demonstrated that the statutory areas produced inequitable case loads for the Attorneys. The Legislature has not taken any action pursuant to the redistribution brought about as a result of Brinkley, and DHHR has taken no action to returnto the statutory scheme since the dismissal of Brinkley. Commissioner Perry and Secretary Nusbaum apparently believe the present configuration is a more efficient use of the agency's resources. Such action is permissible under the general mandate that the agency function efficiently in the performance of its mission.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. W. Va. Code § 48-19-105 provides "[t]he salary of a bureau for child support enforcement attorney shall be not less than thirty-five thousand dollars per year, and shall be fixed by the commissioner, who shall take into consideration ability, performance of duty and experience."

3. W. Va. Code § 48-18-103(a), which states, "[t]he commissioner shall organize the work of the bureau in such offices or other organizational units as he or she may determine to be

necessary for effective and efficient operation."

4. Grievant has failed to prove by a preponderance of the evidence that DHHR and/or DOP acted improperly when processing a compensation petition filed by another DHHR agency, or by redistricting the Child Advocate offices to ensure a more equitable caseload.

Accordingly, the 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.

DATE: SEPTEMBER 28, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Section 5 of the Administrative Rule states, "[p]ursuant to the provisions of the W.Va. Code §29-6-10(2), the following salary regulations in this section apply to classified employees."

Footnote: 2

²This holding applies to classified exempt employees as well as the classified employees in Bentley.