MARY WURTH, et al.,

Grievants,

v. **Docket No. 05-HHR-179**

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

Respondents.

DECISION

Grievants, employed by the Department of Health & Human Resources ("DHHR") as Economic Service Workers ("ESW") at the Northern Customer Service Center in Fairmont, West Virginia, initiated this grievance on April 18, 2005. They allege that DHHR has discriminated against them by continuing to require them to work on West Virginia Works ("WVW") cases, which duties were removed from ESWs who work in county offices, by virtue of the Grievance Board decision in Bailey v. Department of Health and Human Resources, Docket No. 03-HHR-167D (June 30, 2004). They seek to have these duties removed from them, compensation for the time they performed them, and reclassification.[1]

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[1]Grievants presented no evidence at either hearing regarding what classification they seek, so this issue will not be addressed further.

The grievance was denied at level one on April 19, 2005, and at level two on April 29, 2005. A level three hearing was held on May 9, 2005, followed by a decision which denied the grievance, dated May 18, 2005. Grievants appealed to level four on May 24, 2005. A hearing was held in Westover, West Virginia, on August 15, 2005. Grievants represented themselves, DHHR was represented by B. Allen Campbell, Senior Assistant Attorney General, and the Division of Personnel ("DOP") was represented by Lowell D. Basford, Assistant Director. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 20, 2005.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed as ESWs in the Northern Customer Service Center ("CSC"). There are two CSCs in the state, one northern and one southern. These CSCs were created to help alleviate some of the workload for county office employees. Clients can call or fax the CSC to report any changes in circumstances that could affect their benefits, such as a change in income or address, or to get information. The ESWs at the CSC make these changes in the computer system, answer inquiries, and process paperwork.

2. ESWs assigned to county offices are assigned a caseload of approximately 450 cases each and are responsible for meeting with new clients, making eligibility determinations, and maintaining the case files. Information which cannot be placed in the computer system is forwarded by the workers at the CSC to the ESW assigned to each

particular case at the county office. Changes recorded in the computer system are accessible to the county ESW assigned to each case.

3. Bailey, supra, was a default remedy case where the grievants, who were employed as county office ESWs, complained that by virtue of having been assigned "child only" WVW cases[2], their caseload had significantly increased, impairing their ability to effectively perform their duties. The unrebutted evidence in that case was that the county ESWs "were overworked even before the addition of the child only cases" and the grievants could no longer "perform to expectations and provide adequate customer service." Accordingly, the administrative law judge ordered that the child only cases be returned to Family Support Specialists, to whom they had originally been assigned.

4. Grievants do not carry a caseload of specific cases, but record changes and answer questions for various clients. ESWs assigned to the CSCs must have knowledge of eligibility requirements, available benefits, and programs and policies, which is required of all ESWs. After Grievants record changes in the system, the case and client remain the responsibility of the county ESW to whom it is assigned.

5. Special training has been given to DHHR employees who regularly work with and process WVW cases. Grievants have been given no specific training on WVW, so they must sometimes refer questions about these cases to their supervisors or other employees who have more experience in the area.

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[2]These cases involve a child who receives a cash assistance check, but no adult in the household is included in the assistance.

6. WVW cases are a very small portion of the total cases with which Grievants work on a daily basis. The CSC answers approximately 5000 phone calls per month, dealing with a variety of cases, situations, and inquiries.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievants allege that they have been the victims of favoritism and discrimination, because they are the only ESWs who must continue to perform work on WVW cases. Conversely, Respondents contend that no discrimination or favoritism has occurred, because, as employees of the CSC rather than county offices, Grievants are not similarly situated to county office ESWs.

"'Discrimination' means 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] "'Favoritism' means unfair treatment of an employee as

[3] W. VA. CODE § 29-6A-2(d).

demonstrated by preferential, exceptional or advantageous treatment of another or other employees."[4] In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals clarified the legal test for discrimination claims raised under the grievance procedure definition. A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Chaddock v. Div. of Corrections, Docket No. 04-CORR-278 (2005); Frymier v. Glenville State College, Docket No. 03-HE-217R (2004). An employee claiming favoritism must also show he is similarly-situated to another employee. Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (1990).

Under the circumstances presented here, Grievants have provided insufficient evidence to prove that they are similarly situated to the ESWs involved in Bailey, supra. Grievants admittedly do not handle a caseload of assigned clients, but answer questions and record changes for a variety of clients in a variety of cases. Moreover, the crux of the issue involved in Bailey was the heavy workload carried by county office ESWs, which had been exacerbated by the addition of the child only WVW cases. Grievants' situation is dissimilar in various ways, most notably the lack of a specific caseload. Additionally,

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[4] W. VA. CODE § 29-6A-2(h).

because Grievants field thousands of calls in any given month, it has not been shown that WVW cases in particular have caused them to become particularly encumbered or overworked. While it was demonstrated that WVW cases sometimes require Grievants to seek advice and direction from others, it appears that this is an occasional occurrence, with two CSC supervisors saying that each of them received about four such questions per month. In light of the thousands of calls coming into the CSC, it does not appear that WVW changes amount to a significant portion of their duties.

Accordingly, Grievants have failed to meet their burden of proving discrimination or favoritism has occurred with regard to this situation, and their grievance must be denied. The following conclusions of law support this Decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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).

2. "'Discrimination' means 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." W. VA. CODE § 29-6A-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. VA. CODE § 29-6A-2(h).

3. A grievant must establish a case of discrimination and favoritism by showing, among other elements, that he or she has been treated differently from one or more similarly-situated employees. Chaddock v. Div. of Corrections, Docket No. 04-CORR-278 (2005); Frymier v. Glenville State College, Docket No. 03-HE-217R (2004); The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004). See also, Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (1990).

4. Grievants have failed to prove by a preponderance of the evidence that they are similarly situated to county office Economic Service Workers.

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.

Date: October 3, 2005

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DENISE M. SPATAFORE
Administrative Law Judge