HARVEY HERB & JERRY COX,

Grievants,

v. **Docket No. 05-HHR-240**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU FOR CHILD SUPPORT ENFORCEMENT, and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Harvey Herb and Jerry Cox ("Grievants") employed by the Department of Health & Human Resources ("DHHR") as Child Support Specialists 2 assigned to the Bureau for Child Support Enforcement, filed individual level one grievances on May 3 and 5, 2005, respectively, in which they alleged:

On April 26, 2005 the Ombudsman/Customer Service Unit became aware that the Training Unit and Oscar Help Desk were reclassified to Department of Health and Human Resources (DHHR) Specialist, Seniors. Based on falsehood within the Division of Personnel (DOP) system, the Ombudsman/Customer Service Unit has been discriminated against. DOP has testified in previous grievances that the DHHR Specialist series was being eliminated because the DHHR Specialist series specification (spec) was wearing down. The Oscar Help Desk was reclassified to the DHHR Specialist series because their counterpart, the Bureau for Child Support Enforcement (BCSE) Training Unit was classified in the HHR Specialist series. The Training Unit was reclassified as HHR Specialist, Seniors because their counterparts, other Trainers/Training Units within DHHR, are classified in the DHHR Specialist, Sr., classification. DOP has apparently made the determination that the Training Unit & Oscar Help Desk would be reclassified as DHHR Specialist, Seniors. This determination depictsfavoritism as the Ombudsman/Customer Service Unit was not reclassified to the series of best fit. DHHR Specialist, as is their counterpart, Client Services, Bureau for Children and Families.

For relief, Grievants requested "[t]o be reclassified appropriately within the DHHR Specialist series: the series of best fit." The parties agreed to waive consideration at levels one and two. The grievances were consolidated at level three, and DOP was joined as a party. Following an evidentiary hearing, the grievance was dismissed based upon a finding that the issue had been previously litigated. Appeal was made to level four on July 12, 2005, and a hearing was conducted on December 8, 2005. Grievants did not appear but were represented by Karleana Meeks. DHHR was represented by Senior Assistant Attorney General B. Allen Campbell, and DOP was represented by Assistant Attorney General Karen O'Sullivan Thornton. Proposed findings of fact and conclusions of law were filed by the parties on or before January 23, 3006. The grievance was transferred to the undersigned for administrative reasons on February 21, 2006.

The following findings of fact have been derived from the record, including all documents and the audio of the level four hearing.

Findings of Fact

1. Grievants have been employed by DHHR as Child Support Specialists 2 assigned to the Customer Service Unit of the Bureau for Child Support Enforcement at all times pertinent to this grievance.

2. As a result of a DOP classification review of all positions in BCSE, several new classifications were recommended for many of the employees in 2000. These new classifications included Child Support Technician, Child Support Paralegal, and ChildSupport Specialist. These recommendations were not accepted by DHHR, due to lack of funding.

3. Finding that approval of an affected agency's appointing authority was not required before a new classification is created, DOP was ordered to create the Child Support Technician 3 classification in *Skiles v. Department of Health and Human Resources and Division Of Personnel*, Docket No. 02-HHR-111 (Apr. 8, 2003).

4. On September 1, 2003, the State Personnel Board approved the creation of all the previously recommended classifications for BCSE.

5. Six BCSE Customer Service employees in the Ombudsman/Customer Service Unit were subsequently reclassified as Child Support Specialists 2. (See footnote 1) A grievance ensued with the employees requesting classification as Child Support Specialist 3 or Health and Human Resources Specialist. The relief was amended at level three to reclassification as HHR Specialists, Senior.

Although the grievance was denied at level three, the grievants entered into a settlement agreement with DHHR/DOP which resulted in their reallocation to Child Support Specialist 3.

6. In May 2005, some three months later, the six employees who had been reallocated, along with Grievants Herb and Cox, filed a grievance requesting reallocation to the best fit within the HHR class series. The grievance was dismissed as it pertainedto the *Hedrick* grievants, as it had been fully litigated, and further consideration was barred by the doctrine of *res judicata.* (See footnote 2)

7. Grievants Herb and Cox were not parties in the *Hedrick* grievance, and their claim was not dismissed at that time.

8. Following the level three hearing, DOP's motion that the grievance be dismissed was granted, based upon a finding that the doctrine of *stare decisis* applied since the issue had been litigated in *Hedrick*.

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 (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 argue that they have been subject to discrimination/favoritism because they were not reclassified to DHHR Specialist, as were the employees in Client Services section of the Bureau for Children and Families. DHHR and DOP argue that the issue ofdiscrimination/favoritism was resolved in *Hedrick*, and further consideration is barred by the doctrine of *stare decisis*. Respondents further assert that Grievants have failed to prove they are misclassified.

Grievants' attempt to achieve reclassification through a discrimination/favoritism argument is misdirected. Classification is not determined by employee comparison, but rather with class specifications. In this instance, Grievants opine they should be classified as DHHR Specialist, the classification held by employees assigned to Client Services in the Bureau for Children and Families. This is simply not how the classification system works.

To determine an employee's classification, DOP compares a position description detailing the duties and responsibilities assigned to the position with classification specifications. The specification which is the best fit for the position description controls the classification. Discrimination/favoritism do not play a role in the classification determination because the duties and responsibilities are evaluated in terms of the specifications, not in comparison with the duties of other employees. This is a more objective method of evaluation, and less prone to incorrect placements based on other employees, who themselves may be incorrectly classified. In this case, it is possible that the employees in the Bureau for Children and Families are incorrectly classified. The proper remedy in such circumstances would be to correct their classification, rather than compound the error by misclassifying Grievants in the same manner.

Reclassification is attained when a grievant shows that his duties more closely match another DOP classification specification than that under which he is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038(Mar. 28, 1989). However, Grievants emphasize they are not alleging misclassification based on duties and responsibilities, the basis for making classification determinations. Therefore, it is unnecessary to conduct an analysis of the classification specifications in question. Since classification is determined by a comparison of duties to class specifications, Grievants are not entitled to reclassification based on their perception they have suffered discrimination/favoritism because another group of employees hold the classification they seek.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following formal conclusions of law.

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. A claim of misclassification cannot be proven by a showing of discrimination/favoritism because classification determinations are based on class specifications.

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: APRIL 6, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.This grievance, Hedrick, et al. v. Bureau for Child Support Enforcement and Division of Personnel, DHHR Control No. 042104-1, included employees Karleana Meeks, Susan Dennis, Aline Workman, Saundra Daugherty, William Stephens, and Mary Kay Hedrick.

Footnote: 2

[2]The six employees appealed to level four where the grievance was denied in Hedrick et al. v. Department of Health & Human Resources/Bureau of Child Support Enforcement and the Division of Personnel, Docket No. 05-HHR-226 (Nov. 8, 2005).