THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ROSSANA, et al.,

Grievants,

v. **Docket No. 05-HHR-460**

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

BUREAU for CHILDREN and FAMILIES and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

The majority of Grievants are employed by the Department of Health and Human Resources ("HHR") as Social Service Workers 3 by the Bureau for Children and Families ("BCF"). Grievant Cheryl Long is a Social Service Worker Supervisor. Grievants filed multiple grievances asserting they are entitled to the same pay increase received by Child Protective Service Workers. (See footnote 1) Grievant Courts' Statement of Grievance was typical and asserts Social Service Worker 3 do the same work as Child Protective Service Workers, and they also have recruitment and retention problems.

The relief sought was a 20% increase in Social Service Workers' salaries.

These grievances were heard in separate groups and denied at Levels I and II. At Level III, the Grievance Evaluator found the State Personnel Board had the authority to assign classifications and grant the pay differentials. Additionally, he found nodiscrimination had occurred, as Social Service Workers did not have the same level of recruitment and retention problems as Child Protective

Service Workers. (See footnote 2)

Grievants appealed to Level IV. These grievances were consolidated, and a Level IV hearing was held on February 1, 2007, in the Grievance Board's Charleston office. (See footnote 3) Some Grievants represented themselves, and others were represented by Joseph Albright, Jr., Esq., Geoffery Ekenasi, Esq., and Mark Carbonne, Esq. The Division of Personnel was represented by Karen Thornton, Assistant Attorney General, and HHR was represented by Jennifer Akers, Assistant Attorney General. This case became mature for decision on March 21, 2007, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 4)

Synopsis

Grievants make several assertions. They assert they have been discriminated against, and the equal pay for equal work requirements of W. Va. Code § 29-6-10 have been violated. Grievants also argue the recruitment and retention problems for Social Service Workers 3, (See footnote 5) in some counties, are as great as those of Child Protective Service Workers. (See footnote 6) Grievants do not claim they are misclassified, nor do they seek reallocation in this grievance. (See footnote 7)

Respondents maintain the actions taken by HHR and DOP were necessitated by the urgent, state-wide need to recruit and retain Child Protective Service Workers. Respondents maintain their actions were correct, and they followed all required statutes, policies, rules, and regulations.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. The vast majority of Grievants are employed by HHR as Social Service Workers 3 in BCF and are in Pay Grade 12. All Grievants are paid within their pay grade. Prior to the pay increase at issue in this grievance, Protective Service Workers were in Pay Grade 13.

2. Social Service Workers 3 work in many areas including: foster care, emergency shelter care, youth services, community juvenile delinquency, single adolescent parent, adoption, Hartley program, Medley program, Medical Waiver Project, and licensing. The Social Service Workers 3 classification has been designated as a separate class specification since August 20, 1992, and the latest revision to this class specification was on February 1, 2001.

3. Social Service Supervisors supervise the work of Social Service Workers 1, 2, and 3, and coordinate work with volunteer organizations and other public agencies. Their class specification is

set at Pay Grade 14.

4. The Social Service Supervisor classification has not experienced either recruitment or retention problems. Test. Long, Level III Hearing.

5. HHR has had a problem in recruiting and retaining Child Protective Service Workers for at least ten to fifteen years.

6. In 1996, HHR gave Child Protective Service Workers who had three years or more of tenure a 3% salary adjustment.

7. Much of the funding for the child protective services provided by BCF comes from the federal government. 8. The federal government requires that certain standards be met in the area of child abuse and neglect cases. Timelines are mandatory for delineated actions and failure to meet the standards and deadlines can result in a loss of funding.

9. In 2002, the federal government's review of West Virginia's record in meeting standards and guidelines found this State had not met the stated goals in the areas of permanency, safety, and well-being of the children entrusted to its care. HHR was required to present an Improvement Plan to address these issues. (West Virginia has since completed the requirements outlined by the federal government.)

10. In 2004, in order to deal with this problem, the Legislature appropriated money to fill approximately 200 positions in the Child Protective Service Worker area. Most of the positions were for Child Protective Service Workers, but others were for supervisors, case aides and social workers who performed duties involving children.

11. HHR had difficulty filling the Child Protective Service Workers positions and difficulty retaining employees in these positions. Employees would frequently stay in the position until they completed the training, or for a year or two after that, but then they would apply for different positions in HHR or with another state.

12. When HHR would request a register of qualified employees to fill Child Protective Service Workers positions, frequently there were no applicants. HHR actively engaged in recruitment to try and increase the number of applicants for these positions. At certain times and in certain counties, HHR has had difficulty retaining Social Service Workers 3, but when HHR would request a register of qualified employees to fill Social Service Worker 3 positions, there were usually applicants from which to make a selection. Testimony Palma & Anderson, Levels III & IV. 13. In December 2004, the

Berkeley County Circuit Court found HHR in contempt for its failure to provide sufficient child protective services to protect the children of the area. The Court ordered HHR to take immediate action to address the severe recruitment and retention problems for the Eastern Panhandle.

14. During the Winter of 2005, the Legislature provided special funding to increase the salaries of Child Protective Service Workers.

15. During this period of time, DOP and HHR Secretary Martha Walker discussed the recruitment and retention problem to arrive at a proposal for the utilization of these funds.

16. On March 9, 2005, Secretary Walker sent a Memo to Willard Farley, Acting Director of DOP. She requested his approval and recommendation to the State Personnel Board for her proposal "to address critical manpower needs in child protective services." She made the following requests:

> Create a classification of child protective services worker trainee assigned to pay grade 13 with employees who will be assigned to this classification to receive a minimum salary increase of 15%.
>
> Create a classification of child protective services worker assigned to pay grade 15 with employees who will be assigned to this classification to receive a minimum salary increase of 20%.
>
> Reassign the classification of child protective services supervisor from a pay grade 15 to a pay grade 17 with affected employees to receive a salary increase of 20%.
>
> Reassign the classification of social service coordinator from a pay grade 16 to a pay grade 18 with affected employees to receive a salary increase of 20%.
>
> Rename the classifications of protective services worker trainee and protective services worker to adult protective services worker trainee and adult protective services worker, respectively. 17. The March 9, 2005 memo outlined the number of allocated positions in the Child Protective Service classification, the number of vacancies by region, the percentage of staff with less than one year of tenure and the percentage of vacancy rate, plus staff with less than one year of tenure. (A Child Protective Service Worker Trainee does not carry a full caseload.) The memo also listed seven county offices that were currently experiencing a very severe manpower crisis in Child Protective Services, and stated West Virginia was currently not meeting the minimum requirements necessary to assure the safety, permanency, and well-being of children who have been reported as abused or neglected.

18. Secretary Walker noted in the March 9, 2005 memo that there were many factors that had contributed to the current crisis. The key factor was the low salary levels. Additionally, she identified the work was stressful and required long hours, including evenings and weekends, and being on call. She also noted the West Virginia's salary levels were not competitive with the surrounding states, and that Maryland was currently offering a $3,000 signing bonus for Child Protective Service Workers. Secretary Walker

19. On March 21, 2005, Mr. Farley wrote Secretary Walker informing her the State Personnel Board had approved her proposal with some modifications, and on March 22, 3005, Secretary Walker informed all HHR employees of the increases and changes.

20. While there maybe some retention and recruitment problems among Social Service Workers 3, the majority of these positions are filled. The statewide vacancy rate for Child Protective Service Workers at the time of the reclassification was greater than Social Service Workers 3: 14.9% as compared to 11.8%. The percentage of Child Protective Service Workers with less than one year of service was 37.0%, and for SocialService Workers 3 it was 23.5%. The numbers for total vacancies of one year and less than one year of tenure was 51.9% for Child Protective Service Workers and 35.3% for Social Service Workers 3. While there are some retention problems with Social Service Workers 3, there is not a recruitment problem, as there are qualified names on the register from which to fill vacant positions. Some areas of practice for Social Service Worker 3's have more problems with retention than others. For example, youth services has greater turnover than adoption services. Res. Exh. 3; Test. Long, Level III; Test. Palma and Faulkner, Level IV.

21. The pertinent sections of the classification specifications at issue are reproduced below:

CHILD PROTECTIVE SERVICES WORKER

Nature of Work

Under general supervision, performs advanced and complex social casework in the area of Child Protective Services. Work is characterized by cases involving abuse/neglect/exploitation of children. The nature of the situations requires expertise and judgment to deal with problems that are potentially dangerous to the client and the worker. Work requires the use of personal automobile for extensive

travel. Employee is subject to being on-call during non-business hours and must be available and have access to a telephone. Requires ongoing training to be fully accountable for a high volume of demanding and time-restricted cases. Performs related work as required.

Examples of Work

Works within a caseload that crosses program lines into adoption, foster care, legal guardianship, and others.

Conducts investigations concerning allegations of abuse by talking with and visually observing affected individual; talks with immediate family, relatives, neighbors, teachers, doctors, and relevant others and reviews any pertinent records.

Makes initial assessment of validity of the allegation and the degree of danger that the child is in; documents the results of the investigation of the parent and/or caretaker.

Completes family assessment to determine dynamics and problems that may be precipitating an abusive situation. Develops effective interventions to strengthen family that address safety, well being, and permanency of children.

Prepares safety, service, and/or treatment plans to remedy contributing problems and stop behavior patterns of abuse/neglect/exploitation and solicits family cooperation.

Engages family in counseling to solve problems, refers them to other available resources, and monitors safety and risk of further abuse to prevent a reoccurrence of abuse.

Files petition with the court as needed to ensure safety of the child, testifies before the court, and makes appropriate placement of child, including but not limited to staying with relatives, in foster homes, residential treatment facilities, or in an emergency shelter.

Evaluates the progress of the family or living environment towards meeting objectives of the safety/service/treatment plans, the need to modify the plans, and the eventual disposition of the case.

Maintains detailed case records and extensive documentation, prepares specialized reports, and composes correspondence.

Attends extensive, ongoing training to develop comprehensive knowledge of State and Federal social welfare laws, rules, regulations, and evolving protocols regarding child abuse and neglect.

Conduct and facilitate Multi-Disciplinary Team Meetings.

Conducts validating interview of sexual abuse investigations.

Knowledge, Skills and Abilities

Knowledge of State and Federal social welfare laws, rules, and regulations, particularly those concerning child abuse and neglect policy (i. e. Gibson, ASO, ASFA, Title IV-E, Chapter 49, Chapter 9000).

Knowledge of social work theory, casework methods, and community organization.

Knowledge of human behavior and the behavioral sciences, particularly concerning child development, family dynamics, and interpersonal relationships.

Ability to assess emotional states, behavioral indicators, family dynamics, and overt signs of abuse in order to evaluate safety and risk and determine whether an abusive situation exists.

Ability to formulate client safety, service, and treatment plans.

Ability to influence people to engage in problem-solving activities and to change attitudes and behavior.

Ability to work effectively with judges, law enforcement officials, and other professionals.

Ability to communicate with individuals who have emotional or mental problems, substance abuse issues, and/or domestic violence situations.

Ability to communicate both orally and in writing.

Ability to maintain detailed case records and extensive documentation, prepare specialized reports, and compose correspondence both in written and database format.

Ability to operate a computer.

Ability to pass competency testing.

Minimum Qualifications

Training: Bachelor's degree in Social Work from an accredited four-year college or university.

Substitution: Bachelor's degree in Sociology, Psychology, Counseling, Criminal Justice, Behavioral Science, Interpersonal Communications, Human Services, Education, Special Education, Elementary Education, or Secondary Education from an accredited four-year college or university may be substituted for the degree in Social Work.

OR Current West Virginia Social Work License

Experience: Two years of full-time or equivalent part-time paid experience in adult or children's

services in a public or private health and human services agency.

Substitution: A Master's degree in Social Work may substitute for the required experience.

Special Requirement: Eligible for Temporary Social Worker License OR Licensed as a Social Worker, Graduate Social Worker, or Certified Social Worker by the West Virginia Board of Social Work Examiners.

NOTE: Applicants may be appointed for a period not to exceed sixty (60) days from date of hire pending verification of licensure. Applicants must agree in writing to verify licensure within sixty days or be terminated. Employees working under this restriction shall not perform any social work duties until license is verified.

SOCIAL SERVICE WORKER 3

Nature of Work

Under general supervision, performs advanced level professional social service work in providing services to the public in one or multiple program areas. Work requires the use of a personal automobile for local travel. Employee is subject to on-call status during non-business hours. May be required to deal with situations which are potentially dangerous to client and worker. Performs related work as required.

Distinguishing Characteristics

All three levels of Social Service Worker provide professional social services to the public. The Social Service Worker 3 provides these services in one or more of the following areas: foster care, emergency shelter care, youth services, community juvenile delinquency, single adolescent parent, adoption, Hartley program, Medley program, Medical Waiver Project, licensing specialist or other services at this level. This class may also be used for positions in certain geographic areas performing professional social work in a variety of program areas such as day care, generic social services, foster care and protective services, and differs from the generic Social Service Worker 2 in that the positions involve a significant, but not predominant, amount of protective services work.

Examples of Work

Maintains a caseload for programs and services at this level.

Prepares social assessment of client circumstances.

Interacts with a variety of professional practitioners in the areas of social work, mental health, developmental disabilities, education, juvenile delinquency, and counseling and guidance to assess client's needs and provide appropriate services.

Develops client service plan designed to accomplish habilitation and rehabilitation of the client and to provide social services to assist client in attaining social, educational and vocational goals.

Cooperates with the court system for foster care, adoption, juvenile delinquency and Medley program services by preparing social assessments and recommending actions to accomplish goals.

Locates and evaluates providers for foster care, adoption, emergency shelter care and Medley home services; counsels and [t]rains providers in effectively providing required services; conducts periodic evaluations of facilities and services.

Counsels clients/families in achieving goals of client service plan.

Counsels youth to correct delinquent and socially unacceptable behavior; prepares probation plans for juvenile offenders; monitors progress of probationers under the court supervision. Speaks before educational and community organizations and groups regarding services available and to develop community resources.

Writes reports on case findings and summaries of client social and financial circumstances.

Knowledge, Skills and Abilities

Knowledge of theories and practices in social work.

Knowledge of federal and state laws, regulations and programs in social services.

Knowledge of emotional states and their behavioral indicators.

Ability to assess social, educational and economic circumstances of clients to determine need for social services.

Ability to develop client service plan to habilitate and rehabilitate client and assist client in attaining social, educational and vocational goals.

Ability to evaluate social service providers according to established guidelines.

Ability to work effectively with other professionals and social service agencies in providing social services.

Ability to counsel people in favor of specific actions, changes in attitude or insights.

Ability to maintain records, prepare reports and correspondence related to the work.

Ability to communicate with others, both orally and in writing.

Minimum Qualifications

Training: Bachelor's degree in Social Work from an accredited college or university.

Substitution: Bachelor's degree in Sociology, Psychology, Counseling, Criminal Justice, Behavioral Science, Interpersonal Communications, Human Services, Education, SpecialEducation, Elementary Education, or Secondary Education from an accredited college or university may be substituted for the degree in Social Work.

OR Current West Virginia Social Work License

Special Requirement: Eligible for Temporary Social Work License OR Licensed as a Social Worker, Graduate Social Worker, or Certified Social Worker by the West Virginia Board of Social Work Examiners.

Established: 8/20/92; Revised: 2/5/93, 3/6/96, 10/5/2000, 02/1/2001; Effective: 02/1/2001.

SOCIAL SERVICE SUPERVISOR

Nature of Work

Under general supervision, performs complex administrative, supervisory, and advisory services in the development and maintenance of specialized human resources programs. Responsible for planning, organizing, and leading a comprehensive program of staff activities, and coordinating the work of the agency, volunteer organizations, and public agencies. Work requires the use of a personal automobile for local travel. Employee is subject to on-call status during non-business hours. May be required to deal with situations which are potentially dangerous to client and worker. Performs related work as required.

Examples of Work

Develops acceptable standards of casework and supervises the maintenance of such standards.

Provides administrative supervision of employees to insure uniform application of all laws, regulations, policies, and procedures relating to any or all social service programs.

Evaluates effectiveness of social service programs.

Coordinates work with volunteer organizations and other public agencies.

Counsels and guides subordinates in the development of individual or group programs for the rehabilitation of clients.

Knowledge, Skills and Abilities

Knowledge of State and Federal public welfare laws.

Knowledge of social casework methods and principles.

Knowledge of the methods of casework supervision.

Knowledge of department policies and procedures.

Knowledge of community and family social, economic, and health problems.

Knowledge of social services legislation.

Knowledge of structure, functions, relationships, and practices of organizations as related to individual and family problems.

Knowledge of applicable alternative resources. Ability to supervise subordinates and to cooperate with other public and private agencies.

Ability to speak effectively, to exercise good judgement, and to maintain effective working relationships with the public.

Minimum Qualifications

Training: Bachelor's degree in Social Work from an accredited college or university.

S **ubstitution**: Bachelor's degree in Sociology, Psychology, Counseling, Criminal Justice, Behavioral Science, Interpersonal Communications, Human Services, Education, Special Education, Elementary Education, or Secondary Education from an accredited college or university may be substituted for the degree in Social Work.

OR Current West Virginia Social Work License

Experience: Two years of full-time or equivalent part-time paid experience as a social worker in a public or private health or human services agency.

Substitution: Graduate training in Social Work, Sociology, Psychology, Counseling, Interpersonal Communications, Human Services, Education, Special Education, Elementary Education, or Secondary Education may be substituted for the required experience on a year-for-year basis.
Special Requirement: Eligible for Temporary Social Work License OR Licensed as a Social Worker, Graduate Social Worker, or Certified Social Worker by the West Virginia Board of Social Work Examiners.
Established: 8/20/92; Revised: 2/5/93, 3/6/96, 6/10/96, 10/5/2000, 02/1/2001; Effective: 02/1/2001.

22. The "Nature of Work" and "Examples of Work" Sections detail the differences in the two class specification, specifically in the areas of complexity, training, and job duties. For example, Child Protective Service Workers are required to "deal with situations that are potentially dangerous to the client and worker," their work is identified as "advanced and complex," "high volume," "demanding," and "time-restricted." By contrast, the class specification for Social Service Workers 3's identifies the work as "advanced," "may" require dealing with potentially dangerous situations, and the volume and time restrictions are not mentioned.

23. The "Knowledge, Skills and Abilities" and "Minimum Qualifications" for Child Protective Service Workers and Social Service Workers 3 are not the same. ChildProtective Service Workers are required to have two years of experience or a Masters in Social Work, pass competency testing, and posses the skills identified for Social Service Workers 3 with greater depth and breadth. (See footnote 8)

24. Before the reclassification, Protective Service Workers were in Pay Grade 13, one pay grade above Social Service Worker 3's, in Pay Grade 12.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. 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). (See

footnote 9)

I. Background and standard of proof Pursuant to W. Va. Code § 29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or appeal legislative rules governing the

preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

Additionally, the State Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). (See footnote 10) The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel, Docket No. 94-HHR-126 (Aug. 26, 1994). See Callaghan v. W. Va. Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va. 1980).

Further, "DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function." Travisv. Dep't of Health and Human Res., Docket No. 96-HHR-518 (Jan. 12, 1998). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985). As stated by the West Virginia Supreme Court of Appeals, an employee who alleges impropriety regarding a reclassification action or challenges the pay grade to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Bennett v. Dep't of Health and Human Res., Docket No. 93-HHR-518 (June 23, 1995); Johnston v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-206 (June 15, 1995); Thibault v. W. Va. Div. of Rehab. Serv., Docket No. 94-RS-061 (May 31, 1995); Frame v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-140 (Nov. 29, 1994).

This standard of entitlement to substantial weight applies when an employee grieves DOP's interpretation of its own regulations, classification specifications, and pay grades. Farber v. W. Va. Dep't of Health and Human Res./Div. of Personnel, Docket No. 95-HHR- 052 (July 10, 1995). "There is no question DOP has the authority to establish pay grades within a pay plan." Stephenson v. W. Va. Bureau of Employment Programs/Div. of Personnel, Docket No. 92-DOP-447 (Aug. 12, 1993). The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of DOP. Moore, supra. Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. If agrievant can demonstrate his or her classification or pay grade was made in an arbitrary and capricious manner or was an abuse of discretion, then he or she has met the required burden of proof. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., No. 29066 (W. Va. 2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

"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 Res., 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

DOP Rule 143 C.S.R. 1 § 5.4(f)2c4, "Pay Differentials" is applicable to the issues raised here.

The Board, by formal action, may approve the establishment of pay differentials to

> address circumstances such as class-wide recruitment and retention problems, regionally specific geographic pay disparities, shift differentials for specified work periods, and temporary upgrade programs. In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc.), not individual employees.

(Emphasis added.)

II. Equal pay for equal work

One of Grievants' main assertions is that the actions of HHR and DOP violated W. Va. Code § 29-6-10 (1) & (2). As previously stated, this Code Section gives the State Personnel Board the authority to implement both a classification and pay plan for all employees in the classified service.

The holding of the West Virginia Supreme Court of Appeals in Largent v. West Virginia Division of Health and Division of Personnel, 192 W. Va 239, 452 S.E.2d 42 (1994), is instructive in examining the issues raised by Grievants. Largent noted W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. Largent at Syl. Pts. 2, 3, & 4. The requirement is all classified employees must be compensated within their pay grade. See Nafe v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-386 (Mar. 26, 1997); Brutto v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-076 (July 24, 1996); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health& Human Res., Docket No. 91-H-177 (May 29, 1992). See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." Id. at 246. (Emphasis added).

The issue of equal pay for equal work has been previously addressed by the Grievance Board on several occasions in very similar circumstances. The first case in this series was Travis v. Department of Health and Human Resources, Docket No. 96-HHR- 518 (January 12, 1998). In Travis, some Investigators 2 received a 25 percent "special hiring rate" due to severe recruitment and retention problems, while other Investigator s did not. Administrative Law Judge Lewis Brewer found there was no violation of the equal pay for equal work provisions of W. Va. Code § 29-6-10, DOP acted within its discretion in the interpretation of its Administrative Rule pertaining to pay differentials,

Investigator 2's who received the increase comprised "a reasonably defined group of employees," DOP Rules authorized special treatment in appropriate circumstances, and he was "unable to substitute his judgment for that of the State Personnel Board and DOP where the decision at issue has a rational basis."

In Pishner v. Department of Health and Human Resources, Docket No. 97-HHR-478 (May 21, 1998) aff'd Kanawha County Circuit Court, Civil Action Number 98-AA-93 (December 10, 2001), Protective Service Workers, who worked with adults, filed a grievance over the 3% pay increase received by Protective Service Workers, who worked with children. Administrative Law Judge Mary Jo Swartz ("ALJ Swartz") found HHR had continual recruitment and retention problems with the Child Protective Service Worker classification. She reviewed the general rules and standards governing DOP's authority and noted DOP had broad discretion, as long as it did not exercise this discretion in an arbitrary or capricious manner. Crowder v. W. Va. Dep't of Tax & Revenue, Docket No. 94-T&R-545 (Feb. 28, 1995). See Callaghan, supra; Blankenship, supra; Princeton Community Hosp., supra; Smith v. W. Va. Div. of Corr., Docket No. 94- CORR-624 (Feb. 27, 1995). See also Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc., 166 W. Va. 775, 277 S.E.2d 613 (1981); appeal dismissed, 454 U.S. 1131 (1982). ALJ Swartz found the actions were within DOP's and HHR's authority, were not arbitrary and capricious, had a rational basis, and should be upheld.

The third case that is instructive is Kincaid v. Department of Health and Human Resources, Docket No. 01-HHR-246 (June 14, 2002). In Kincaid, Social Service Supervisors grieved the pay increase given to Child and Adult Protective Service Workers and the reallocation of Child Protective Service Supervisors to a higher pay grade with an attendant increase. ALJ Swartz found these action were related to the actual job responsibilities of the employees, were not arbitrary and capricious, and cited to Pishner, supra. ALJ Swartz also cited to Travis, supra, and noted the Grievance Board had held, "the granting of a pay differential in order to address recruitment and retention problems, which is limited to a specific group of employees in a specific program, is within DOP's discretion and authority." After reviewing the holdings in Travis, Pishner, and Kincaid, it is clear there has been no violation of the equal pay for equal work provision of W. Va. Code § 29-6-10 under these facts. As noted in Pishner, there was a severe recruitment and retention problem with Child Protective Service Workers, and the actions taken by HHR and DOP in granting an increase to one group, but not the other, did not violate any statute, policy, rule, or regulation. The same reasoning applies here. The

actions taken to resolve the recruitment and retention problem in the Child Protective Service Worker classification were not arbitrary and capricious, had a rational basis, and did not violate equal pay for equal work provisions. Grievants are paid within their pay grade, are not in the same classification, do not perform the same work, and do not have the same recruitment and retention problems as Child Protective Service Workers. Accordingly, Grievants have not proven a violation of the equal pay for equal work policy, as they are properly classified and paid within their pay grade.

III. Discrimination

Grievants also argue they were discriminated against when their salaries were not increased, and they assert they perform the same duties as Child Protective Service Workers and have the same recruitment and retention problems. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "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." The West Virginia Supreme Court of Appeals revised the legal test for discrimination claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), theWest Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 11)

> (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.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievants have not met their burden of proof and established a case of discrimination, as they are not similarly situated to the employees to whom they compare themselves. The key issue is that while Grievants do have some retention problems, they are not as severe as those of Child Protective Service Workers, and they simply do not have similar recruitment problems. The reason for this pay increase was because West Virginia could not hire or retain enough Child Protective Service Workers to keep the children of this state safe.

The Findings of Fact are clear. The vacancy rate of Child Protective Service Workers was higher than Social Service Workers 3, and Grievants' failed to demonstrate similar recruitment problems for Social Service Workers 3. Further, no evidence wassubmitted that demonstrated any recruitment and retention problems with Social Service Supervisors.

Additionally, Grievants did not demonstrate they are similarly situated to Child Protective Service Workers. The West Virginia Supreme Court of Appeals held in Flint v. Wood County Board of Education, 207 W. Va. 251, 531 S.E.2d 76 (1999) that to be considered similarly situated, the employees must be in the same classification as the employees to whom they compare themselves. In that education case, the West Virginia Supreme Court of Appeals dealt with W. Va. Code § 18A-4-15 which requires uniformity in salaries, etc., for those who perform "like assignments and duties." The Court stated "the first prerequisite for establishing a prima facie case of discrimination or favoritism is a showing that the grievant is similarly situated, in a pertinent way, to one or more other employees." The Court found the grievants could not make such a showing because they were not in the same classifications as those to whom they compared themselves "[o]bviously employees who do not have the same classifications are not performing 'like assignments and duties.'" This ruling was affirmed in Airhart v. Wood County Bd. of Educ., Docket No. 99-54-419 (May 19, 2000), aff'd in part, rev'd in part, 212 W. Va. 175, 569 S.E.2d 422 (2002). Here, as in Flint, the differences in treatment are related, in part, to the job duties of the employees. Grievants are not in the same classification and do not perform "like" duties. See Findings of Fact 2, 21, 22, 23, and 24.

This same ruling has been applied to state employees. In Farley v. West Virginia Parkways Economic Development and Tourism Authority, Docket No. 00-PEDTA-015 (June 22, 2000), the administrative law judge cited to Flint and noted the grievants did nothold the same classifications as any of the employees to whom they compared themselves. As the employees were not similarly situated, no discrimination was found. Additionally, in another decision involving comparisons of compensation in different state classifications, Aultz v. West Virginia Department of Transportation, Docket No. 90- DOH-522 (February 28, 1991), this Grievance Board held state salaries cannot be compared, and equal compensation required, across classification lines. In Aultz, the grievants contended they should receive the same salary increase awarded to employees in the Highway Engineer II, Chemist IV, and Geologist IV classifications. This assertion was rejected, and the Administrative Law Judge found the Division of Highways and DOP had not "abused their discretion

in upgrading the salary-levels [of these classifications] in light of the recruitment and retention problems."

A review of the case law and facts reveals the actions of HHR and DOP were not discriminatory. The key to this finding is that the actions were taken because of the severe recruitment and retention problems experienced in the Child Protective Service Worker classification. Social Service Workers 3 were not similarly situated because they did not experience similar recruitment problems and did not have as severe retention problems. Additionally, Grievants are not similarly situated because they are not in the same classification as Child Protective Service Workers, do not perform the same job duties, are not required to possess the same skills and abilities or pass a competency test, and are not required to have two years of experience or a Masters degree. Again, Grievants are paid within their pay grade, and no discrimination is found on these facts.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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).

2. Grievants have the burden of proof in this case to establish, by a preponderance of the evidence, that the granting of retention and recruitment increases to Child Protective Service Workers and not to Social Service Workers was clearly wrong, arbitrary, capricious, contrary to regulation, or otherwise illegal and/or improper. W. Va. Code § 29-6A-6; Bennett v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 94-HHR-206 (June 15, 1995).

3. W. Va. Code § 29-6-10 authorizes the State Personnel Board to promulgate rules for the

implementation and administration of the classified State employees' job classification and pay plans for which plans the Personnel Board is responsible. Framev. W. Va. Dep't of Health and Human Res./Div. of Personnel, Docket No. 94-HHR-140 (Nov. 29, 1994).

4. The Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2).

5. The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Moore v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 94-HHR-126 (Aug. 26, 1994).

6. "[T]he rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation." Farber v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 95-HHR-052 (July 10, 1995). See Callaghan v. W. Va. Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va. 1980).

7. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, W. Va. Dep't of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993); Princeton Community Hosp. v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985); Dillon v. Bd. of Ed. of County of Mingo, 301 S.E.2d 588 (1983).

8. An employee, who alleges the actions of the DOP and HHR were in violation of statute, policy, rule, or regulation, bears the burden of proving this claim by apreponderance of the evidence. This is a difficult undertaking. Blankenship, supra; Bennett, supra; Johnston, supra; Thibault v. Div. Rehab. Serv./Div. of Personnel, Docket No. 94-RS-061 (May 31, 1995); Frame, supra; See O'Connell v. W. Va. Dep't of Health and Human Res./Div. of Personnel, Docket No. 95-HHR-251 (Oct. 13, 1995).

9. "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 Res., 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

10. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of DOP. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W. Va. 1982). 11. W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. Largent v. West Virginia Div. of Health and Div. of Personnel, Syl. Pts. 2, 3 and 4, 192 W. Va 239, 452 S.E.2d 42 (1994). The requirement is all classified employees must be compensated within their pay grade. See Nafe v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-386 (Mar. 26, 1997); Brutto v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-076 (July 24, 1996); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Res., Docket No. 91-H-177 (May 29, 1992). See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989).

12. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." Largent at 246. (Emphasis added).

13. No violation of the equal pay for equal work provisions of W. Va. Code § 29- 6-10 occurs when "[a] preponderance of the credible evidence of record indicates that DOP properly acted within its discretion in [the] interpreting and applying of its Administrative Rule pertaining to pay differentials." Especially when "a reasonably defined group of employees" is used, as this follows DOP Rule § 5.04 which authorizes special treatmentin appropriate circumstances. Travis v. Dep't of Health and Human Res., Docket No. 96- HHR-518 (Jan. 12, 1998).

14. An Administrative Law Judge is "unable to substitute [her] judgment for that of the State Personnel Board and DOP where the decision at issue has a rational basis." Id.

15. When employees are paid in accordance with the pay scale for their classification, there is no violation of the equal pay for equal work doctrine when a pay increase is granted to employees who are in another classification. Pishner v. Dep't of Health and Human Res., Docket No. 97-HHR-478 (May 21, 1998) aff'd Kanawha County Circuit Court, Civil Action Number 98-AA-93 (Dec. 10, 2001). See Aultz v. W. Va. Dep't of Transp., Docket No. 90-DOH-522 (Feb. 28, 1991).

16. "[T]he granting of a pay differential in order to address recruitment and retention problems, which is limited to a specific group of employees in a specific program, is within DOP's discretion and authority." Kincaid v. Dep't of Health and Human Res., Docket No. 01-HHR-246 (June 14, 2002).

17. Grievants did not meet their burden of proof and demonstrate a violation of the equal pay for equal work statute.

18. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "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." 19. 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 held 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.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

20. To be considered similarly situated, the employees must be in the same classification as the employees to whom they compare themselves. Flint v. Wood County Bd. of Educ., 207 W. Va. 251, 531 S.E.2d 76 (1999); Airhart v. Wood County Bd. of Educ., Docket No. 99-54-419 (May 19, 2000), aff'd in part, rev'd in part, 212 W. Va. 175, 569 S.E.2d 422 (2002). See also Farley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 00-PEDTA-015 (June 22, 2000); Aultz v.

W. Va. Dep't of Transp., Docket No. 90-DOH-522 (Feb. 28, 1991); Travis, supra; Pishner, supra; Kincaid, supra.

21. Grievants have failed to establish they have been discriminated against. They have not demonstrated they are similarly situated to Child Protective Service Workers because they are not in the same classification and do not have recruitment problems and as severe retention problems. See Emigh v. Dep't of Health and Human Res./Bureau of Public Health and Div. of Personnel, Docket No. 99-HHR-408 (May 31, 2000).

22. Grievants have failed to prove a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work in relation to theircompensation. They are properly classified, and they are compensated within the pay grade for their position.

23. Grievants have failed to prove HHR or DOP acted arbitrarily or capriciously, abused their discretion, or their actions did not have a rational basis. Respondents did not exceed their statutory authority in their development and implementation of the HHR job classifications and pay grade plans at issue in this case. Nelson v. Dep't of Health and Human Res./Office of Inspector General and Div. of Personnel, Docket No. 05-HHR-315 (May 16, 2006).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. Va. Code § 18-29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). 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.

_____

Janis I. Reynolds

Acting Chief Administrative Law Judge

Date: September 28, 2007

Footnote: 1

As discussed at the beginning of this Level IV hearing, apparently many Social Service Workers have filed another grievance stating they are misclassified.

Footnote: 2

At Level III, a group of HHR employees, representing many classifications, attempted to join the already filed grievances as Intervenors. The Grievance Evaluator found the interest of Intervenors was not adverse to Grievants, as required by the definition, and the bid to join the grievance was an attempt to circumvent the time frame for filing. Intervenors appealed this ruling to Level IV, and on October 18, 2005, the undersigned Administrative Law Judge found the interest of Intervenors was not adverse to Grievants.

Footnote: 3

There were many grievances filed as a result of this pay increase. These cases were divided into classifications for hearing. The parties at this hearing agreed to incorporate the testimony and documents from the first hearing in this series, Boggs v. Department of Health and Human Resources, Docket No. 05-HHR-136 (July 31, 2007), which dealt with Adult Protective Service Workers.

Footnote: 4

The proposals were due on March 21, 2007, and all other parties submitted them on time. On March 28, 2007, Mr. Albright filed a request with the Grievance Board to submit these proposals by April 15, 2007. The parties had been directed at the close of the hearing to first seek the agreement of the other parties before requesting an extension. The Division of Personnel objected, noting all other parties had submitted their proposals in a timely manner, and this late submission would result in an advantage, as Mr. Albright would have these proposals prior to his submission. Accordingly, this request was not granted.

Footnote: 5

Although this grievance was to cover all Social Service Workers, the focus of this hearing, and the hearings below was on Social Service Workers 3.

Footnote: 6

Confusingly, in their proposals Mr. Carbonne and Mr. Ekenasi asserted Child Protective Service Workers and Social Service Workers 3 had been in the same classification prior to the March 21, 2005 action which changed Child Protective Service Workers class specification and granted them a pay grade increase. Additionally, Mr. Carbonne and Mr. Ekenasi asserted Social Service Workers 3 had performed the same job duties as Child Protective Service Workers in the past, and the positions required the same Minimum Qualifications and Knowledge, Skills and Abilities. All these assertions are incorrect. See Findings of Fact 1, 2, 21, 24, 25, 26, and 27.

Footnote: 7

At the start of the Level IV hearing, the parties agreed that the issues of misclassification and reallocation were not before the undersigned Administrative Law Judge. Accordingly, the duties of the classifications will only be addressed as

they pertain to the issues of discrimination and equal pay for equal work.

Footnote: 8

DOP classifies positions by job duties and responsibilities.

Footnote: 9

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 10

Section 5.1 of DOP's Rules notes the purpose and intent of the classification plan is to "[t]o attract qualified employees and retain them in the classified service" and the State Personnel Board "shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses."

Footnote: 11

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).