WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MANDA HARVEY-GALLUP, et al.,

Grievants,

v. Docket No. 04-HHR-149(J)

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

Respondents.

DECISION

This grievance was filed by numerous employees of the Department of Health and Human Resources' ("DHHR"), Bureau for Children and Families ("BCF"), as a result of new classifications and pay grade assignments which were implemented for positions within the Bureau for Child Support Enforcement ("BCSE") in 2003. Many employees of BCF have requested that a "series" be created for their classifications and that their classifications be placed in higher pay grades, similar to the benefits conferred upon the newly-created BCSE classifications.

Procedural History

In October of 2003, approximately 250 individuals from various classifications filed these grievances around the state. After denials at levels one and two, the various grievances were

consolidated at level three, and the Division of Personnel ("DOP") was joined as an indispensable party. A level three hearing was conducted, in person and by videoconferencing, before David M. Adkins, DHHR Grievance Evaluator, on November 21,2003, January 30, 2004, and March 9, 2004. The grievances were denied by level three decision dated April 15, 2004.

Upon appeal to level four, these cases were ultimately divided into separate grievances, according to job classifications. A hearing was held in the Grievance Board's office in Charleston, West Virginia, on April 17, 2007. Grievant Terri Mullins was the only grievant who appeared for the hearing, representing herself, and the other named grievants did not appear or contact the Board after the hearing. DHHR was represented by counsel, B. Allen Campbell, Senior Assistant Attorney General, and DOP was represented by counsel, Karen O. Thornton, Assistant Attorney General.

After Grievant Mullins gave her testimony, it became apparent that, because she had been reallocated from the classification of Office Assistant, the title she held when these grievances were filed, Grievant should have been consolidated with the other Family Support Specialists in *Adkins, et al., v. Dep't of Health and Human Res.*, Docket No. 04- HHR-149(H), which had been heard nearly a year earlier.

In a related matter, it appears that Grievant Manda Harvey-Gallup was erroneously joined to the *Adkins, supra*, grievance by Errata Notice dated December 3, 2007. Due to their failure to appear for the level four hearing in this grievance or make any contact with this Grievance Board, no relief may be granted to Grievants Harvey-Gallup and Tracey Smith, and their grievances will not be addressed further.

Although given the option to file fact/law proposals at the conclusion of all of these related grievances, Respondents elected to rely upon the proposals filed on October 10, 2006, after the conclusion of the initial level four hearing in *Posey v. Department of Healthand Human Resources*, Docket No. 04-HHR-149(A) (Sept. 17, 2007). Grievants filed no proposals.

Due to the resignation of Chief Administrative Law Judge Paul Marteney, this matter was reassigned to the undersigned on August 18, 2007. The undersigned has been provided with, and has reviewed, the entirety of the level three record, along with the recordings of the proceedings conducted at level four.

Synopsis

In response to recruitment and retention problems, along with federal requirements in the area of child support, new classifications were created within the Bureau for Child Support Enforcement, along with somewhat higher pay grade assignments. Grievant is a Family Support Specialist for the Bureau for Children and Families and alleged that she should be compensated at the same or a higher rate than the Child Support Specialist 3 classification. Grievant is assigned to a different division of the Department of Health and Human Resources, is in a different classification, and performs completely different duties from the employees to whom she compared herself. She failed to prove that her assigned pay grade/salary was arbitrary and capricious, an abuse of discretion, or the result of unlawful discrimination or favoritism.

Findings of Fact

After a detailed review of the record in its entirety, the undersigned makes the following findings of fact: 1. Grievant is employed by the BCF as a Family Support Specialist ("FSS"). FSSs are compensated at Pay Grade 11, which has an annual salary range of $20,760 to $38,400.

2. Pursuant to a request from its former commissioner, and as the result of severe recruitment and retention problems, DOP conducted a classification study of various positions within the Bureau of Child Support Enforcement ("BCSE"). As a result of the study, in January of 2001, DOP recommended the creation of several new classifications, including Child Support Technician 1 and 2, Child Support Paralegal, Child Support Specialist 1, 2, and 3 ("CSS"), Child Support Supervisor 1 and 2, and Child Support Regional Manager.

3. In 2002, BCSE Commissioner Susan Shelton Perry submitted a request for approval of the implementation of the new classifications, but it was rejected by the DHHR Secretary, because DHHR could not provide the necessary funding. Although most of the funds were to be provided by federal sources, DHHR was asked to provide nearly $1,000,000 of the necessary money.

4. On September 1, 2003, the State Personnel Board approved the creation of the new BCSE classifications, prompting the filing of the instant grievances. Virtually all of the funding for this program was provided by the federal government, through matching and incentive funds designated for child support issues, based upon the West Virginia program's performance. These federal funds are only to be used by BCSE and cannot be "shared" with any other division of DHHR.

5. The primary function of a FSS is assisting clients who are receiving state financial

assistance in obtaining employment through the “West Virginia Works” program. The work of a FSS is described, in part, in the classification specification for the position as:

> Conducts personal interviews with applicants and/or recipients, recording, evaluating and verifying social and financial information, determining services needed to enable fulfillment of personal responsibility contract goals, analyzing and interpreting aptitude and interest test results to direct the development of employment goals for applicants/recipients, coordinates with other social service and community organizations when appropriate to ensure completion of personal responsibility contract and conducting case management activities related to continuing eligibility for services.

6. The CSS classification is divided into a series. The CSS classifications were determined by the relative complexity of duties and level of expected responsibility at each level, as related to the other classifications within the series. (See footnote 1)

7. The CSS 1 is an entry level position, whose duties are intended to provide formal and on-the-job training, so that the employee can eventually reach the full- performance level of case management responsibilities. These employees are expected to perform beginning level child support case work by processing cases through location, case development, initial notice to non-custodial parents regarding obligation and child support enforcement involvement.

8. The CSS 2 is a full-performance level position who performs independent case management duties with limited supervision. Employees in this position are expected to perform any activity needed in the collection of child support in West Virginia, have fullknowledge of all applicable policies, laws and procedures, and make recommendations to the BCSE attorneys for legal action.

9. The CSS 3 must have three years of experience working with child support, is expected to serve as a mentor and trainer for CSS 1s and 2s, and assists BCSE attorneys in complex litigation. These employees also have the authority to make decisions regarding the release of additional child support funds to caretakers, without a superior's approval. The classification specification describes the work of a CSS 3 as:

> Under limited supervision, a Child Support Specialist 3 provides advanced level child support services. Employees assigned to positions at this level will have greater independence of action[.] Interacts with a variety of professional practitioners in the legal community, as well as other agencies. Must be able to assess the customer's needs and the posture of the case and determine appropriate course of action. Employees in this position should have the ability to train employees in the Child Support Specialist 1 and 2 classifications and may serve as a back-up for the supervisor.

10. The CSS 3 classification is assigned to Pay Grade 13, with a salary range of $23,784 to $43,992 annually.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 footnote 2) *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).

Grievant is not contending that she is misclassified, but she believes that her responsibilities are just as difficult and complex as those of the CSS 3 and that she should be paid the same or a higher salary than those employees.

The State 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). (See footnote 3) 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 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 HumanRes./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).

Additionally, "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." *Travis v. Dep't of Health and Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998). 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). 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. *See Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989). "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." *Id*. (*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.

Grievant's contentions in this case constitute a “comparable” or “comparative” worth argument, as she is not comparing herself to employees within her own classification, but to employees in another classification who she believes perform similar work utilizing a similar skill level within a similar working environment. *See Moore, supra*; *Fike v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-155 (Aug. 28, 1998). Nevertheless, unless a grievant presents sufficient evidence to demonstrate DOP's interpretation of pay grade is clearly wrong, or the result of an abuse of discretion, an administrative law judge must give deference to DOP and find that the pay

gradeassignment was correct. *O'Connell v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-251 (Oct. 13, 1995).

Most comparative worth litigation concerning an employer's establishment of pay scales has been handled by federal courts in cases brought by employees within the context of discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2a. *See IUE v. Westinghouse Electric Corp*., 631 F.2d 1094 (3rd Cir. 1980), cert. denied, 452 U.S. 967 (1981); *Gunther v. County of Washington*, 602 F.2d 882 (9th Circ. 1979), *reh'g denied with supplemental opinion*, 623 F.2d 1303 (9th Cir. 1980), aff'd 452 U.S. 161 (1981); *Gerlach v. Michigan Bell Tel. Co.*, 501 F. Supp. 1300 (E. D. Mich. 1980); *Taylor v. Charley Brothers Co.*, 25 F.E.P. 602 (W. D. Pa. 1981). Most federal courts have expressly rejected claims brought under a pure comparative worth theory absent a showing of intentional discrimination. *See Pleme v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983); *Power v. Berry County*, 539 F.Supp. 721 (W. D. Mich. 1982).

As this Grievance Board observed in *Delauder v. Dep't of Health and Human Resources*, Docket No. 01-HHR-152 (Jan. 27, 2004),

> This Grievance Board has followed the direction taken by the federal courts, and others, in refusing to decide misclassification cases on the basis of comparative worth. While it certainly is apparent that the [other] employees perform some similar duties as Grievants, and that Grievants' positions are much more demanding and complex than [those other] employees, the fact remains that Grievants are properly classified . . . , and are paid within the pay scale for that classification.

In order to prove their point, Grievants in the hearing for *Adkins, supra*, offered the testimony of Sharon Hess, a 28-year employee of the BCSE, who is currently classified as a Child Support Supervisor 2. Ms. Hess testified as to the duties of CSSs and herperception of their complexity. She stated that most of the petitions, motions, and other legal documents which CSSs are responsible for “drafting” are merely forms which are accessible on the computer system. She also explained that, in her office, CSSs rarely testify in court; however, she further stated that she only knows what occurs in her particular county office and acknowledged that situations do vary throughout the state.

This testimony does not establish that the pay grade to which FSS is assigned is improper. As explained by Lowell Basford, of DOP's Classification and Compensation Division, CSSs perform a vastly different function from that which FSSs perform, resulting in a slightly higher pay grade assignment. Classification specifications are created with extensive input from the agency and the

employees who are performing the duties of the position at issue. Once the specification has been finalized, salary surveys are conducted to determine the appropriate salary range and pay grade assignment for the type of position involved. In this case, the evidence simply does not establish that a different pay grade assignment would be appropriate for the FSS classification, nor that Grievant's duties are sufficiently similar to those of the CSS 3 classification to warrant the same salary. In addition, the undersigned finds that the pay grade assignment for Grievant's position was not arbitrary and capricious, an abuse of discretion, or the result of intentional discrimination on the part of Respondents.

Grievant also contends that discrimination and favoritism has occurred with regard to her salary versus that of the CSS 3 employees. (See footnote 4) West Virginia Code § 29-6A-2(d)defines "'discrimination'" 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." "'Favoritism'" is defined by Code § 29-6A-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (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. Higher Education Policy Comm., Nos. 32163 and 33296 (W.Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e. that the elements of discrimination and favoritism are essentially identical. *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corrections*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.,* Docket No. 90-50-281 (Jan. 28, 1990).

Grievant is not similarly situated to CSSs, and the differences in treatment are entirely job-related. 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 towhom they compare themselves. In this 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 . . . discrimination or favoritism is a showing that the grievant is similarly situated, in a pertinent way, to one or more other employees." (See footnote 5) 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, because "[o]bviously employees who do not have the same classifications are not performing 'like assignments and duties.'" This ruling was confirmed in *Airhart v. Wood County Board of Education*, 212 W. Va. 175, 569 S.E.2d 422 (2002).

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, supra*, and noted the grievants did not hold the same classifications as any of the employees to whom they compared themselves. As the employees were not similarly situated, no discrimination was found. Here, as in *Flint*, the differences in treatment are related to the job duties of the employees. Grievant is not in the same classification, is employed within a different division of DHHR, and does not perform the same duties as CSS 3s.

As was similarly concluded in *Posey*, *supra*, the service that Grievant provides to DHHR's clients is no less valuable than that of the CSS employees; however, it is verydifferent in its nature, and the knowledge and experience required to perform it simply cannot be compared to what is necessary to provide child support collection services. In the absence of sufficient evidence demonstrating that DOP's determination of pay grade for their positions was clearly wrong, inappropriate, or the result of an abuse of discretion, deference must be given to DOP's determination. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994); *O'Connell*, *supra*.

The following conclusions of law are appropriate in this case.

Conclusions of Law

1. 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).

2. If a grievant 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).

3. "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 amanner 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).

4. Unless a grievant presents sufficient evidence to demonstrate DOP's interpretation of pay grade is clearly wrong, or the result of an abuse of discretion, an administrative law judge must give deference to DOP and find that the pay grade assignment was correct. *O'Connell v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-251 (Oct. 13, 1995).

5. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., Nos. 32163 and 33296 (W.Va., Oct. 12, 2007); *See Bd.*

of Educ. v. White, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

6. Grievant has failed to prove by a preponderance of the evidence that the salary assigned to her job classification was arbitrary and capricious, an abuse ofdiscretion, or the result of discrimination or favoritism, or that the pay grade assignment for the Child Support Specialist 3 classification entitled her to a salary increase.

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. *See* W. Va. Code § 29-6A-7 (*repealed* March 7, 2007*)* (*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.

Date: February 21, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

As with most of these related grievances, Respondents relied upon the evidence they introduced in the level four hearings of previous grievances. The information in this decision regarding the Child Support Specialist classifications was obtained largely from the record in Posey, supra.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, 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 decidedunder 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, which continue to control the proceedings in this case.

Footnote: 3

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: 4

Although it is unclear whether Ms. Mullins specifically meant to make this particular argument, the analysis has been included in this Decision in the interest of fairness, in that it was made by the Grievants in Adkins, supra, with whom Grievant should have been consolidated.

Footnote: 5

Although the White decision partially overruled the discrimination test as set forth in Flint and Airhart, the only portion of the test which was declared invalid was the final prong, which allowed an employer to attempt to justify the difference in treatment.