WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROGER M. ECHOLS II
Grievant,

v. **Docket No. 2011-0418-DOE**

WEST VIRGINIA DEPARTMENT OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Roger M. Echols II, filed this grievance against his employer, the West Virginia Department of Education ("WVDE"), Respondent, on September 22, 2010, protesting his salary as a Curriculum Development Technician. Grievant alleges that WVDE discriminated against him "in establishing the starting salary for [his] position inconsistent with the manner in which it has determined the salary for at least one other similarly situated employee." For relief, Grievant requests a change in job title to WVDE Videographer/Coordinator; back pay plus interest in the amount of the difference in salary between a Curriculum Development Technician and a Videographer/Coordinator since the start of his full time employment at the WVDE; an increase in salary to the "coordinator" level; attorney and court fees; and $10,000 in damages for mental stress, physical stress, and medical costs.[1]

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[1] It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). WEST VIRGINIA CODE § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) **Any expenses incurred** relative to the grievance procedure at levels one, two or three **shall be borne by the party incurring the expense**." Emphasis added. Further, this Grievance Board does not award tort-like or punitive damages.

A conference was held at level one on February 12, 2011. The grievance was denied at that level on March 2, 2011. Grievant appealed to level two on March 16, 2011. Grievant appealed to level three on June 29, 2011. A level three grievance hearing was set for September 22, 2011. Respondent filed a motion dated September 19, 2011, to exclude Grievant from calling witnesses for the then scheduled level three hearing, citing 156 C.S.R. 1 § 6.5.1 (2008).[2] Grievant, represented by legal counsel, had not submitted a prerequisite witness list, which was to be filed prior to September 15, 2011, being six working days prior to the hearing date. On September 21, 2011, Grievant filed a motion for continuance of the level three hearing. On September 22, 2011, a phone conference with the legal counsel of the parties was held. Protracted arguments and positioning with regard to the motions and the issue of pending litigation was heard. It was determined by the undersigned Administrative Law Judge, that the parties would maintain the posture each had or would have had, if the scheduled hearing had transpired. A continuance was granted to Grievant and Respondent's Motion was granted. Respondent's posture would not be penalized nor would Grievant's case in chief be enriched by establishing a new hearing date. Ultimately, a level three hearing was held on January 30, 2012, in the Grievance Board's Charleston office. Grievant appeared with legal counsel, Trent A. Redman, Esquire. Respondent was represented by its General Counsel, Heather L. Deskins.

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[2] W. VA. CODE ST. R. § 156-1-6.5.1 (2008) provides, "All parties shall provide the Board and all other parties with a list of the witnesses they intend to call at the level three hearing, whether subpoenaed or not, at least six days prior to the hearing."

This grievance matter became mature for decision on March 23, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant is employed as a Curriculum Development Technician. He contests his job title and salary. Grievant alleges he has been discriminated against in that he performs the same job duties, and is similarly situated, as an identified "Video Production Coordinator," but is prohibited from enjoying a compatible salary. Grievant avers that the difference in treatment has caused a substantial inequity in their salaries and there is not proper justification for this difference. Respondent disagrees.

Respondent demonstrated that Grievant is not similarly situated to the comparative employee identified by Grievant. There are other WVDE employees at the "technician" level, the scope of Grievant's work is similar to the scope of work done by other WVDE technicians, and the scope of Grievant's work is substantially more limited than the work of an individual paid at the higher "coordinator" level salary. Respondent's actions are not considered to be arbitrary and capricious. Grievant failed to establish, by a preponderance of the evidence, the necessary elements of his allegations. Grievant did not demonstrate a violation of any statute, rule, policy or procedure, or that he was otherwise entitled to the relief requested. Consequently, this grievance is DENIED.

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

Findings of Fact

1. Grievant is currently employed by the WVDE as a Curriculum Development Technician.

2. Grievant was first hired by the WVDE as a Curriculum Development Technician in a part time/temporary capacity in approximately October 2007. The money for his salary was obtained from a federal grant, the Foreign Language Assistance Program (FLAP), which was established to improve or expand innovative foreign language programs for elementary and secondary school students. In February 2009, after grant funding was increased, the position was posted as a full-time job dependent on the continued availability of the grant funds.

3. The applicable job posting of 2009, for Grievant's position, which also serves as a job description, lists Grievant's Duties and Responsibilities as:

> 1. Provide instructional media services.
> 2. Operate a wide array of audio, video and production equipment in the development of audio/video programs.
> 3. Prepare storyboards and other pre-production elements.
> 4. Film, direct, edit and produce final instructional program for mass distribution via a variety of technological media.
> 5. Attend and participate in planning meetings.
> 6. Other duties as assigned by the Office Director.

See Respondent's Exhibit 9.

4. Grievant is assigned to work in the Division of System Support/Office of International Schools. *See* Organizational Chart, Respondent's Exhibit 1, page 5. The Assistant Superintendent over the Division is Dr. Amelia Courts. Grievant's immediate supervisors are Robert Crawford, Assistant Director, and Richard Lawrence, Executive

Director. Grievant's job, in essence, is to produce videos to assist school children in learning foreign languages at the direction of his immediate supervisors. Grievant works with a limited and set number of employees at the WVDE. His deadlines and directives are given and set by a handful of superiors in his sphere of the Division of System Support. To perform his job, Grievant needs to be familiar with a content area, application and a defined segment of West Virginia educators. Grievant's work is specialized and limited in scope and province.

5. Also employed by Respondent, WVDE, is Dan Blackwood, who has been a full-time employee of WVDE for over twenty years. Mr. Blackwood's current position title is Video Production Coordinator. For a time there was no job description or job posting in Mr. Blackwood's file. Nobody presently working at the WVDE could account for this omission. When the omission was discovered, Mr. Blackwood's supervisor asked him to write his own job description.

6. The job description that Coordinator Blackwood wrote depicting his position was never formally adopted by the WVDE and has not been officially made a part of Mr. Blackwood's personnel file. The Duties and Responsibilities listed by Blackwoods' self-created job description are significantly more expansive than those listed in the Grievant's job description. The duties and responsibilities are:

> Perform all duties related to the production of educational and instructional video materials **for use by the WVDE** and state school system, including:
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> - **Coordinate with state, county and local personnel** to schedule productions in schools, board offices and other locations.
> - **Work with state, county, and local personnel** to develop video production scripts and facilitate productions, coordinate locations, talent resources required to produce professional quality video productions.
> - Transport field production equipment to sites and set up for location shoots.

- Coordinate production lighting and set design.
- Record video and audio in studio and field locations for use in productions.
- Utilize computerized video equipment (digital and analog) to edit, produce and compress high quality videos for educational and promotional uses as required.
- Operate and maintain equipment including minor repairs such as cable replacement, software installation and upgrades.
- Provide video support to WVDE.
- Follow industry trends and recommend equipment upgrades/software upgrades to keep department capabilities current.

(Emphasis added.) Respondent's Exhibit 7.

7. The preface statement above Coordinator Blackwood's job duties (set forth above), and the first two bullet points beneath the preface (also set forth above) emphasize that the scope of his work includes the entire WVDE and state, county and local personnel. His work is not limited to one content area or to one segment of teachers. Coordinator Blackwood's work load is manipulated to meet the needs of the entire WVDE. Mr. Blackwood also works directly with the State Superintendent and is often assigned to perform work at statewide meetings of county superintendents. Coordinator Blackwood's duties include working with various administrative personnel of Respondent. Coordinator Blackwood's duties require more than knowledge of how to operate video equipment and editing software. Mr. Blackwood is required to maintain an up-to-date working knowledge of all major WVDE initiatives and projects across all content areas.

8. The scope of Mr. Blackwood's work is significantly greater than the work of Grievant.

9. Respondent considers both Grievant as a Curriculum Development Technician and Dan Blackwood as a Video Production Coordinator to be valued employees of the West Virginia Department of Education.

10. The salary level in 2010 and 2011 for the position of Curriculum Development Technician established by Respondent is identified as $52,625.29 and $54,568.00, annually. See Respondent's Exhibits 2 and 3.

11. The salary level in 2010 and 2011 for employment with Respondent in the position of Video Production Coordinator varies with educational background, nevertheless the salary for the position is greater than that of a Curriculum Development Technician annually.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

WVDE staff members are non-contractual at-will employees. *Barnhart v. Department of Education*, Docket No. 03-DOE-027 (Dec 17, 2004). The statutes applying to *county board of education employees* set forth in articles 18 and 18A of the West

Virginia Code have no application to *state department of employees* unless specifically stated. Nevertheless, Grievant is of the opinion that Respondent's actions in compensating him less than an identified comparative employee are improper. Grievant is desirous of an increase in his salary. This desire is not a unique or unprecedented grievance issue. Salaries may be affected by numerous factors not exclusively limited to experience and training. 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 v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994). Grievant asserts he is entitled to additional compensation.[3] His argument, presented by legal counsel, is at the very least two fold: (1) equal pay for equal work and/or; (2) Grievant was under-compensated as a result of the authorized agencies' failure to properly assess and classify the duties he performs.

Grievant contends that his job duties as a Curriculum Development Technician are substantially similar to the job duties performed by Dan Blackwood a Video Production Coordinator. Respondent disagrees with Grievant's contentions. Respondent avers Grievant's allegations of wrong-doing are skewed and inaccurate. Respondent maintains its decisions regarding the appropriate salary level for Grievant were based upon the actual

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[3] While not directly set forth in the applicable rules and regulations promulgated by the State Board of Education, generally speaking in employment classification matters, in West Virginia, it is readily acknowledged that 'employees who are performing the same tasks with the same responsibilities should be placed within the same job classification,' e.g., W. VA. CODE § 29-6-10(2); *Largent, supra.;* WV Division of Personnel Administrative Rules 143 C.S.R. 1 § 5.1; also see West Virginia Equal Pay for Equal Work Statutes, W. VA. CODE § 21-5B-1 *et seq.*

job responsibilities and scope of the work. Respondent asserts that Grievant does not perform the duties and/or maintain the responsibilities of a Video Production Coordinator (Dan Blackwood). Respondent maintains that Grievant's salary is lawful.

Grievant argued his situation constituted discrimination and/or favoritism. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish 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,
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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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008); *also 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).

Grievant did not establish that he and Dan Blackwood are similarly situated employees. Grievant testified and presented numerous exhibits in an attempt to validate his conjecture. Grievant's argument was not persuasive. Grievant's Exhibit 1 is a listing of the job duties and responsibilities set forth in the representative job description of the two positions. Grievant's exhibit is comparative from Grievant's perception, but not totally inclusive of all factors required for full comparison of the two positions. This exhibit is informative, but not demonstrative of a complete analysis. Grievant's Exhibit 3 is a job posting for Mr. Blackwell's job from 1985. This posting is almost thirty years old. It is so old that the information provided limits its probative value upon the issue in litigation. The WVDE is structured differently now, and the pay scales and job titles which existed in 1985 are no longer in effect or are of limited weight in analyzing Grievant's current allegations. The basis for the decision in this matter must be based on an examination of the current job duties and the current scope of work of Grievant and Mr. Blackwood. The predominant duties of a position has legitimate bearing on proper classification.

Respondent has established a salary schedule for job titles/classification employed at the WV State Board of Education. *See* Respondent's Salary Schedules Exhibits 2 and 3. It is established that there are other WVDE employees who are paid at the "technician" level. In addition to the Curriculum Development Technician position, there is an Information System Technician position at WVDE. Superintendent Marple testified that individuals are paid at the technician level because, as with Grievant, the scope of their work is limited. They do not work with the staff of the entire WVDE. They perform technical/computing tasks that are assigned to them by their supervisor; tasks that do not require a working knowledge of the full spectrum of WVDE projects and initiatives.

Expertise is technical, as is the type of video production and editing done by Grievant, but such duties involve far less discretion than the work done by coordinators like Dan Blackwood.

For example, an Information System Technician sometimes designs online surveys which include questions that are provided to their supervisor by other employees throughout the WVDE. They don't initiate the process and they don't choose the questions, but they do design the survey instrument and monitor its distribution and collection. Likewise, Grievant does not speak Chinese or Japanese, and does not write the script that the actors in the instructional language videos perform. Grievant's assigned tasks are limited to setting the stage and choosing the lighting, organizing actors, operating video equipment, and editing the raw footage into a pleasing package. Mr. Blackwood, on the other hand, may be given an assignment to design a video directed at school administrators which demonstrates the value of arts classes in preparing students for the 21st Century workplace. This requires him to know the WVDE position on 21st Century skills; understand the correlation between arts/creative thinking, school success, and workplace readiness; have an understanding of other WVDE projects that may support the goal; contact coordinators at the WVDE and teachers in the field to obtain video footage of exemplary arts programs and arts students; and then implement his technical skills in filming and editing the video. At the same time, Mr. Blackwood may be working with the Office of Healthy Schools to prepare television ads targeted at parents to encourage healthy eating habits at home. This project would involve a completely separate WVDE initiative, a completely separate content area and teachers, and a completely different

Division at the WVDE.[4] The scope of Mr. Blackwood's work is significantly more broad than the scope of a technician's work.

It is not disputed that the two men are cohorts and have worked well together and in tandem with one another from time to time on a project; nevertheless, the responsibilities of their respective jobs are not the same. Grievant did not establish that he is the victim of discrimination or favoritism. Nor has Grievant demonstrated that he is entitled to the job title of Video Production Coordinator. Grievant has not presented examples of his work, no examples of Mr. Blackwood's work, and no document, as submitted by Grievant was found to be sufficiently persuasive to substantiate his position or to refute the testimony of Superintendent Marple. It is not found that Grievant and Video Production Coordinator, Dan Blackwood share like job responsibilities.

"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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 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

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[4] During Superintendent Marple's employment period at the WVDE which has included service as an Assistant Superintendent in the Division of Curriculum & Instructional Services, service as Deputy State Superintendent, and service as the State Superintendent, she has never once worked with Grievant on a video production project. Superintendent Marple has had occasion to work with Dan Blackwood in each of her positions at the WVDE.

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 of review does not permit an administrative law judge to simply substitute his judgment for that of the [employing agency]. *Bradley v. Bd. of Directors,* Docket No. 96-BOD-030 (Jan. 28, 1997). *See Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993).

The Grievance Board's role is not to act as an expert in matters of classification of positions, job analysis, and compensation schemes, or to substitute its judgment in place of a recognized authority. 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 a grievant can demonstrate his or her classification 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. 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.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re: Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). It is fair to say that a grievant challenging his classification has an uphill battle. *See W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993).

It is found that Respondent, in determining Grievant's job title and salary, among other considerations, predicated its decision on the actual job duties, scope of authority and responsibilities of Grievant. Respondent has not acted arbitrarily and capriciously in assigning Grievant's salary. Respondent's decision regarding the appropriate salary level for Grievant was based upon the actual scope of Grievant's work.

Grievant has alleged that the work he has performed outside the foreign language content area, justifies the relief he has sought in this matter. However, in examining the Grievant's time and effort sheets, which were submitted as Respondent's Exhibit 8, and the Timesheet Summary submitted as Respondent's Exhibit 4, Grievant only worked outside of the foreign language content area for 11.06% of his total working hours over a 27 month period (59.75 out of approximate 540 work days). Of this time, only 5.25 days were spent doing work that fell outside of his Division, which is headed by Dr. Amelia Courts. All other work performed falls under the Parent Involvement Category (PAR) on the time sheets. The WVDE's Parent Involvement initiative is headed by Dr. Courts. The work done by Grievant outside of the foreign language area is *de minimis*, and does not support a change in compensation or salary.

Finally, the fact that Grievant went to the same training/continuing education seminar as Mr. Blackwood does not mean that the scope of their work is the same. Attendance of continuing education programs is usually beneficial to career development but it does not eradicate significant diversity in authority and scope of employment without official action by the employing party. As Superintendent Marple testified, she often attends seminars and training sessions with coordinators and other subordinates on her staff, however, there is no question that the work of the coordinators and subordinates is significantly different in scope.

Grievant, bearing the burden of proof in this non-disciplinary grievance, has failed to establish wrongdoing or illegality by Respondent. The salary of Grievant is lawful. Grievant has failed to prove, by a preponderance of the evidence, that Respondent has any legal obligation to increase his pay. This grievance must be denied in accordance with

the facts, applicable law, and circumstances as discussed above. Grievant has not established that his salary is in violation of any applicable and controlling statute, rule or regulation. Grievant is being paid in accordance with the pay criteria Respondent has established for the position of Curriculum Development Technician. A mandatory duty to grant Grievant a salary increase, to the level comparable to that of a "Video Production Coordinator," the identified job title, Grievant avers is appropriate for the duties he routinely performs, was not established. Grievant's dedication to his duties and professionalism is appreciated by his employer; however, Respondent did not find itself motivated to grant Grievant an increase in salary, to the degree desired by Grievant. Further, Grievant has failed to establish, by a preponderance of the evidence, that his salary is in violation of any mandatory rule, regulation or law.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. In order to establish 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,
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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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant is not similarly-situated to the identified comparative employee.

4. In determining Grievant's job title and salary, among other considerations, Respondent predicated its decision on actual job responsibilities of Grievant. Grievant failed to demonstrate that he was the victim of discrimination or favoritism.

5. Grievant has failed to establish, by a preponderance of the evidence, that his salary is in violation of any mandatory rule, regulation or law. Grievant did not demonstrate a violation of any statute, rule, policy or procedure, or that he was otherwise entitled to the relief requested.

6. Pursuant to the preponderance of the evidence established in this grievance, Respondent is not required to grant Grievant a pay increase to the level comparable to that of Video Production Coordinator.

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 § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: September 25, 2012

Landon R. Brown
Administrative Law Judge