



JAMES PAUL GEARY
Chairman
ORTON A. JONES
DAVID L. WHITE
Members
C. RONALD WRIGHT
Director

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

240 Capitol Street
Suite 515
Charleston, WV 25301

GASTON CAPERTON
Governor

REPLY

207 National Road
Post Office Box 267
Triadelphia, WV 26059
Telephone: 238-1040
ON NET: 557-1040

ARDEN LOOMIS and MARK GRAEBER

v.

Docket No. 91-DHS-172

WEST VIRGINIA DIVISION OF HUMAN SERVICES/DIVISION OF PERSONNEL

SHIRLEY A. KITCHEN

v.

Docket No. 91-HHR-319

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

DECISION

Grievants are employed by Respondent West Virginia Department of Health and Human Resources' (Department) Division of Human Services (DHS) and assigned to a Child Advocate Office (CAO). CAO, an adjunct facility found within existing regional DHS offices, is administered by the Department's Bureau of Income Assistance. Prior to March 1991, Grievants held the title of Child Support Enforcement Specialist (CSES), pay grade (PG) 13. Through the efforts of the Department and the West Virginia Division of Personnel (Personnel), effective March 16, 1991, the CSES classification was abolished, and approximately sixty or seventy incumbent CSEs holding that class title were

reclassified as Child Advocate Legal Assistants (CALA), PG 14. Grievants herein claim that their change of employment status amounted to a promotion and that they should have received a "full step" increase in pay.¹

Some background information is necessary. According to Grievants, as a result of a lawsuit, the Department had been ordered by the United States District Court for the Southern District of West Virginia in early 1990 to restructure its operations so that Child Advocates (attorney positions) would directly supervise the CAO's legal matters, including the training and work of all subordinate employees such as paralegals and other office support personnel. Further information advanced by Grievants reveals that the Department held meetings in Spring and Summer 1990 to plan and implement a reorganization of CAO in response to the court order.

It appears that the Department initially planned to divide the legal and administrative functions of CAO. This is confirmed by a July 16, 1990, memorandum issued by the Bureau of

¹Grievants Loomis and Graeber initially filed their complaint to level four because it had not been timely scheduled for a level three hearing. The case was remanded for further proceedings at level three whereat hearing was held June 4, 1991. The Department ruled against Grievants by decision rendered June 10, 1991. Meantime, Grievant Kitchen, also affected in an identical manner by the Department's actions, had filed a grievance raising the same issues as Loomis/Graeber. When Kitchen's grievance reached level three, the parties agreed to forego an evidentiary hearing in light of the adverse ruling rendered in the Loomis/Graeber grievance. Later, all of the parties to both grievances agreed to a record decision at level four based on evidence adduced at level three in the Loomis/Graeber case.

Income Assistance's acting administrator, Mary Terry, to Child Advocates, DHS's Regional Supervisors and Regional Administrators, Assistant Directors and State Office Administrative Staff. Ms. Terry's "guideline" identifies separate administrative and legal units, presumably within DHS/CAO, delineates the "allocation of duties" of each unit and describes the "flow of work between units."² The document touches upon the duties to be performed by CSESS "pending the hiring of the Legal Assistant," i.e., CALA(s). Ms. Terry also made several other references to the "Legal Assistant" positions and concluded by stating that those positions would be filled "promptly."

According to Grievants, in August 1990, DHS posted twenty-two statewide job vacancies for the newly-created title and position of "Child Advocate Legal Assistant." As noted in Ms. Terry's July memorandum, CALAs were to work directly under the supervision and direction of each regional CAO's Child Advocate. In effect, incumbent DHS/CAO personnel, most likely CSESS, were free to bid on the CALA positions. Accordingly, if a CSES won a bid to a vacant CALA position, that employee would have moved from PG 13 to PG 14. Grievant Graeber testified at level three that he had been approached about vying for a CALA position but that he had not been interested and had declined to apply. When a question arose at the level three hearing about the twenty-two

²Presumably, the division of CAO's functions was formulated in order that DHS could retain some control over CAO's operations or at least the employees who worked within the CAO unit.

CALA vacancies, Lowell Basford, Personnel's Assistant Director of its Compensation and Classification Section, indicated that he did not know if any of them had been filled. Indeed, no evidence on the matter exists in the record.

In any event, in late December 1990, the aforementioned Court entered a subsequent order that DHS cease its division of CAO into separate administrative and legal units.³ It reaffirmed that CAO's Child Advocates were to have superior status over DHS's administrative employees in CAO-related affairs and ultimate discretion in determining which matters were legal versus administrative. It also reaffirmed that Child Advocates would train and direct the work of both CSES and CALA personnel and other essential CAO support staff. In sum, the Child Advocate was to have complete control of CAO personnel management and also the flow of pertinent client information within his or her regional CAO.

By letter issued on or about January 4, 1991,⁴ the Department's Deputy Secretary Raymona Kinneberg petitioned Personnel to approve certain revisions within the Child Advocate series. The letter stated, in pertinent part,

In order to comply with the . . . [Court] Order, we propose the following:

1. Abolish the classification of Child Advocate Enforcement Specialist and revise the Child

³It may very well be that the CALA position vacancies had not been filled due to further court action and that DHS simply decided to await a ruling prior to any further action affecting CAOs.

⁴The letter is actually dated January 4, 1990, obviously a typographical error since it referred to a December 1990 event.

Advocate Legal Assistant, paygrade would remain unchanged. Reallocation of Child Advocate Enforcement Specialist into the Child Advocate Legal Assistant classification would be in accordance with Division of Personnel Rules and Regulations, Section 6.04, (f), 2. Pay on Reclassification, a. 1 and 2.

The Department's requests were approved by Personnel's Director Michael Smith by letter dated January 28, 1991.

A personnel-action document, a "WV-11," indicates that Mr. Loomis had been a CSES since August 1990 at PG 13, Step 2A. After the reclassification he was placed at PG 14, Step 1A with no change in salary. A similar document attests that Mr. Graeber, also classified as a CSES since August 1990, had resided at PG 13, Step 1B. After the reclassification, he was placed at PG 14, Step 1A, with a one-half step salary increase, or \$27.00 more a month.⁵

Grievants place much significance on the fact that the position of CALA had been created and posted while the CSES title was still intact, and further, that when the twenty-two CALA jobs had been posted in 1990, an opportunity existed for CSESS to be selected for a CALA position prior to the personnel changes affecting those classes which were approved in January 1991. Under those circumstances, Grievants maintain, any CSES who landed a CALA position in 1990 would have been promoted to a higher pay grade. The thrust of Grievants' argument seems to be that of fairness. In essence, they argue that it was unfair for

⁵Details about Ms. Kitchen's new salary were not provided. Apparently, she did not receive a full step salary increase.

DHS to offer the job of CALA as a promotion to CSESSs at one time and later simply "reclassify" CSESSs to a higher class requiring greater duties or a higher level of work performance, i.e., to CALAs, without providing a promotional salary adjustment.⁶

The Department maintains that Grievants have not met their burden of proof in this matter. It argues that Personnel has the authority to amend, revise or reclassify job classifications and that the personnel action which affected Grievants did not involve a promotion. It proposes that

-- Reclassification is defined as the revision of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition, and may include a change in title, paygrade, or minimum qualifications for the classes involved. Division of Personnel Rules and Regulations, Section 3.

-- A promotion is a change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities. Division of Personnel Administrative Rules and Regulations, Section 3.

-- The State Personnel Board has sole authority to abolish, amend or establish job classifications for the classified service. W.Va. Code §29-6-10(1)

⁶Personnel's regulation at Section 6.05(a), Pay on Promotion, provides:

Minimum Increase - The salary of an employee who is promoted shall be adjusted to the minimum rate of the new class. If the incumbent's current pay rate is at or above the minimum rate for the new class, but coincides with a step in the new range, the salary shall be adjusted one step in the range. Where the pay does not coincide with a step in the new range, the salary shall be adjusted to the next higher rate which provides at least a full step increase.

Unfortunately for Grievants, the applicable regulations in this matter clearly favor the Department. Personnel's Administrative Regulations, beginning with "Classification Plans" at Section 5, include:

5.02. Revision of Plans - Existing classes of positions may be abolished or changed, or new classes added, in the same manner as the classification plans were originally adopted.

. . . .

5.05. Reclassification

(a) Upon its own initiative, or at the request of an appointing authority, the Board may reclassify positions by the creation or abolishment of classes, or the revision of the definition of the work of the classes brought about by changing work methods, new technology or reorganization.

(b) For each position affected the appointing authority shall provide a current description of the duties and responsibilities assigned.

(c) The employee in the position at the time of a reclassification shall be entitled to continue to serve in that position, provided that any licensure or certification requirements are met.

Section 6, "Compensation Plan and Salary Regulations," provides for "Pay on Reclassification" at subsection 6.04(f)(2)(a), "Higher minimum," as follows:

1. When a class is reassigned by the Board to a salary range having a higher minimum, the salaries of those incumbents below the new minimum shall be adjusted to the new minimum.

2. Where the salary of the incumbent coincides with a step in the new range, the salary shall remain unchanged.

3. Where the salary of the incumbent falls within the new range and does not correspond with a step in the range, the salary shall be adjusted to the next higher rate in the new range.

Grievants have failed to show any violation or misapplication of these regulations in conjunction with the Department's and Personnel's actions in January 1991.

In addition, Grievants' theory of promotion is not borne out in other respects. The record does not support that Greivants' duties or responsibilities changed significantly after their reclassification. Mr. Graeber had been repeatedly asked at the level three hearing whether any new duties had been assigned to him since his reclassification. At one point he essentially responded that he performed basically the same duties as he had before the reclassification. In general, he would not directly answer the Department's counsel about any specific differences between his present and past duties. Instead, Mr. Graeber referred to the Nature of Work section of CALA's specification and stated that he might have to draft legal petitions, a factor not precisely found in CSES's Nature of Work section. However, that portion of the CSES specification had required incumbents to assist CAO/DHS "in the development of cases" and to "develop necessary information to implement methods of child support enforcement," duties that would not necessary preclude the incumbents' involvement with assisting Child Advocates with legal research and in drafting petitions such as are more specifically found in CALA's Nature of Work section.⁷

⁷Although Mr. Loomis initially characterized his work as being more legally oriented and responsible than it had been in
(Footnote Continued)

Finally, from Grievants' perspective it may seem unfair that CALA positions had been offered as promotional vacancies at one point, an option that at least Mr. Graeber declined. However, Grievants produced no policy, law or regulation which would, under those circumstances, prohibit the Department and Personnel from abolishing the CSES class and reclassifying the incumbents to the CALA class in January 1991 as was done. Grievants also failed to tender any other persuasive argument that the Department and Personnel had acted wrongfully in this matter. It must be pointed out that, in fact, Grievants have benefitted in some manner from the reclassification because they now have a greater salary range from which future wage enhancements or merit raises can be made.

The factual and legal determinations contained in the foregoing discussion and analysis are incorporated in and made a part of the following formal conclusions of law.

Conclusions of Law

1. The grievant must prove all the allegations constituting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

(Footnote Continued)

the past, e.g., that he now worked much more closely with the Child Advocate, he ultimately disavowed that he was presently engaged in complex legal research or writing and agreed that he performed essentially the same duties as he had before the reclassification, T.14-16.

2. Under existing West Virginia Division of Personnel regulations, covered employees are not entitled to a one-step promotional salary enhancement when their existing class is reclassified for legitimate work purposes and allocated to a higher pay grade level.

3. Grievants failed to establish that they were entitled to a promotion when the Department and Personnel followed existing regulations to abolish the CSES title and reclassify all incumbent employees, sans a promotional salary adjustment, in January 1991.

The grievances are accordingly **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. 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. And appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.



NEDRA KOVAL
Administrative Law Judge

Date: February 27, 1992