IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CHRISTOPHER L. ELION, WILLIE PORTER, MARK RICHARDSON, CHRISTOPHER KIRBY, NATHAN CHAMNESS, CHARLES BRUTCHER, LARRY BANKSTON, RONALD PALMER, KENNETH WASHINGTON, ELIZABETH TRIPLETT, TERI BRANDON, SARAH TROUY, and LAWRENCE CARGILE,	)	
Plaintiffs,	)	
v.	)	**No. 08-2411-P**
SHELBY COUNTY GOVERNMENT,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the court is defendant Shelby County Government's ("Shelby County") Amended Motion to Dismiss for Failure to State a Claim or, in the Alternative, for Summary Judgment. (ECF Nos. 30, 33.) For the reasons below, the court GRANTS summary judgment for Shelby County.

I. BACKGROUND

The plaintiffs all hold the position of Appraiser in the Shelby County Assessor's Office and have been employed in that capacity since at least 1996.[1] (Am. Compl. ¶¶ 2-14, 20.) As

[1]Unless otherwise noted, the facts are not in dispute. The court views the facts in the light most favorable to the

Appraisers, the plaintiffs hold "classified" positions under the Shelby County Civil Service Merit System, and thus are entitled to certain job protections, such as not being terminable at will. Chapter 12, Article II of the Shelby County Code ("Code") governs all aspects of the county's civil service system.[2] Section 12-29 of the Code requires the county to establish a written classification plan. The classification plan must contain, among other things, a description of the duties and responsibilities for each position. Section 12-30 provides that "[f]or each class of positions established in the classification plan, a study shall be made of the rates paid for similar services elsewhere and of other information pertaining to proper rates of compensation, and a schedule of compensation will accordingly be established." Section 12-31 further provides that "[a]ll policies, rules and regulations regarding personnel and employees within the systems shall be reduced to writing."

Pursuant to the Code's requirements, Shelby County has established a written compensation policy ("Compensation Policy"). (See ECF No. 18-1 at 26-48.) The stated purpose of the policy "is to establish an equitable and fair compensation plan and procedures for administration of rates of pay for new hire, promotion,

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plaintiffs, the non-moving party.

[2]The court will refer to the version of the Code in effect during the relevant 2006 to 2008 time period at issue in this case.

demotion, reclassification, and other pay situations." (Compensation Policy § I.) Under section I.C.2 of the Compensation Policy, the Human Resources Administrator "shall have the authority and responsibility for the overall development and administration of the Compensation/Salary Policy and Classification System for Shelby County Government." (Id. § I.C.2.) When the "major responsibilities" of a particular job position "significantly change[s]," a job evaluation is required "to ensure the correct grade assignment." (Id. § VI.C.) Section VIII governs job evaluations and provides in relevant part as follows:

> A. Overview
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> Job evaluation is the foundation of a sound classification plan. A job evaluation involves an analysis of the duties and responsibilities of the job. The job evaluation identifies and determines the value of the job in relation to all other jobs. In a job evaluation, only the job is evaluated and not the person holding the job. The job evaluation does not consider the employee's performance or the years of the employee. A job evaluation should not be used to provide a salary increase to an employee. . . .
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> **If pay is a concern, a request for a salary review should be submitted to Compensation (See Pay Exceptions).**
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> A job evaluation provides for the grouping of positions which contain similar duties and responsibilities and which require similar qualifications, knowledge, skills and abilities.
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> A job evaluation is initiated when a new position is developed or the duties of an existing position are significantly and substantially changed on a permanent basis. . . .
>
> B. Job Analysis

> The basis of a job evaluation is the job description. An accurate listing of the major duties and responsibilities of the job must be assembled to begin the process. An analytical review is then initiated to determine, among other factors, the complexity of the position, the scope and effect of the position, guidelines governing the work performed and supervisory controls.
>
> A written analysis that identifies and analyzes the primary duties and responsibilities of a position is developed. A grade is then assigned which places the job in the hierarchy of existing positions. Job evaluations establish grades which maintain equity between jobs.
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> C. Procedure to Request a Job Evaluation
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> Written request to Compensation Human Resources from the Elected Official, Division Director or Chief Administrative Officer or their designee to evaluate the position for proper classification must be provided to Compensation. . . .
>
> D. Approvals
>
> Once the request is submitted, it is the responsibility of the Compensation Department to ensure a sound job description and to determine grade assignment. The Compensation Department provides a neutral and unbiased assessment of the job's worth in the organization. It is essential that the integrity of the job evaluation system is maintained to ensure equitable grade assignments and to help build confidence that grade assignments are free from influence.

(Id. § VIII) (emphasis in original.) Finally, section XIII states that "[a] pay adjustment for equity purposes may be made as a result of a review/study by Compensation. Such an adjustment is designed to ensure equity in pay levels internally and/or externally." (Id. § XIII.A.)

The lead plaintiff, Christopher Elion, was hired by the Assessor's Office as an Appraiser on January 1, 1996. (Def.'s

Statement of Undisputed Material Facts ("SUMF") ¶ 1.) The Shelby County Assessor is an elected position, and in 1996, the Assessor was Harold Sterling. (Pls.' Resp. to Def.'s SUMF ¶ 3.) At the time that Elion was hired, a Senior Appraiser position also existed, which was higher in rank, involved more complex duties (including supervisory responsibilities), and had a higher pay grade. (Def.'s SUMF ¶ 2; Am. Compl. ¶ 23.) During 1996, Sterling, as well as various management-level employees in the Assessor's Office, asked Elion and the other plaintiffs to perform the duties of a Senior Appraiser. (Def.'s SUMF ¶ 3; Pls.' Resp. to Def.'s SUMF ¶ 3.) The plaintiffs were told that the Assessor would approve retroactive out-of-class pay after the upcoming election to compensate them for performing the duties of a Senior Appraiser while classified and paid as an Appraiser. (Def.'s SUMF ¶ 4; Pls.' Resp. to Def.'s SUMF ¶ 3.)

Later that same year, Sterling ran for re-election in the general election and lost. His opponent, Rita Clark, was elected Assessor and took office on September 1, 1996. (Def.'s SUMF ¶ 5.) Shortly after Clark became Assessor, Elion and the other plaintiffs repeatedly approached management about being paid out-of-class pay and being officially promoted to Senior Appraiser, consistent with their new duties. (Def.'s SUMF ¶ 6; Pls.' Resp. to Def.'s SUMF ¶ 6.) In 1997 or 1998, the plaintiffs were informed that Clark had abolished the position of Senior Appraiser and had redistributed

the job duties of various classifications within the Assessor's Office. (Def.'s SUMF ¶ 7; Def.'s Reply at 4-5.) Clark never put in a request to the Human Resources Department to approve out-of-class pay for any of the plaintiffs, and as a result, the plaintiffs did not receive additional pay for performing Senior Appraiser duties. Since 1996, the plaintiffs have continued to perform many of the duties that were previously required of a Senior Appraiser, but have been paid at the Appraiser pay grade.

In March 2006, Clark announced that the county would be conducting a systematic, position-by-position job study to reevaluate position classifications ("2007 Job Study"). (Pls.' Resp. to Def.'s SUMF ¶ 17; ECF No. 34, 3/8/2006 email from Charles Blow to Lorie Ingram.) An Assessor Job Study - 2007 Fact Sheet ("Fact Sheet") was created, which described the upcoming job study.[3] The Fact Sheet stated in relevant part as follows:

> The Assessor, the Office of County Attorney made a request to [the Compensation Division of the Human Resources Department] that a review be undertaken of all positions in her office. This review is to ensure proper classification and grade assignment. . . .
>
> A Job Audit is the identification of most important duties and responsibilities of the job. The information is generally obtained through an interview with the employee performing the job. The information gathered is then used to develop a job description. The job description is the essential document used in the job evaluation to determine grade assignment and ultimately the range of pay paid for the job. If the grade

[3]It is unclear from the record who created this Fact Sheet, when or why it was created, and which employees received it.

> assignment results in a higher grade for the employee performing the job, the new grade is considered a reclassification of the employee and results in a reclassification increase. All job evaluations do not result in a higher grade. When there is no change in grade, no monetary increase is provided. There will be no loss of pay to employees as a result of the Job Study. . . .
>
> Compensation will attempt to meet with every individual in a job classification. However, where there are several individuals in a job classification (for example: Clerical Specialist A) Compensation will meet with the majority of employees in that classification per department to ensure adequate information on the job duties and responsibilities are obtained. . . .
>
> The Job Audits will begin August 2007 and will continue through November 2007. . . .

(ECF No. 34-4 at 4-5, Fact Sheet.) The Fact Sheet further provided that an "Advisor" to the Compensation Division would conduct the study, interview managers and employees, and develop a job description based on the information developed. (Id.) According to the Fact Sheet, the 2007 Job Study was scheduled to be completed in December 2007, and any salary adjustment increases recommended in the study would be presented to the County Commission for review and approval. (Id.) The 2007 Job Study, however, was not completed by December 2007.[4]

Meanwhile, on June 5, 2007, Elion and co-plaintiff Willie

[4]Plaintiffs claim that Clark canceled the 2007 Job Study. However, the documents attached to the plaintiffs' response brief do not support their claim that the study was ever canceled. In any event, even if Clark had in fact canceled the 2007 Job Study, as discussed below, a job study was conducted in 2008 by an independent consulting firm, which recommended no change in the Appraisers' pay.

Porter sent an email to Greg Moody, the Administrator of Residential and Commercial Property Assessment in the Assessor's Office, requesting out-of-class pay and invoking the administrative grievance process as set forth in the Shelby County Employee Handbook. (Def.'s SUMF ¶ 8; Pls.' Resp. to Def.'s SUMF ¶ 8.) On December 19, 2007, an administrative grievance hearing was conducted on Elion's grievance by Carol A. Farris, the Human Resources Manager for the Division of Health Services. (ECF No. 18-1, 1/31/2007 report of Carol Farris ("Farris Report").) Present at the hearing were Elion, Moody, and Lorie Ingram-Glenn, the Assessor's Office Human Resources Director. (Farris Report at 1.) Farris's report contained the following findings, recommendations, and conclusions:

> According to Mrs. Ingram-Glenn, Mrs. Clark did restructure the Assessor's Office in 1997, which directly impacted existing work assignments and responsibilities. This restructure eliminated the Senior Appraiser classification, and redistributed the duties performed by the Appraiser, Senior Appraiser and Manager classifications. As a result of this restructure, it is a logical assumption that Mr. Elion's job did change from the original position for which he applied and was hired.
>
> Mr. Elion states that he is now performing duties that are identical to the Senior Appraiser classification, and that he is currently required to act in a "supervisory" capacity related to his relationship with the Field Appraisers. Both Mr. Moody and Mrs. Ingram-Glenn stated that Mr. Elion's position is not responsible to supervise the Field Appraiser staff; but Appraisers are required to work directly with the Field and Associate Appraisers in the coordination of the appraisal work processes. The current structure (as outlined in the organizational chart) of the Assessor's staff in the Commercial Department (where Mr. Elion is assigned) reflects both

> Associate Appraiser and Appraiser classifications, and all positions report to the manager. The Residential Department reflects Field Appraisers, Associate Appraisers and Appraisers - again all reporting directly to their respective managers. Therefore, it cannot be determined that Mr. Elion is now required to perform the majority of the core duties once assigned to the Senior Appraiser position, primarily because there was also an adjustment in the assigned duties of the Manager classification.
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> Recommendation
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> As Property Assessor, Mrs. Clark was well within her rights to restructure existing work assignments and/or tasks to maximize her office's efficiency and ensure the judicious use of taxpayer funds. This restructure undoubtedly created a blending of job duties/responsibilities between what was previously classified as Appraiser, Senior Appraiser and Manager.
>
> In order to create a clear delineation between these classifications, the Assessor should request a job analysis. Mr. Elion has requested that the County's Compensation Unit conduct the job study, but I do not concur with this request. I believe that an independent and objective third party should provide the job analysis, and also offer a recommendation as to whether the organizational structure which is currently utilized by the Assessor is the most effective and productive for the Office.
>
> Related to Mr. Elion's request for back pay related to his belief that he has worked out-of-class since 1996, I cannot determine that he has consistently performed the major functions of the Senior Appraiser position for the past twelve (12) years; therefore, I cannot agree that back pay is warranted.
>
> Conclusion
>
> I recommend that Mr. Elion wait for the results of the impending job analysis that has been requested via RFP [or "Request for Proposals"], and offer his full cooperation and assistance to the Assessor's Office and the selected project vendor related to this effort.

(Farris Report at 3-4; Def.'s SUMF ¶ 14; Pls.' Resp. to Def.'s SUMF

¶ 14.) Clark agreed with the report and signed it. (Id.)

In 2008, Fox Lawson & Associates LLC ("Fox Lawson"), an independent human resources and employee compensation consulting firm, was hired to conduct a salary and job classification review for all of the positions in the Assessor's Office. (Def.'s SUMF ¶ 20.) Every employee in the Assessor's Office was asked to prepare a written job description identifying each of their job duties and responsibilities. (ECF No. 30-2, 5/6/2011 Statement of Michael Lewis ¶ 5.) All of the plaintiffs actively participated in the job study, which included preparing written job descriptions and being interviewed by Fox Lawson. (Id.) Fox Lawson concluded that all of the employees in the Assessor's Office occupying the position of Appraiser were being paid in line with persons occupying similar positions in other Assessors' Offices within the same region of the country. (Id.) Accordingly, Fox Lawson did not recommend any adjustment in the salaries of the individuals occupying the position of Appraiser. (Id.) In 2008, Cheyenne Johnson was elected as Shelby County Assessor and replaced Clark, effective September 1, 2008. (ECF No. 18-1, 12/30/2010 Statement of Michael Lewis ¶ 10.)

Plaintiffs were dissatisfied with the results of the Fox Lawson job study, and as a result, they filed this action pursuant

to 42 U.S.C. § 1983.[5] Plaintiffs allege the county violated their right to due process under the Fourteenth Amendment to the United States Constitution. They argue that the Farris Report recommended that a job analysis be conducted of the plaintiffs' duties, that the job analysis "per County policy" must be conducted by the Compensation Division of the Human Resources Department (as opposed to Fox Lawson or any other outside party), and that the Assessor has refused and continues to refuse to formally request that a job analysis of the Appraiser position be conducted by the Compensation Division. Plaintiffs contend that Article II of the Code, together with the Compensation Policy, create "a property interest in a job analysis and/or salary review to determine the classification of their job in the Assessor's Office and to determine the proper pay for the duties they are performing and have consistently performed since at least January 1, 1996." (Am. Compl. ¶ 48.) They claim that Shelby County has deprived the plaintiffs of "their property rights by refusing to initiate and follow through with a request for a job analysis and/or salary review for Plaintiffs' positions." (Id. ¶ 50.) Plaintiffs ask the court to order Shelby County to have its Compensation Division conduct a job analysis of the Assessor's position, award them out-of-class pay, and award

[5]Subsequent to the filing of the complaint, all parties consented to the exercise of jurisdiction by the Magistrate Judge. The undersigned was first notified of the parties' consent and assignment of this case in October 2010.

attorney's fees.

Shelby County now moves to dismiss the complaint, or in the alternative, for summary judgment.

II. ANALYSIS

A. Standard of Review

Shelby County labels its motion as one for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment pursuant to Rule 56. Rule 12(d) states:

> [i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d). A district court should treat a motion to dismiss as a motion for summary judgment if the court will consider affidavits submitted by the moving party. See Harris v. Jones, No. 88-1975, 1989 WL 20577, at *1 (6th Cir. Feb. 21, 1989) ("When the district court considers affidavits, the court should construe the motion to dismiss as a motion for summary judgment."); United States v. McCloud, No. 07-15013, 2008 WL 4277302, at *7 (E.D. Mich. Sept. 17, 2008) ("When matters outside the pleadings, including affidavits and deposition testimony, are presented to the court in support of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the motion is treated as a motion for summary judgment and all parties must be given a reasonable opportunity to present all material made

pertinent to such motion by Rule 56.") (internal quotation marks omitted). Both parties have attached exhibits to their briefs and have asked the court to consider these exhibits in deciding the present motion. Therefore, the court will treat Shelby County's motion as one for summary judgment.

Federal Rule of Procedure 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Geiger v. Tower Auto., 579 F.3d 614, 620 (6th Cir. 2009). In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted). "The moving party bears the initial burden of production." Palmer v. Cacioppo, 429 F. App'x 491, 495 (6th Cir. 2011) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Once the moving party has met its burden, "the burden shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 200 (6th Cir. 2010) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "[I]f the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which the nonmovant has the burden, the moving party is entitled to

summary judgment as a matter of law." Thompson v. Ashe, 250 F.3d 399, 405 (6th Cir. 2001). "The central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Palmer, 429 F. App'x at 495 (quoting Anderson, 477 U.S. at 251-52) (internal quotation marks omitted).

B. Due Process Violation

Plaintiffs claim that Shelby County violated their Fourteenth Amendment right to due process by refusing to have the Compensation Division conduct a job study for the Appraiser position. Section 1983 of Title 42 "provides a remedy for deprivations of rights secured by the Constitution and laws of the United States . . . ." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 924 (1982). The Fourteenth Amendment prohibits governmental deprivation of "life, liberty, or property, without due process of law." U.S. CONST. Amend. XIV, § 1. Courts separate claims alleging deprivation of due process into two categories: violations of substantive due process and violations of procedural due process. Midkiff v. Adams Cnty. Reg'l Water Dist., 409 F.3d 758, 762 (6th Cir. 2005) (citations omitted); see also Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990) ("Due process may impose either substantive or procedural limitations upon a particular deprivation"). "Procedural due process is traditionally viewed as the requirement that the government provide a fair procedure when depriving someone

of life, liberty, or property; substantive due process protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." EJS Properties, LLC v. City of Toledo, 698 F.3d 845, 855 (6th Cir. 2012) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)) (internal quotation marks omitted).

A procedural due process claim involves a two-part analysis: "First, the court must determine whether the interest at stake is a protected liberty or property right under the Fourteenth Amendment. Only after identifying such a right do we continue to consider whether the deprivation of that interest contravened notions of due process." Midkiff, 409 F.3d at 762-63; see also Thomas v. Cohen, 304 F.3d 563, 576 (6th Cir. 2002). "Substantive due process claims, in comparison, serve[] as a vehicle to limit various aspects of potentially oppressive government action." Handy-Clay v. City of Memphis, 695 F.3d 531, 546-47 (6th Cir. 2012) (quoting Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996)) (internal quotation marks omitted). "They often fall into one of two categories – claims that an individual has been deprived of a particular constitutional guarantee, or claims that the government has acted in a way that 'shock[s] the conscience.'" Id. at 547 (quoting Valot v. Se. Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1228 (6th Cir. 1997) (citations omitted)). "Where government action does not deprive a plaintiff of a particular constitutional

guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest." Id. (quoting Valot, 107 F.3d at 1228) (internal quotation marks omitted).

The plaintiffs do not clearly state in either their amended complaint or their brief in opposition to the motion for summary judgment whether they are alleging a violation of substantive due process, procedural due process, or both. The court will give the plaintiffs the benefit of the doubt and will analyze their claim under both theories.

1. Constitutionally Protected Property Interest

The first step in any due process analysis is to identify a liberty or property interest entitled to due process protection. Royal Oak Entm't, L.L.C. v. City of Royal Oak, 316 F. App'x 482, 486 (6th Cir. 2009) ("This Court has consistently held that a plaintiff who brings a substantive or procedural due process claim must identify a protected liberty or property interest."). The plaintiffs do not allege a deprivation of their liberty; thus, in order to survive summary judgment, they must demonstrate that there is a triable issue on whether there has been a deprivation of a constitutionally protected property interest. See Arnett v. Myers, 281 F.3d 552, 567 (6th Cir. 2002) (concluding that genuine issue for trial existed regarding whether plaintiffs had a constitutionally protected property interest in duck blinds, which

precluded summary judgment). The plaintiffs claim a constitutionally protectable property interest in a job study conducted by the Compensation Division.[6] In support of their claim, they rely on the Code and Compensation Policy, the 2007 Job Study that Clark initiated but later allegedly canceled, and the recommendation for a job study in the Farris Report.[7]

"The federal Constitution does not create property interests." Mertik v. Blalock, 983 F.2d 1353, 1259 (6th Cir. 1993). Instead, "[a] property interest can be created by a state statute, a formal contract, or a contract implied from the circumstances." Blazy v. Jefferson Cnty. Reg'l Planning Comm'n, 438 F. App'x 408, 412 (6th

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[6]The plaintiffs contend that once the requested job study is completed by the Compensation Division, they would expect to receive a pay increase consistent with the likely recommendations contained in that study. However, the plaintiffs do not allege that they have a constitutionally protected property interest in a pay raise *per se.* Nor could they, as there is nothing in the Code, Compensation Policy, or any of the other materials in the record that even remotely suggest that the plaintiffs have a property interest in a pay raise.

[7]The court does not construe the plaintiffs' claim of a protected property interest as being based on any oral promises for out-of-class pay made in 1996 by Sterling and others in the Assessor's Office. In any event, by 1998, the plaintiffs were made aware that Clark had abolished the Senior Appraiser position, had redistributed the duties of the abolished position, and had not requested approval from Human Resources for out-of-class pay for the plaintiffs. Any claim based on an alleged property interest created by the promises made in 1996 would be time barred. See Hebron v. Shelby Cnty. Gov't, 406 F. App'x 28, 30 (6th Cir. 2010) (applying Tennessee's one-year statute of limitations to plaintiff's due process claims brought pursuant to § 1983); see also Tenn. Code Ann § 28-3-104(a). Moreover, Sterling did not promise the plaintiffs a job study, which is what the plaintiffs seek in this case.

Cir. 2011) (internal citations and quotation marks omitted); see also Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law."). "However, [a]lthough the underlying substantive interest is created by an independent source such as state law, *federal constitutional law* determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." EJS Properties, 698 F.3d at 855-56 (quoting Town of Castle Rock v. Gonzales, 545 U.S. 748, 757 (2005)) (internal quotation marks omitted) (emphasis in original). In order for a plaintiff to have a property interest in a benefit related to government employment, he "must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

The court finds that none of the state law based sources relied upon by the plaintiffs create a property interest in a job study - much less a job study that must be conducted by the Compensation Division. The plaintiffs can point to no provision in the Code or Compensation Policy that entitles an employee to a job study. For example, there is no provision that allows an employee to request a job study, provides employees with official channels to make such a request, or provides any remedies to employees if

their request for a job study is denied. To the contrary, under section VIII.C of the Compensation Policy, only the "Elected Official, Division Director or Chief Administrative Officer or their designee to evaluate the position for proper classification" has the authority to request a job study. In other words, the Compensation Policy provides only certain select individuals with the authority to request a job study, and none of those listed include Appraisers.

In addition, the Compensation Policy imposes no restrictions or limitations on the discretion of the elected official, Division Director, or Chief Administrative Officer or designee in requesting a job study. "[I]f an official has unconstrained discretion to deny the benefit, a prospective recipient of that benefit can establish no more than a 'unilateral expectation' of it." Golden v. Town of Collierville, 167 F. App'x 474, 478 (6th Cir. 2006) (quoting Med Corp., Inc. v. City of Lima, 296 F.3d 404, 409-10 (6th Cir. 2002)). Stated another way, a plaintiff "can have no legitimate claim of entitlement to a discretionary decision." Golden, 167 F. App'x at 478 (quoting Richardson v. Township of Brady, 218 F.3d 508, 517 (6th Cir. 2000)); see also Sisay v. Smith, 310 F. App'x 832, 841 (6th Cir. 2009) (holding that because Airport Management's control over the operation of cabs at the airport was wholly discretionary, the plaintiffs could not establish that they had a "legitimate claim of entitlement" to use the airport's

outbound queue); Bauss v. Plymouth Township, 233 F. App'x 490, 499 (6th Cir. 2007) (holding that because the Township Board had the discretion to deny Bauss's re-zoning request, Bauss did not have a "legitimate claim of entitlement" or a "justifiable expectation" in the Board's approval of his re-zoning request); Med Corp., 296 F.3d at 410 (holding that plaintiff, an ambulance service, did not have a property interest in receiving 911 calls from the city because plaintiff could not point to any policy, law, or mutually explicit understanding that both conferred the benefit and limited the discretion of the City to rescind the benefit); Jennings v. City of Lafollette, No. 3:09-cv-72, 2010 WL 5173189, at *10 (E.D. Tenn. Dec. 14, 2010) (holding that former mayor did not have a constitutionally protected property interest in receiving health insurance benefits after leaving office because the defendant had discretion to deny benefits).

By claiming that they have a property interest in a job study, the plaintiffs are in essence claiming that they have a property interest in the *procedure* used by Shelby County in making classification and pay grade determinations. However, courts have consistently held that where there is no property interest in the underlying decision, there is no protected property interest in the procedures which attend the decision. See TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty., Ohio, 430 F.3d 783, 793 (6th Cir. 2005) (explaining that a party "cannot have a protected property interest

in the procedure itself, whereby the contract was or ought to have been awarded"); see also Etere v. City of New York, 381 F. App'x 24, 25 (2d Cir. 2010) (holding that where provisional employee had "no property interest in the employment, there [could] be no property interest in the procedures that follow from the employment"); Shvartsman v. Apfel, 138 F.3d 1196, 1199–1200 (7th Cir. 1998) (rejecting contention that property right existed in procedures to contest decision regarding entitlement where entitlement itself was not a protected property interest; doing so "would make the scope of the Due Process Clause virtually boundless"); Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1285 (4th Cir. 1995) (noting that state procedural requirements do not create a property interest in those procedures); Mumford v. Godfried, 52 F.3d 756, 759 (8th Cir. 1995) (holding that "a contractual right to have certain procedures followed does not create a property interest in the procedures themselves"); Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1463–64 (11th Cir. 1991) (noting that where there was no protected interest in privileges, there was no property interest in the standards for granting the privileges because "the process due and the constitutionally protected property interest are separate and distinct elements"); Curtis Ambulance of Fla., Inc. v. Bd. of Cnty. Comm'rs of Shawnee Cnty., Kan., 811 F.2d 1371, 1377 (10th Cir. 1987) (observing that "[c]ourts generally agree that no property interest exists in a

procedure itself, without more").

In Swartz v. Scruton, 964 F.2d 607 (7th Cir. 1992), Benjamin K. Swartz, Jr., a professor in the Department of Anthropology at Ball State University, brought a § 1983 due process action against the university and other individuals when his department failed to adhere to an established method of calculating merit pay increases and awarded him a lower pay increase. Id. at 608. Swartz's alleged constitutionally protected property interest was in the method of calculating his merit pay increase, which was set forth in great detail in the "Ball State University Guidelines for Annual Salary Adjustments Faculty and Professional Staff," the "Official College Salary Plan," and the "Department of Anthropology Salary Plan for 1985." Id. Instead of using the formula contained in these plans, the chairman of the department devised a new formula, which resulted in a lower merit pay increase. Id. at 609. The Seventh Circuit held that Swartz lacked a constitutionally protected property interest in the method in which his merit pay increase was calculated:

> Swartz argues that he enjoys a Fourteenth Amendment property interest "in a *method* of calculation of merit pay." We disagree. Procedural interests under state law are not themselves property rights that will be enforced in the name of the Constitution. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. Thus, Swartz's asserted legitimate claim of entitlement to the process - the "method" - by which his merit pay increase is determined is not a constitutionally protected property interest.

Id. at 610 (internal citations and footnote omitted) (emphasis in original).

Similarly, in Bunger v. Univ. of Okla. Bd. of Regents, 95 F.3d 987 (10th Cir. 1996), two untenured university professors who were terminated filed a § 1983 due process action against the university because the university failed to follow its faculty handbook guidelines in making its termination decision. Id. at 990. Specifically, the professors argued that the university violated its rules regarding the selection of a reviewing personnel committee, notification procedures, the scheduling of meetings, the development of evaluation plans, and the provision of an opportunity for the faculty member under scrutiny to address the personnel committee. Id. The Tenth Circuit held that the professors lacked a constitutionally protected property interest in the procedures contained in the faculty handbook: "The university's promise that it would follow certain procedural steps in considering the professors' reappointment did not beget a property interest in reappointment." Id. at 991.

As classified employees covered by Shelby County's Civil Service Merit System, the plaintiffs have a state law based, constitutionally protected property interest in continued employment. See Kizer v. Shelby Cnty. Gov't, 649 F.3d 462, 466 (6th Cir. 2011). However, they have no property interest in reclassification of their position or a pay increase, and thus they

cannot have a property interest in the procedures (i.e. a job study) that might help them get a reclassification or a pay increase.

With regard to the 2007 Job Study, as noted earlier, the evidence before the court does not support the plaintiffs' contention that the study was canceled, or that Clark was responsible for canceling the study. Indeed, the fact that Fox Lawson conducted a job study in 2008 strongly suggests that the 2007 Job Study was never canceled. In any case, whether the 2007 Job Study was or was not canceled is irrelevant, because the plaintiffs were not entitled to a job study simply because Clark told them that a study was going to be conducted. As explained above, Clark had the discretion to request a job study, and there is nothing in the Compensation Policy that would have prohibited her from canceling the study. At most, Clark's announcement of the 2007 Job Study created a unilateral expectation, which is insufficient to create a protected property interest. Golden, 167 F. App'x at 478.

With regard to the Farris Report, the report only recommended that Clark request a job study, which was not binding on Clark. Farris was tasked only with hearing Elion's grievance, and there is no evidence that she was the "Elected Official, Division Director or Chief Administrative Officer or their designee to evaluate the position for proper classification." Clark's approval of the

report did not confer a mutual understanding with the plaintiffs that a job study would be performed. Even if it did, the report expressly rejected Elion's request for a study by the Compensation Division and instead recommended that an outside vendor conduct the study. Thus, even assuming, *arguendo*, that the Farris Report could somehow be construed as conveying a property interest to the plaintiffs in a job study (which it clearly does not), that job study, at most, would be one conducted by an outside party - which is what the plaintiffs obtained through the Fox Lawson job study.

Hypothetically speaking, even if the court were to agree with the plaintiffs that they have a property interest in a job study, the court would nevertheless conclude that the plaintiffs do not have a property interest in a job study conducted by the Compensation Division. The court does not find any support in the Code or Compensation Policy for the plaintiffs' argument that the job study must be conducted by the Compensation Division. Section VIII, which describes the job evaluation process, makes no mention of the party responsible for conducting the study. Importantly, the policy does not prohibit an outside party, such as Fox Lawson, from being hired by the county to conduct the job study.[8] Therefore, even if the plaintiffs have a property interest in a job study, they do not have a property interest in a job study

[8]The Fact Sheet for the 2007 Job Study stated that an "Advisor" to the Compensation Division was going to conduct the study.

conducted only by the Compensation Division.

Based on the plaintiffs' lack of a constitutionally protected property interest, the motion for summary judgment is granted. As discussed below, however, Shelby County is entitled to summary judgment on other grounds as well.

2. Substantive Due Process

Substantive due process claims fall into one of two categories: claims that an individual has been deprived of a particular constitutional guarantee, or claims that the government has acted in a way that "shock[s] the conscience." Handy-Clay, 695 F.3d at 546-47; see also Bracken v. Collica, 94 F. App'x 265, 268 (6th. Cir. 2004); Midkiff, 409 F.3d at 769; Baesler, 910 F.2d at 1352. It is well-settled that state-created contractual rights do not generally fall within the purview of substantive due process. See Hange v. City of Mansfield, 257 F. App'x 887, 897 (6th Cir. 2007) ("[Plaintiff's] right to enjoy the grievance procedure outlined in the CBA and his right to termination for cause are simply not so vital that 'neither liberty nor justice would exist if [they] were sacrificed.' Thus, [plaintiff's] conditional termination does not deny him a particular constitutional guarantee."); Bracken, 94 F. App'x at 269 ("Bracken's at-will employment hardly seems the sort of fundamental interest protected by substantive due process"); Holthaus v. Bd. of Educ., 986 F.2d 1044, 1046 (6th Cir. 1993) (holding that discharge

for allegedly improper racial remark did not violate coach's substantive due process rights); Thomson v. Scheid, 977 F.2d 1017, 1020 (6th Cir. 1992) (holding that plaintiff did not have entitlement to job or promotion based on substantive due process); Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1351 (6th Cir. 1992) (holding that classified civil servants' "statutory right to be discharged only for cause is not a fundamental interest protected by substantive due process"); Baesler, 910 F.2d at 1353 ("State-created rights such as Charles' contractual right to promotion do not rise to the level of 'fundamental' interests protected by substantive due process. Routine state-created contractual rights are not 'deeply rooted in this Nation's history and tradition,' and, although important, are not so vital that 'neither liberty nor justice would exist if [they] were sacrificed.'") (quoting Bowers v. Hardwick, 478 U.S. 186, 191-94 (1986)).

If a contractual right to a promotion does not rise to the level of a fundament interest protected by substantive due process, see Baesler, 910 F.2d at 1353, and a classified civil servant's statutory right to be discharged only for cause is not a fundamental interest, see Sutton, 958 F.2d 1339 at 1351, then the plaintiffs' purported property interest in a job study certainly does not implicate a fundamental interest that would warrant substantive due process protection. Nor does the county's refusal

to conduct a job study "shock the conscience," because it is not "so brutal and offensive that it [does] not comport with traditional ideas of fair play and decency." Hange, 257 F. App'x at 897 (quoting Breithaupt v. Abram, 352 U.S. 432, 435 (1957)) (internal quotations omitted). For these additional reasons, the court grants summary judgment on the plaintiffs' substantive due process claim.

3. Procedural Due Process

As a final matter, the plaintiffs' procedural due process claim cannot survive summary judgment because, in addition to the lack of a constitutionally protected property interest in a job study, they have not shown that there is a triable issue as to whether they have been denied the right to be heard "at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) (internal quotation marks omitted). "[A] § 1983 plaintiff may prevail on a procedural due process claim by either (1) demonstrating that he is deprived of property as a result of established state procedure that itself violates due process rights; or (2) by proving that the defendants deprived him of property pursuant to a 'random and unauthorized act' *and* that available state remedies would not adequately compensate for the loss." Macene v. MJW, Inc., 951 F.2d 700, 706 (6th Cir. 1991). A plaintiff alleging the first element of this test does not need to

demonstrate the inadequacy of state remedies. Moore v. Bd. of Educ. of Johnson City Sch., 134 F.3d 781, 785 (6th Cir. 1998). If the plaintiff pursues the second line of argument, he must comply with the rule of Parratt v. Taylor, 451 U.S. 527 (1981), which holds that a state may satisfy procedural due process with only an adequate post-deprivation procedure when the state action was "random and unauthorized."[9] See Macene, 951 F.2d at 706.

Relying on Mertik v. Blalock, 983 F.3d at 1366-67, the plaintiffs argue that "[t]his case does not fit into either of the two categories identified in Macene, therefore the rule in Parrat does not apply. Rather, the rule enunciated in Mertik is the appropriate rule." (Pls.' Resp. at 13-14.) It is unclear to the court why the plaintiffs believe Mertik saves their procedural due process claim. At the end of the day, however, the plaintiffs have not presented any evidence to show that they have been denied notice and an opportunity to be heard. Elion filed a grievance and had a hearing, which he attended and was given an opportunity to be heard. Farris considered Elion's concerns, including his request for a job study conducted by the Compensation Division, as evidenced in her detailed report. Even though she did not agree with all aspects of Elion's request, Farris recommended to Clark

[9]In Zinermon v. Burch, 494 U.S. 113 (1990), the Supreme Court narrowed the Parratt rule to apply only to those situations where pre-deprivation process would have been impossible or impractical. Id. at 128-29.

that a job study be conducted by an independent third party. Clark agreed with that recommendation and moved forward with the independent job study by hiring Fox Lawson. The plaintiffs actively participated in the job study by preparing written job descriptions and being interviewed by Fox Lawson. Fox Lawson completed the study, recommending no change in the plaintiffs' pay. The court finds that, to the extent the plaintiffs were entitled to some sort of process, the undisputed facts demonstrate they received the process they were due. The court grants summary judgment on the plaintiffs' procedural due process claim on these additional grounds.

III. CONCLUSION

For the reasons above, Shelby County's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

December 10, 2012
Date