ELLEN C. TONEY

v. Docket No. 93-HHR-460

WEST VIRGINIA DEPARTMENT OF HEALTH AND

HUMAN RESOURCES

DECISION

The grievant, Ellen Toney, is employed by the Department of Health and Human Resources (HHR) as a Social Service Worker II (SSW II) assigned to its Beckley office. She initiated a grievance at Level I March 19, 1993 alleging,

> As a Social Service Worker II, I have been assigned Adult Protective Service work on frequent occasions for the past 4 years. I do not feel this is part of my job duties. I do not meet the minimum requirements for the positions of Protective Service Worker Trainee or Protective Service Worker even though my current job title SSW II has the same minimum requirements as a Protective Service Worker Trainee. The relief I am seeking is not to be assigned adult protective service work. I am also requesting back pay for the period of time that I have been assigned these duties.

The grievant's supervisor was without authority to address the matter and Level II was bypassed. (See footnote 1) The grievance was denied atLevel III following a hearing held September 21, 1993, and an appeal to Level IV was made November 8, 1993. The parties subsequently agreed to submit the case for decision on the record developed below. The parties declined to submit proposed findings of fact and conclusions of law. (See footnote 2)

The grievant was first employed as an SSW II in February 1989. Since that time she has been assigned to the Raleigh/Fayette County Adult Services Unit, a division which provides a number of social services to elderly clients, including the investigation of complaints of adult abuse and/or neglect. She, like the other SSW IIs in the unit at the time, was assigned to investigate such complaints and complete other assignments relating to the investigations.

Effective May 24, 1984, the West Virginia Division of Personnel (Personnel) (See footnote 3) created the classifications Protective Service Worker (PSW) and Protective Service Worker Trainee

(PSWT). The minimum training and experience requirements for the PSWT were "Eligible for licensure as a Social Worker, Graduate Social Worker or Certified Social Worker by the West Virginia Board of Social Work Examiners." The PSW position had the additional requirement of "One year of full-time or equivalent part-time paid experience as a Protective Service Worker Trainee or in professional protective services work." Apparently, these classifications were assigned to substantially higher paygrades than those for SSW II. (See footnote 4) HHR did not begin to utilize the new classifications in its Beckley office until the fall of 1990 when one of the SSW IIs assigned to the grievant's unit resigned. At that time, HHR advertised the created vacancy as a PSWT position. (See footnote 5) Ms. Bonnie Pishner applied for and was awarded the job. The grievant assisted in Ms. Pishner's training and continued to perform adult protective services duties. In 1991, another SSW II in the Adult Services Unit resigned and that position was also upgraded to PSWT. Eventually this position and that held by Ms. Pishner were upgraded to PSW.

Effective December 5, 1992, Personnel added "graduation from an accredited four-year college or university" to the minimum qualifications for PSWT and PSW. Additionally, the experiencerequirement for the PSW position was changed from one to two years. (See footnote 6) HHR posted a PSW position in the Beckley office on or about February 22, 1993, and the grievant made a timely application. Personnel and HHR Social Service Coordinator Robert James both advised the grievant that she did not meet the minimum qualifications for the position. The record does not reflect the reason for the rejection but, considering the experience in Adult Protective Services she had acquired at that time and that her current title requires a college degree, it is assumed that she was not then eligible for social work licensure. The grievant evidently concluded that since she was not eligible to hold the job full-time, she should not be assigned any duties associated with the position. As previously noted, the grievance was filed March 19, 1993.

The grievant asserts that the adult protective services duties she has been performing since February 1, 1989 are outside the specifications for SSW II and should be deleted from her responsibilities. As indicated, she also seeks back pay for the time she performed those duties which she contends consumes approximately 25% of her time. HHR concedes that the grievant has performed the duties for the years claimed and that she is currently designated as Ms. Pishner's "backup." The agency asserts however, that, at most, she devotes only 15% of her time to such duties, and that this percentage of time falls within thespecifications for her present classification of

SSW II. (See footnote 7) For the reasons hereinafter discussed, the undersigned concludes that the grievant must prevail.

Personnel's specifications for PSW (See footnote 8) provide:

> **Nature of Work**: Under limited supervision, performs advanced and complex social casework in a specialized area. Work is characterized by cases involving abuse/neglect/exploitation of children or adults. The nature of the situations require expertise and judgement to deal with problems that are potentially dangerous to the client and the worker. Work requires the use of personal automobile for local travel. Employee is subject to being on-call during non-business hours. Performs related work as required.

Examples of Work

> Conducts investigations concerning allegations of abuse by talking with and visually observing affected individual; talks with immediate family, relatives, neighbors, teachers, doctors, and reviews any relevant records.
>
> Makes initial assessment of validity of the allegation and the degree of danger that the child or adult is in; documents the results of the investigation.
>
> Assesses family dynamics and problems that may be precipitating an abusive situation.
>
> Prepares a complete client service plan to remedy contributing problems and stop behavior patterns of abuse/neglect/exploitation and solicits family cooperation.
>
> Engages family in counseling to solve problems, refers them to other available resources, and monitors situation to prevent a reoccurrence of abuse.
>
> Files petition with the court when a child is judged to be in imminent danger and testifies before the court in order to remove a child from the family; makes appropriate placement of a child with relatives, in foster homes, or in emergency shelter.
>
> Persuades the family, relatives, or adult family care provider that it is in the best interest of the client to live elsewhere after the worker has substantiated significant

abuse/neglect/exploitation; arranges placement of the adult client in an alternative living environment.

Evaluates periodically the progress of family or living unit towards meeting objectives of the service plan, the need to modify the plan, and the eventual closing of the case.

The specifications for SSW II provide:

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

Distinguishing Characteristics: All three levels of Social Service Worker provide professional social services to the public The Social Service Worker II provides these services in one or more of the following areas: nursing home placement, adult family care, pre-institutionalization, admission and aftercare, generic social services, homeless, reception social work, or other services at this level.

Examples of Work

Maintains a caseload for programs and services at this level.

Takes, evaluates and approves client applications for services; explains services and eligibility criteria.

Recruits, evaluates and approves providers of services at this level; conducts on-site evaluation of provider facilities and services.

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

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

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

Speaks before community organizations and groups regarding services available and to develop community resources.

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

While it is apparent from a comparison of the two descriptions that both jobs entail the practice of social work, the positions are different in significant aspects. Clearly, the PSW is oriented, and rather narrowly so, to intervention in cases involving abuse and neglect. The specifications for SSW II evince an intent to give that job a broader but nevertheless limited base. Of considerable import is that those specifications make no mention whatsoever of conducting investigations concerning complaints of abuse or neglect, the very duties HHR concedes the grievant has been performing since her assignment to the Adult Services Unit.

Further, it is telling that in the Distinguishing Characteristics section of the SSW II description, the list of types of services an incumbent performs does not include the crisis-oriented duties associated with protective services. This "exclusion" alone is sufficient to find that such duties do not fall within the purview of the position.

It is noted that the Nature of Work section of the SSW II specifications provides that the incumbent "performs full-performance level social service work in providing services to the public in one or multiple program areas." This ambiguous provision, however, to the extent that "multiple program areas" can be said to reference protective services, is outweighed by the remainder of the description which, as noted, makes no other mention of such services. That Personnel saw fit to adopt the field-specific PSW description and develop an SSW II description which makes no specific mention of protective services supports that Personnel

did not intend that SSW IIs be assigned, at least on an on-going basis, to investigate reports of abuse and neglect.

Finally, of record are the specifications for Social Service Worker III which, under the "Distinguishing Characteristics" section, notes that the incumbent may be assigned to a "variety of program areas such as day care, generic social services, foster care and protective services. . ." The description otherwise makes it clear that such assignments constitute a distinction between SSW IIs and SSW IIIs. For the foregoing reasons, it is concluded that protective services are not responsibilities of an SSW II.

Except for infrequent short-term assignments, an employer may not impose duties upon a classified state employee which are outside the specifications established by the Division of Personnel for his or her position. See, Williams v. W.Va. Dept. of Human Services, Docket No. 90-DHS-476 (Feb. 28, 1991). See generally, A.F.S.C.M.E. v. Civil Serv. Comm'n of W.Va. (A.F.S.C.M.E. I), 324 S.E.2d 363 (W.Va. 1984). An employee may be awarded, as relief, the deletion of the "out-of-class" duties from his or her jobresponsibilities. Britton v. Preston County Bd. of Educ., Docket No. 90-39-015 (Aug. 31, 1990). The grievant herein is entitled to such relief.

Employees are also entitled to compensation for the period in which they performed out of their classification. A.F.S.C.M.E. I also makes it clear that employees are entitled to compensation for the period in which they performed out of their classification if those duties were assigned to a higher paying classification. On the issue of the grievant's claim for back pay, it is initially noted that HHR has made no assertions regarding the timeliness of the claim or raised the affirmative defense of laches. Since the Grievance Board will not sua sponte address such issues, see Burton v. Boone County Bd. of Educ., Docket No. 03-86-058 (Sept. 18, 1986), there is no time bar to the requested relief.

The only evidence presented by HHR regarding the amount of time the grievant spends and has spent performing protective service-related work was the testimony of Doug Elliott, the grievant's supervisor since her appointment to the Adult Services Unit. He simply stated, "I'd have to give a guesstimate on that. I've never, you know, calculated, but I would say no more than ten to fifteen percent of the time." The grievant, however, was more certain in her assertion that the duties consumed "at the minimum twenty-five [percent], and at times a

whole lot higher than that."

Documents of record establish that the grievant had the better recollection and/or perspective on the extent of the assignments.

Grievant's Exhibit No. 1, a compilation of the reports of adult abuse or neglect assigned to the grievant on a monthly basis since February 1989, reflects that of the 64 such reports received between February 1989 and December 1989, the grievant was assigned 11; of 128 complaints made in 1990, the grievant was assigned 28; of 184 1991 complaints, the grievant received 25; of the 190 1992 reports, the grievant was assigned 18; and of the 120 reports filed between January 1993 and August 1993, the grievant received 11. (See footnote 9) **Given that the record reflects that the remaining complaints were divided among the two PSWs and that such assignments were considered "full" caseloads for those workers, the exhibit amply supports that the grievant's twenty-five per cent estimate is the more accurate assessment.**

Further, Grievant's Exhibit No. 2, a calculation of the number of contacts the grievant had with protective service clients during the period January 1991 to August 1993, reflects that she had, at a minimum, one telephone call, home visit or office visit per month with protective service clients and a maximum of 25 such contactsper month during that time. (See footnote 10) **These figures are generally supportive of the grievant's back wage claim.**

Finally, Grievant's Exhibit No. 3, a list of the dates of Ms. Pishner's absences from January 1992 to August 1993, which Ms. Pishner attested to be representative of her yearly use of annual leave, sick leave and time allotted to training, reflects that she is away from her duties on an average of six weeks per year. As previously noted, the grievant serves as Ms. Pishner's "backup" on those days. This document is also generally supportive of the grievant's estimate. Accordingly, it is concluded that the grievant has established by a preponderance of the evidence that she has worked out of her classification for the amount of time and during the period alleged and is entitled to compensation therefor.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1) The grievant has been employed by HHR as a Social Service Worker II (SSW II)

assigned to the Raleigh/Fayette Adult Services Unit since February 1989.

2) Since her assignment to the Adult Services Unit, the grievant has been assigned cases involving the abuse, neglect and exploitation of elderly and/or incapacitated adults. Suchassignments have consumed approximately 25% of the grievant's work time.

CONCLUSIONS OF LAW

1) The West Virginia Division of Personnel (Personnel) is authorized by W.Va. Code §29-6-10 to establish and maintain a position classification plan for all positions in the classified service. State agencies utilizing such positions must adhere to that plan in making assignments to their employees.

2) Except for infrequent short-term assignments, an employer may not impose upon an employee in the classified service duties which are outside the specifications established by Personnel for his or her position. In the event an employee establishes that he has been assigned such duties, he is entitled, as relief, that the duties be discontinued and back wages in the form of the difference between his salary and that of the higher classification.

3) The grievant has established by a preponderance of the evidence that the adult protective services duties imposed on her since her assignment to the Adult Services Unit were outside the specifications for SSW II. She has also established that the duties have constituted an average of 25% of her work time.

Accordingly, the grievance is GRANTED and the West Virginia Department of Human Resources is hereby ORDERED to discontinue its practice of assigning adult protective services duties to the grievant. The Respondent is further ORDERED to compensate the grievant for the time she has spent performing such duties consistent with the holdings herein.

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. Any 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.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: June 17, 1994

Footnote: 1W.Va. Code §29-6A-3(c) provides that a "grievant may file the grievance at the level vested with authority to grant the requested relief if each lower administrative level agrees in writingthereto." It is assumed that the grievant obtained the required written agreement. In any event, no error is found in the procedural history of the case.

Footnote: 2The grievant was represented by Pam Ray of the West Virginia State Employees Union and the agency was represented by George Surmitis, Assistant Attorney General. Although both indicated a desire to submit proposals and were notified to do so by December 29, 1993, none were received. The grievant tendered a two-page handwritten statement which essentially outlines the factual history of the case and does not make reference to applicable law. Since there is no dispute over the facts of the dispute, the statement is of little value. Accordingly, the parties' legal positions, as hereinafter stated, are derived from the remarks made by the representatives at the Level III hearing.

Footnote: 3The agency was then the West Virginia Civil Service System.

Footnote: 4The record is unclear as to the specific paygrades. It appears that PSW is at least two paygrades above SSW II.

Footnote: 5This "revision" of the position was referred to by several witnesses as "upgrading." It is not known why the specifications for the PSWT and PSW were established in 1984 but were not utilized by HHR until 1990. The record suggests that the agency had some discretion in the matter and may have made the adjustments as funds were available.

Footnote: 6The specifications, including the "Nature of Work" and "Examples of Work" sections remained the same.

Footnote: 7This assertion is inferred from several remarks made by HHR's representative's remarks at the Level III hearing and witness Doug Elliott, the grievant's supervisor. Mr. Elliott asserted that "it was his understanding" that an employee could be "worked out-of-classification up to 50% of their time." This statement is of course inconsistent with the argument that the protective service duties are an implicit part of the SSW II description. It is simply noted that the undersigned has reviewed the pertinent Personnel regulations and found no provision

permitting an agency to assign duties to an employee which are outside his classification during any percentage of his workday.

Footnote: 8*The description for PSWT is essentially the same and is not reproduced here. Also, the parties are in agreement that the duties in question fall into the PSW classification.*

Footnote: 9*The exhibit also reflects that the grievant shared responsibility for a small percentage of the complaints assigned her with another worker. It was such a small percentage, however, that the overall conclusions regarding the extent of her protective service duties would not be affected.*

Footnote: 10*The grievant testified that she did not retain her contact records for previous years and it is assumed that they were discarded. Since this exhibit is considered corroborative of the other documents referenced herein and not conclusive on the issue of the amount of time spent on protective services, the failure to produce the previous years' records is of little significance.*