ELIZABETH G. FARBER and .

NANCY BETH HALL CHAMBERS .

Grievants, .

.

.

.

v. . Docket Number: 95-HHR-052

.

.

.

.

WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES / OFFICE OF .

SOCIAL SERVICES and WEST VIRGINIA .

DEPARTMENT OF ADMINISTRATION / .

DIVISION OF PERSONNEL, .

Respondents. .

D E C I S I O N

On August 11, 1993, Nancy Beth Hall Chambers filed a grievance pursuant to West Virginia Code §§29-6A-1, et seq., alleging that she was improperly classified by the Division of Personnel (hereinafter Personnel) as a Health and Human Resources Specialist. Elizabeth G. Farber, on August 13, 1993, also filed a grievance contending that she was misclassified as a Health and Human Resources Specialist. Both Grievants contend that they should be classified as Health Facilities Surveyors. Each grievance was denied at level one and level two. The cases were consolidated atlevel three and a decision denying the claim at that level was issued on January 24, 1995.

Appeal was made to level four on February 2, 1995, and an evidentiary hearing was held on April

24, 1995, at the Grievance Board's Charleston, West Virginia office, in order to allow the parties to supplement the record already developed. A briefing schedule was set at the conclusion of that hearing which established that the case would become mature for decision on May 15, 1995. On this date, Grievant's counsel made a motion to keep the record open until such time as the parties were presented with a transcript of both the third and fourth level hearings. The Department of Heath and Human Resources' attorney objected to this motion. Both parties submitted Proposed Findings of Fact and Conclusions of Law to the Undersigned on May 16, 1995, and Grievant submitted an amended brief on June 7, 1995.

The evidentiary record in this case was completed on April 24, 1995, at the conclusion of the level four hearing, even though the Undersigned was not presented with a copy of the transcript of the hearing at level three. Grievant's counsel's request for an extension of time for which to submit briefs was denied as it was determined that no further briefing was necessary given the legal issue in the case. The case became mature on July, 7, 1995, the date the Undersigned received the transcript of the level three hearing.

Legal Standard Applicable

Grievants contend that the majority of their time is spent evaluating, reviewing and surveying child welfare agencies. Theyconclude that the nature of the duties they must perform, in connection with their responsibilities, are substantially similar to the nature of the duties of those employees of the Department of Health and Human Resources who are classified as Health Facilities Surveyors. Grievants argue that the specific language of the classification specification of Health Facilities Surveyor is a better match in relationship to the duties they perform than the classification they currently maintain. They rely upon the following language contained in the nature of work section of the Health Facilities Surveyor specification in support of their argument: "performs advanced level professional work conducting surveys of hospitals, extended care facilities, home health agencies, sheltered care homes, day care providers, and laboratories" (emphasis added). They point out that they have worked in conjunction with Health Facilities Surveyors in surveying behavioral health care facilities on numerous occasions.

The Department of Health and Human Resources has deferred to the arguments presented by Personnel. Personnel, through the testimony presented by Lowell D. Basford, Assistant Director of

Classification and Compensation, contends that Grievants are correctly classified given the nature of the duties they perform in relationship to the general language of the Health and Human Resources Specialist specification. Specifically, Mr. Basford testified that Grievants do not survey health facilities; therefore, they may not be classified as Health Facilities Surveyors. Further, he opined that the nature of the work that theGrievants perform is less complex than that of the individuals who survey health facilities. Finally, Mr. Basford stated that the classification specification for the position of Health and Human Resources Specialist is written in a more general manner than is the Health Facilities Surveyor specification because there are so many more employees who fall within the parameters of this classification but who also perform substantially different tasks. The West Virginia State Personnel Board, a part of Personnel, was created in 1989 to replace the former Civil Service Commission. W. Va. Code §29-6-6 (1989). The duties and responsibilities of the former Director of the Civil Service System were also transferred to the Director of Personnel. Code §29-6-9 (1989). Pursuant to Code §29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend or appeal legislative rules governing the

> preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

The Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. Code §29-6-10(2).

The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the PersonnelBoard are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. See, Callaghan v. West Virginia Civil Service Comm'n, 273 S.E.2d 72 (W.Va. 1980). Finally, and in general, a governmental agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hospital v. St. Health Planning, 328 S.E.2d 164 (W.Va. 1985). This standard applies when one attempts to review Personnel's interpretation of its own regulations and classification specifications, if ambiguous as written, in order to determine if the administrative decision at issue was the product of an exercise of

abuse of discretion.

More specifically, in order for Grievants to prevail upon a claim of misclassification, they must prove by a preponderance of the evidence that their duties for the relevant period more closely matched another cited Personnel classification specification than that under which they are currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991); for these purposes, the "Nature of Work" section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The keyto the analysis is to ascertain whether Grievants' current classification constitutes the "best fit" for their required duties. Simmons v. W. Va. Dept. of HHR/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Services, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue, if said language is determined to be ambiguous, should be given great weight unless clearly erroneous. See, W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (1993).

The ultimate issue in this case is whether Personnel properly assigned Grievants' positions to the classification of Health and Human Resources Specialist or whether it abused its discretion in taking said action. The answer to these questions must be derived from a review of the testimony and the language of the classification specifications at issue, in connection with the administrative regulations promulgated by Personnel. The relevant sections of the specifications' text are reproduced herein as follows:

HEALTH AND HUMAN RESOURCES SPECIALIST

Nature of Work: Under general supervision, performs work at the full-performance level by providing development of program, as well as associated policy and procedures based on standards and regulation, administrative oversight of and complex technical assistance with a program or a particular major component of a statewide program, or major technical area specific to or

characteristic of the Department of Health and Human Resources. Assures compliance with federal, state, and local regulations governing the program or technicalarea. Uses independent judgement to determine appropriate action taken to achieve desired results. Has responsibility for providing consultation on highly complex individual problem situations. Develops and delivers training programs related to assigned program or component. Monitors and evaluates the operation of the assigned program or program component. Exercises considerable latitude in determining approaches to problem solving. Work may be performed independently and/or in conjunction with other program or technical area staff. Performs related work as required.

Distinguishing Characteristics: The Health and Human Resources Specialist is distinguished from the Health and Human Resources Associate by the responsibility for development and management of a statewide program or operational area or a significant segment of a major statewide program or operational area. This class is distinguished from the Health and Human Resources Specialist, Senior, by the fact that although the Specialist may oversee clerical or support staff in relation to the completion of his/her own work, this class does not function in a regularly assigned lead or supervisory capacity over professional classes as a significant segment of their total assignment nor does he/she have responsibility related to entire programmatic or operational systems.

Examples of Work

Analyzes laws and regulations governing program or technical area and applies them appropriately to resolve problems and assure compliance.

Interprets laws and regulations governing program or technical area for participants and staff.

Monitors changes in laws and regulations and advises participants and other staff.

Confers with inter- and intra-agency personnel to transact business or discuss information.

Collaborates on determining need for changes in procedures, guidelines, and formats; devises resolutions and changes, and monitors success.

Drafts program manuals, clarifying the wording and describing new procedures, etc., accurately.

Represents the program in the area of assignment with the agency and outside entities.

Has contact with federal, state, local program representatives and participants, or technical area personnel.

Completes related reports; may compile special and/or statistical reports, analyzing data and

interpreting results.

May oversee the work of support staff or other specialists in relation to the completion of specific assignments.

Knowledge, Skills and Abilities

Knowledge of the rules, regulations, policies, and procedures of the Department of Health and Human Resources.

Knowledge of the federal and state regulations, laws and statutes governing program or technical area.

Knowledge of the objective of the program or technical area, its procedures, policies, and guidelines, and its relationship to the rest of the Department and other user entities.

Ability to analyze situations, problems and information and develop appropriate responses and resolutions.

Ability to communicate well, both orally and in writing.

Ability to represent area of assignment and to provide consultation on program or Department concerns.

Ability to synthesize information and provide interpretation.

HEALTH AND HUMAN RESOURCES SPECIALIST

AREAS OF ASSIGNMENT

Behavioral Health

Community Health

Environmental Health

Health

Health Facilities Licensure and Certification

Health Planning

Health Promotion

Investigation

Legal

Rural Health

Social Services

Volunteer Services

HEALTH FACILITIES SURVEYOR

Nature of Work: Under general supervision, performs advanced level professional work conducting surveys of hospitals, extended care facilities, home health agencies, sheltered care homes, day care providers, and laboratories. As part of a team, surveys facilities through observation and reviews documentation such as policy and procedures, floor plans, and financial records. Work involves frequent overnight travel. There is considerable latitude of judgment in the performanceof a survey. Determines compliance with state and federal licensure requirements and recommends changes to facilities, standards, and procedures in order to improve client/patient services. Performs related work as required.

Examples of Work

Conducts on-site surveys of health care facilities; discusses survey procedures and practices with administrators and department directors.

Observes client/patient care, records objective data, reviews medical records, and interviews clients/patients in a group or individually.

Reviews financial records including accounts receivable, accounts payable, payroll, and billing practices to determine compliance with regulatory standards.

Reviews organizational charts, personnel records, and policies and procedures to determine appropriate staffing levels and qualifications of staff to perform services.

Tours the facility to evaluate areas such as laboratory, food service, physical plant, sanitation and pharmacy.

Evaluates social services to ensure that activities, recreation and patient rights counseling are being adequately provided.

Enters data into lap top system to compile, document and record data; prints preliminary findings.

Discusses areas of non-compliance with team members to compile recommendations concerning licensure and/or certification status; edits final report including corrective measures.

Meets with survey team to research facility history, review appropriate regulations and delegate survey duties for each survey; reviews accommodation and travel plans; submits detailed expense and activity reports.

Revises and develops health care regulations based on changes in state or federal regulations or studies; submits drafts of proposed changes to various organizations and agencies for comment.

Knowledge, Skills and Abilities

Knowledge of a technical health-related field.

Knowledge of medical terminology, health service personnel, medical facilities and organization, and medical treatments.

Knowledge of practices and procedures in medical care administration.

Ability to comprehend, interpret and apply complex information and program material.

Ability to work well with a variety of people.

Ability to communicate well, both orally and in writing.

Ability to exercise good judgment in evaluating situations.

Ability to manage time effectively.

Further, Section 4.04 of Personnel's Administrative Regulations, 143 CSR 1, describing how class specifications are to be interpreted, contains the following relevant subsections:

> (a) Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.
>
> (b) In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole. Consideration shall be given to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the positions that the class intended to include.
>
> (c) A class specification shall be construed as a general description of the kinds of work characteristics of positions properly allocated to that class and not as prescribing what the duties of any position are nor as limiting the expressed or implied power of the appointing authority now or hereafter vested with the right to prescribe or alter the duties of any position.
>
> (d) The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.

These legislative rules are both helpful and instructive as to how classification specifications should be interpreted in order to determine the nature of the positions in question.

The issue of whether a classified employee has met his/her burden of proof to establish that he/she is misclassified must be made on a case-by-case basis, given the facts therein. A determination is made as to the nature of the duties of the grievants' position from an evaluation of the facts presented which describe said position's duties and responsibilities. The following discussion of facts and findings of fact have been properly deduced from the evidentiary record developed in the case.

Discussion

West Virginia has a comprehensive system of child welfare throughout the State which is administered by the State Department of Welfare [Division of Human Services], in cooperation with the United States Department of Health and Human Services and the United States Department of Justice. W. Va. Code §49-1-1. Any time that a child is committed to the care and custody of the State by a court, the State may provide care for the child through a licensed child welfare agency, a state institution, a family home or otherwise. Code §49-2-1. With regard to all child welfare agencies, the State Department of Welfare is responsible for licensing, approving and registering any facility which provides for neglected, delinquent, and/or mentally or physically handicapped children. In doing so, the Legislature has mandated that statewide rules be promulgated for regulating programsproviding for the proper care of children. Code §49-2B-1. The supervision to assure compliance with these rules and regulations is vested with the Commissioner of Human Services. Code §§49-2B-9 and 10. Grievants are two of the individuals who perform the day-to-day work of conducting on-site surveys of these state facilities.

The majority of the job duties that Grievants perform are not in dispute and can be briefly summarized as follows:

1. Survey, evaluate, monitor and review child welfare agencies to determine compliance with state licensing regulations.

2. Develop, review and amend licensing rules and regulations for the governance of child welfare agencies.

3. Facilitate problem resolutions with the operation of a licensed program or agency.

4. Investigate allegations of noncompliance with the State's rules.

Grievants testified that they work with over four hundred facilities which include child day care centers, adoption agencies, juvenile detention centers, therapeutic and specialized foster care agencies and residential care facilities. Many of the facilities surveyed by Grievants provide medical, mental health, educational and social services to the children entrusted to their care. Grievants avers

that the majority of their time is spent conducting surveys and reviewing these facilities.

Grievants base their argument, in large part, on the theory that the Health Facilities Surveyor classification specification includes within its coverage the surveying of "day care providers." They maintain that the facilities which they survey provide day care to children, and therefore, the classification specificationfor the Health Facilities Surveyor better describes the nature of the duties they perform. They opine that the remainder of the nature of work and examples of work sections of the Surveyor classification specification more specifically relate to the duties they perform.

Obviously, a Health Facilities Surveyor must survey health facilities. What is a health facility is not easy to define although the classification specification in issue lists examples of six health facilities, one of which is a day care provider. No definition of this term is readily apparent and, upon reading the specification as a whole, it is determined that the term is sufficiently ambiguous to allow Personnel to interpret and explain what it meant by its use of this term in its specification.

Mr. Basford testified that the term "day care provider" was meant to refer to those health care facilities which treat infirm adults and not children. He opined that there is a distinction between a health facility which provides day care to adults and those facilities which provide typical day care to children. When questioned on cross-examination, Mr. Basford indicated that Personnel did not rely upon a recognized definition of the term "day care provider" at the time the classification specification was drafted, nor did the employer provide it with such a definition. He opined that Personnel believes that the duties performed by Health Facilities Surveyors are more complex than those performed by Health and Human Resources Specialists due to the significant health care aspect of their positions; therefore,Grievants are correctly classified given the nature of the duties they perform. In conclusion, he stated that the health problems encountered by the Health Facilities Surveyors are more significant than the behavioral problems encountered by Grievants.

Grievants contend that a broader interpretation of the term "day care provider" should be accepted. They also assert that they work with facilities which do provide health care to the children served. Further, they opined that the Health and Human Resources Specialist classification specification does not address or refer to the types of duties which they perform, i.e., surveying child day care centers, and that the Health Facilities Surveyor classification more closely matches the nature of the work which they perform.

The Health and Human Resources Specialist classification specification, when read as a whole,

encompasses those duties associated with developing, regulating and administering a complex, technical statewide program. Incumbents in this position are responsible for assuring compliance with both state and federal regulations, and monitoring and evaluating the operation of the entities working under the program established. It is accepted that the language of this classification specification is more general in nature, as it relates to the duties of one of more particular persons holding this classification, than is the classification specification of Health Facilities Surveyor. However, this does not render the classification unfit for the duties of various positions like Grievants. According toPersonnel's administrative regulations, all classification specifications are descriptive only and should relate to the general work characteristics of the jobs performed by the incumbents to which they relate. Simply because the classification under which Grievants are assigned is more general than that which they seek does not, in and of itself, support a finding that they are misclassified. The Health and Human Resources Specialist can be read as applying to the duties and responsibilities of Grievants' positions.

Neither Personnel nor the employer appear to deny that Grievants perform surveying duties, along with all of the other related functions thereto, similar to the duties performed by those employees classified as Health Facilities Surveyors. However, it does not appear that Grievants survey, evaluate or monitor facilities which primarily provide **health care** to its clients. Interestingly, the terms "day care center" and "facility" are defined in Code §49-2B-2. A day care center is "a facility operated by a child welfare agency for the care of seven or more children on a nonresidence basis." And the term "facility" is defined as a "place or residence, including personnel, structures, grounds and equipment used for the care of a child or children in a residential or other basis for any number of hours per day in any shelter or structure maintained for that purpose." However, it is also clear that these definitions were not relied upon by Personnel when it drafted the Health Facilities Surveyor classification specification at issue.

Grievants also assert that they are misclassified because the duties they perform are substantially similar to the duties performed by the Health Facilities Surveyors, but their classification is assigned a pay grade three levels lower than the surveyors' classification. They contend that this is another reason why it should be determined that the Health Facilities Surveyor position is the best fit for their duties. Personnel maintains that Grievants' job duties are not as complex as those of the Health Facilities Surveyors. Without going into the numerous factors which Personnel evaluates prior to

assigning a pay grade to a classification, it is determined that Grievants have not presented sufficient evidence to support a finding that the pay grade assigned to their position is inappropriate or was the result of an abuse of discretion.

Given the complete evidence of record, it is determined that Grievants have failed to meet their burden of proving that Personnel abused its discretion in classifying their positions as Health and Human Resources Specialists. Grievants, while primarily being responsible for performing surveys of child care facilities, do not survey, evaluate, monitor or investigate health care facilities as contemplated by the language of the classification specification for the position of Health Facilities Surveyor. Further, Personnel's explanation of the ambiguous terms used in that classification is not determined to be clearly wrong. The rest of this decision shall consist of the Undersigned's appropriate and formal findings of fact and conclusions of law asproperly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievants, employees of the West Virginia Department of Health and Human Resources assigned to the civil service classification of Health and Human Resources Specialist, are assigned to the Division of Human Resources and work within the Office of Social Services.

2. Grievants' job duties consist primarily of assuring that over 400 child day care facilities throughout the State are properly licensed pursuant to W. Va. Code §§49-2B-1, et seq. Grievants perform surveys of these facilities, monitor and evaluate their performance under various state and federal rules and regulations, and investigate complaints. Grievants also provide consultation, technical assistance and training to various facilities to assure compliance with applicable rules and regulations. Grievants are also involved in creating and amending the various state regulations required of the program under which they operate.

3. Grievants do not primarily survey, evaluate, inspect or monitor health facilities as that term is defined by the Division of Personnel.

Conclusions of Law

1. Grievants have failed to meet their burden of proving that the Division of Personnel abused its discretion in assigning their positions to the classification of Health and Human Resources

Specialist.

2. The Division of Personnel's interpretation of the ambiguous language used in its classification specification for the position of Health Facilities Surveyor is not clearly wrong. See, Blankenship, supra.

Therefore, this grievance is hereby **DENIED**.

Any party 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.

_____

ALBERT C. DUNN, JR.

Administrative Law Judge

July 10, 1995