ANNA N. SHAHAN, .

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Grievant, .

.

v. . Docket No. 95-DNR-146

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WEST VIRGINIA BUREAU OF COMMERCE, .

DIVISION OF NATURAL RESOURCES, AND .

DEPARTMENT OF ADMINISTRATION, .

DIVISION OF PERSONNEL, .

.

Respondents. .

D E C I S I O N

Anna N. Shahan (Grievant), employed by Respondent Bureau of Commerce in the Division of Natural Resources (DNR), challenges her classification as an "Environmental Resources Specialist I" (ERS I) by Respondent Division of Personnel (DOP). Grievant contends she should be classified as an "Environmental Resources Specialist II" (ERS II). This grievance was initiated on June 1, 1994, and advanced to Level III where a hearing was held on November 1, 1994. Thereafter, DNR Director Charles B. Felton issued a decision on March 28, 1995, (See footnote 1) denying the grievance at Level III. Grievant timely appealed to Level IV on March 29, 1995, electing to have hergrievance decided on the basis of the record developed through Level III. Thereafter, the West Virginia Department of Administration, Division of Personnel, was joined as an essential party by Order dated April 11, 1995. Grievant and Respondents DNR and DOP submitted written briefs in accordance with an established briefing schedule and this matter became mature for decision on June 16, 1995.

Background

The facts in this case are substantially uncontroverted. Grievant is employed by DNR as the coordinator for two statewide programs, Adopt-A-Highway and West Virginia Wildflowers. The former is a joint effort between DNR and the West Virginia Division of Highways (DOH),

while the latter is a cooperative effort involving DNR, DOH and the West Virginia Garden Clubs. HT at 18. Adopt-A-Highway solicits volunteers to take responsibility for litter control along a two-mile section of highway. West Virginia Wildflowers plants and maintains wildflowers along state highways using donated funds. R Ex 1.

Grievant is directly responsible for preparing all documentation relating to both programs, including publicity brochures and agreements with organizations volunteering to perform various services. According to Grievant, there are between 28,000 and 30,000 volunteers participating in these programs. HT at 10. Grievant is also responsible for coordinating the development and dissemination of public service messages on radio and television, generally promoting litter control. R Ex 1.

Grievant's immediate supervisor, Maxine Scarbro, Environmental Resources Program Manager for Conservation Education and Litter Control, recommended that Grievant be classified as an ERS II. HT at 5-6. See G Ex 3. However, DNR did not concur with her recommendation. HT at 37-38.

Mr. Lowell Basford from the Division of Personnel testified at Level III that Environmental Resources Specialist is a new class series created during the statewide reclassification project to cover a wide variety of jobs involving the acquisition, protection or preservation of environmental resources. HT at 32-33. Mr. Basford explained that DOP attempted "to distinguish positions based upon the complexity of the work relative to each other." HT at 33. In explaining DOP's basis for the decision to classify Grievant as an ERS I rather than an ERS II, he noted that Grievant coordinates the work of volunteers. Other DNR employees exercise greater regulatory authority over certain industries or groups of employees, as exemplified by their control over a specific permitting process. In contrast, Grievant's relationship with volunteer organizations represents more limited authority. HT at 34-35. Additionally, the scope of Grievant's responsibility is diffused, in Mr. Basford's view, by the fact that DOH shares responsibility for implementing the two major programs she coordinates. HT at 34. Mr. Basford also expressed his opinion that the scientific areas of agriculture and horticulture in which Grievant works are not as complex and technical as geology,engineering, chemistry and hydrology represented by other employees who are classified at the ERS II level. See HT at 36-37.

Mr. Basford further explained that ERS I represents the first level in a series. Thus, use of the term "beginning level" in the ERS I class specification was never intended to indicate that an employee classified as an ERS I was not yet capable of performing the full range of duties required at that level. HT at 36. In any event, he emphasized that because Grievant's scope of responsibility is diffused, her duties are not as complex as DNR employees classified as an ERS II. Mr. Basford illustrated this point by referring to duties and responsibilities contained in position descriptions of employees who were classified by DOP at the ERS II level. See R Ex 4.

Classification Specifications at Issue

The relevant portions of the classification specifications for the ERS I and ERS II positions at issue in this case are reproduced herein as follows:

ENVIRONMENTAL RESOURCES SPECIALIST I

Nature of Work

Performs beginning level professional work in a specialty area in the acquisition, preservation, management and enhancement of the state's environmental/natural resources. Acquires the knowledge, skills and abilities to function at the beginning level; assists higher level specialist in programmatic areas. Work involves the application of scientific principles, laws and regulations and program planning techniques in the areas of assignment. Areas may include grants and contract administration, environmental/natural resource program development and evaluation, education, or environmental monitoring and compliance. Assists in the planning, organization and implementation of a state-wide or regional specialty program. Travel over difficult terrain and in inclement weather may be required.

Distinguishing Characteristics

Environmental Resources Specialist I is distinguished from the other levels by acquiring the knowledge, skills and abilities to function at the beginning level; assists higher level specialist in programmatic area.

Examples of Work

Assists higher level specialists in collection and review of technical/scientific data related to environmen tal/natural resources quality; assists in preparing detailed statistical/narrative reports.

Conducts field inspections to identify pollution sources, monitor contract activities and to assess environmen tal/natural resources quality impact.

Collects data, composes and compiles statistical and narrative reports relating to operational and comprehensive plans.

Consults on the technical development of grants, grant proposals and programs relating to the area of assign ment.

Presents findings of studies and explains proposed plans to state and local officials and the general public.

Implements and monitors programs supported by planning agency grants.

Performs site examination of land to determine land-use feasibility.

Processes leases and agreements of rights-of-way for surface and mineral lands and improvements.

Schedules and participates in public meetings to explain the environmental impact of a proposed project or environmen tal permits.

Composes correspondence and memorandums.

ENVIRONMENTAL RESOURCES SPECIALIST II

Nature of Work

At the full-performance level, performs complex professional work in a specialty area in the acquisition, preservation, management and protection of the state's environmental natural resources. Work involves the application of scientific principles, laws and regulations and program planning techniques in the specialty area. Areas include grants and contract

administration, environmental/natural resources, program development and evaluation, education, or environmental monitoring and compliance. Typically, positions are involved in a state-wide specialty program. Travel over difficult terrain and in inclement weather may be required. Performs related work as required.

Distinguishing Characteristics

This classification differs from the Environmental Resources Specialist I by the full-performance level work and complex work in the assigned area. Incumbents are involved in a state-wide specialty program area. The Environmental Resources Specialist IIIdiffers from Environmental Resources Specialist II by the performing (sic) as lead worker in complex program assignment with responsibility for multi-agency and multi-level coordination of program activities.

Examples of Work

Collects and reviews technical/scientific data related to environmental/natural resources quality; assists in preparing detailed statistical/narrative reports.

Conducts field inspections to identify pollution sources, monitor contract activities and to assess environmen tal/natural resources quality impact.

Collects, analyzes and evaluates data in the area of assign ment.

Presents findings of studies and explains proposed plans to state and local officials and the general public.

Collates data, composes and compiles statistical and narrative reports relating to operational and comprehensive plans.

Consults on the technical development of grants, grant proposals and programs relating to the area of assign ments.

Implements and monitors programs supported by planning agency grants.

Conducts testing of plans developed by lower level planners.

Composes correspondence and memos.

Visits project sites to monitor projects, collect samples or to take photographs.

Develops and presents a variety of solutions to problems uncovered by data collection.

May supervise subordinate specialist and/or clerical staff.

Verifies ownership and property rights from county court records; conducts negotiations with landowners.

DISCUSSION

In order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely matched another cited Personnel classification specification than the one under which she is 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/lesscritical, 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. Atchison v. W. Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991); See generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether the Grievant's current classification constitutes the "best fit" for her 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 Serv., Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993).

Under the foregoing legal analysis, the West Virginia Supreme Court of Appeals' holding in Blankenship presents employees challenging their current classification with a substantial obstacle to overcome in attempting to establish that they are currently misclassified. In the instant matter, Grievant's interpretation of DOP's classification specifications for the respective classifications at issue is generally consistent with the impression the undersigned derived from an initial reading of the specifications. Nonetheless, these specifications are not free from ambiguity, particularly in regard to words and

phrasesemployed by DOP personnel specializing in position classification. Grievant's evidence falls short of demonstrating that DOP's determination that she is performing the duties of an ERS I is "clearly wrong." Moreover, given that the ERS I and ERS II classification specifications are somewhat overlapping, DOP's determination that Grievant's predominant duties are not sufficiently "complex" to fit within the ERS II class specification has not been shown to be "clearly wrong" under the record established in this matter. See Dala v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-059 (Mar. 29, 1995).

Although Grievant established that she performs her assigned duties in a proficient manner and her diligence and initiative allow her to make a significant contribution to the effective operation of two important projects, these factors are not controlling in determining her proper classification, because positions, and not persons are classified. See generally, W. Va. Div. of Personnel Administrative Rules, Series I (Amended) § 4.01, et seq. (1993).

In appealing to Level IV, Grievant also argued that she should have been granted a "Summary Judgement" at Level III, noting that her Level III hearing was not conducted within the time limits specified in W. Va. Code § 29-6A-4(c) and the Level III decision denying her grievance was similarly issued well beyond the § 29-6A-4(c) time limits. However, unlike the grievance procedure for school employees, W. Va. Code §§ 18-29-1 et seq., the grievanceprocedure for state employees does not contain a default provision. (See footnote 2) **Accordingly, Grievant is not entitled to prevail by default by virtue of her employer's failure to process her grievance within the statutory time limits specified in W. Va. Code § 29-6A-4. See Coddington v. W. Va. Dept. of Health & Human Resources, Docket Nos. 93-HHR-265/266/267 (May 19, 1994).**

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant is employed by the Division of Natural Resources (DNR) as the coordinator for two statewide programs, Adopt-A-Highway and West Virginia Wildflowers.

2. Adopt-A-Highway is a joint effort between DNR and the Division of Highways (DOH). This program solicits volunteers to take responsibility for litter control along a particular two-

mile section of highway.

3. West Virginia Wildflowers is a cooperative effort among DNR, DOH and the West Virginia Garden Clubs. This program plants and maintain wildflowers along state highways using donated funds.

4. Up to 30,000 volunteers may be involved in the operation of both programs at any one time.

5. Performance of Grievant's duties requires scientific knowledge in the fields of horticulture and agriculture.

6. Grievant is currently classified by the Division of Personnel (DOP) as an Environmental Resources Specialist I (ERS I).

7. DOP interprets "beginning level work" in its position classification specification for ERS I as work which is less difficult than other work performed at higher levels within the same class series. DOP did not intend that "beginning level work" in the class specification for ERS I be applied to employees performing duties at the apprentice, novice or trainee level.

CONCLUSIONS OF LAW

1. Grievant has not proven by a preponderance of the evidence that the classification of ERS II constitutes the "best fit" for the duties she performs. See Simmons v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-433 (Mar. 28, 1991).

2. Although Grievant is performing some duties that are outside her current classification as an ERS I, this does not render her misclassified. Dooley v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-498 (Mar. 19, 1991). See Div. of Personnel Administrative Rules, Series I (Amended), §4.04(d) (1993); Broaddus v. W. Va. Div. of Human Services, Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990).

3. Personnel's interpretation of the classification specifications for the positions of ERS I and II, as they apply to the duties being performed by Grievant, are not clearly erroneous and,therefore, should be accorded great weight. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993).

4. Grievant's job duties, as demonstrated by a preponderance of the evidence, best fit within the classification specification for ERS I.

Accordingly, the grievance is 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: August 31, 1995

Footnote: 1

The W. Va. Education and State Employees Grievance Form shows the date of Mr. Felton's decision as "2/28/95." This date is clearly in error as the actual decision is dated the "28th day of March 1995."

Footnote: 2*It should also be noted that this Grievance Board has found that it is not empowered under W. Va. Code § 18-29-4 to enforce a default which may have occurred at the lower levels of the education employee grievance procedure. Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994); Smith v. Bd. of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993).*