WILLIAM KIMBLE,

Grievant,

v. Docket No. 99-HHR-153

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was initiated by the Grievant, William Kimble, against the Respondents Department of Health and Human Resources/William R. Sharpe, Jr. Hospital ("HHR") and Division of Personnel ("Personnel"), on or about March 11, 1999, alleging he is improperly classified as an Inspector III, pay grade 11. As relief Grievant seeks to be classified as a Safety and Loss Control Specialist III, pay grade 16, and "to be made whole in every way, to include, but not limited to adjustment of salary and back pay with allowable interest." At Level III, Grievant clarified he was seeking back pay to June 19, 1997, (See footnote 1) the date the Safety and LossControl Specialist III classification was established, at the maximum salary for pay grade 16. He did not indicate why the maximum salary for the pay grade would be appropriate. (See footnote 2)

The following Findings of Fact are made based upon the evidence presented at Levels III and IV.

FINDINGS OF FACT

1. Grievant has been employed by HHR at William R. Sharpe, Jr. Hospital as an Inspector III, pay grade 11, (See footnote 3) since February 5, 1996. His working title is Safety Director. Grievant's duties have been substantially the same since his employment with HHR began.

2. Grievant was hired into the position at a salary near the maximum for the pay grade, because, according to Sharpe Hospital's administrator, Michael A. Todt, Ph. D., "we believe that this position presents significant and unusualrecruitment problems." While other candidates were

available, Dr. Todt stated, "[t]o accept other candidates because they would accept the mid-point or below would cause us to severely limit our staffing standards and ability to ensure compliance in this very critical area of safety for patients and staff. (In fact, candi[d]ates with limited qualifications interviewed for this position required greater than the mid-point if they were to accept a job offer.)" Grievant's Level IV Exhibit 37. As of May 1999, Grievant had already reached the maximum salary for the pay grade.

3. Chip Garrison, Assistant Hospital Administrator, is Grievant's supervisor. Grievant makes his own schedule. Mr. Garrison generally does not assign Grievant duties, or tell him what he needs to do. He does not follow prescribed procedures, and each day's tasks are different.

4. Grievant spends less than 20 hours a year, one percent of his time, conducting safety inspections. He makes sure some inspections required by law or the regulating body, the Joint Commission on Accreditation of Healthcare Organiza tions ("JCAHO"), are conducted by others, and prepares corrective action plans. He has no enforcement authority. He does not travel, and works a regular shift. He does not meet with civic or labor groups. He does not act as a lead worker, and supervises no employees.

5. Grievant is responsible for developing and implementing safety plans, and making recommendations to management to assure Sharpe Hospital is in compliance with JCAHO safety requirements, and that is why he was hired. 6. Grievant spends most of his time developing, modifying and implementing plans and/or procedures to assure compliance with the JCAHO requirements for safety, life safety, emergency preparedness, security, hazardous materials, utilities, and equipment; gathering data for quality improvement activities relating to safety, and evaluating information, identifying trends, and developing reports and recommendations for corrective actions to reduce losses and or injuries, or to bring hospital into compliance with the law; reviewing federal and state regulations for applicability and compliance; developing, conducting, and evaluating safety training for employees; acting as the liaison with the local EMS, 911 Center, fire department, and law enforcement, the state fire marshall, EPA, and insurance officials; and preparing reports, attending meetings, and following up on recommendations from committees. He also does research on safety topics as required, and takes on special hospital safety projects. For example, he has been responsible for investigating allegations of "sick building syndrome," including determining appropriate testing and arranging for testing, and reporting the results of the investigation to

management and employees.

7. The Nature of Work section of the Inspector III classification specification is not applicable to Grievant's duties. The Nature of Work section of the Safety and Loss Control Specialist ("SLC Specialist III") classification specification better describes Grievant's duties. 8. The Examples of Work section of the SLC Specialist III classification specification better describes Grievant's duties than the Examples of Work section of the Inspector III classification specification.

9. There are three levels of Inspectors in the class series. The Division of Labor employs the most Inspectors, and they are also employed by the Division of Highways. Inspector III's are lead workers, planning and coordinating inspections throughout a region, contacting employers, training new Inspectors, reviewing the work of other Inspectors, and conducting the more difficult inspections, which could take up a significant portion of time. The purpose of the inspections is to enforce the law.

10. The SLC Specialist class series consists of a I, II, III, and Manager. The series was developed in 1997 to be used for positions in the Workers' Compensation Division. The primary function of the SLC Specialist is to conduct on-site inspections of various work sites for the purpose of gathering data used in setting workers' compensation premiums.

11. Grievant is minimally qualified to be classified as an SLC Specialist III. (See footnote 4)

DISCUSSION

In order for a grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closelymatch those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These 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 the Work" section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dep't 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 his required duties. Simmons v. W. Va. Dep't of Health and Human Resources, 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 Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Importantly, Personnel's interpretation and explanation of the classification specifica tions at issue should be given great weight unless clearly wrong. See, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993). The holding of the Supreme Court of Appeals of West Virginia in Blankenship presents a state employee contesting his classification with a substantial obstacle to overcome in attempting to establish that he is misclassified.

The relevant portions of the classification specifications for the Inspector III and Safety/Loss Control Specialist III are reproduced below for comparison.

INSPECTOR III

Nature of Work

Under general supervision, performs work at the advanced level by conducting inspections in the enforcement of various state and federal regulatory laws and regulations. Work is performed according to prescribed procedures and involves direct contact with employees, public officials, civic, labor groups, and the public. Involves traveling throughout the state and working irregular hours. May supervise or act as lead worker. Performs related work as required.

Distinguishing Characteristics

The Inspector III is distinguished from the Inspector II by the broader scope of administrative oversight and responsibility for planning and operational aspects of the area of inspection. This level functions in a lead worker capacity.

Examples of Work

Conducts complex, special and extraordinary inspections.

Instructs and supervises subordinate inspectors in particular aspects of investigative techniques.

Takes enforcement actions indicated by results of inspections, tests, and investigations.

Makes recommendations concerning the proper application of laws, rules, and regulations, and resolves violations.

Participates in evaluating inspection procedures and advising on policy matters.

Prepares detailed and complex inspection reports and correspondence.

Confers with officials concerning problems related to inspection assignments.

SAFETY/LOSS CONTROL SPECIALIST III

Nature of Work

Under limited supervision, conducts loss analysis and research prior to conducting on-site surveys of worksites to assess the employer's safety efforts and to detect safety hazards to employees, preparing and submitting reports of findings tomanagement, makes recommendations to management to correct hazards and safety program needs. Recognizes conditions or exposures which need an industrial hygiene evaluation. Participates in management training programs. Researches literature, laws, standards and technical developments in the field of workplace safety. Provides underwriting with risk assessments in support of underwriting determinations. Performs as a team leader in overseeing other specialists and associate staff, assists in the monitoring and training of the safety/loss control staff. Performs related work as required.

Distinguishing Characteristics

This position works independently with all classes of employers and performs as a team leader. Positions in this class will generally perform all levels of work, with minimal supervision, for larger and more complex employers. Assists with the team management, training of loss control staff and goal setting.

Examples of Work

Customer Service

Consults with employers to improve the safety programs and performance leading to a safer and healthier workplace.

Maintains a positive working relationship with employers and employees.

Communicates effectively with employer's senior management.

Develops and conducts management safety training programs, may develop areas of specialization such as ergonomics, process safety hazard analysis, etc., with the

approval of the Director, Safety and Loss Control Unit.

Develops a loss control service plan with goals and objectives for each assigned employer.

Teamwork

Provides underwriters with information concerning the level of safety of employers; participates in training to improve safety, consulting, business, and communication skills.

Participates in training programs directed at improving knowledge of workers' compensation laws, rating plans, principles, of insurance.

Guides and trains new representatives, reviews reports and letters prepared by new representatives prior to release.

Guides and directs support staff in research projects, loss analysis and special projects.

Technical Knowledge

Evaluates employer safety programs and worksites for hazardous conditions, able to do problem solving through research and evaluation, able to conduct Industrial Hygiene testing with sound level meters and more complex testing equipment, is conversant with pertinent federal regulations (OSHA and MSHA, etc.).

Able to develop and conduct management safety training programs including curriculum and audio visual materials.

Analytical/Problem Solving

Researches literature, standards, laws, and rules to provide employers with solutions to safety related problems. Develops cost effective methods to correct hazardous conditions.

Analyzes loss information to determine accident trends and provides employers with effective solutions.

Leadership

Assists with the leadership and motivation of the professional and support staff.

May provide primary supervision of personnel in field offices, including work assignment.

Account Management

For new accounts, provides underwriting with accurate and timely report on the hazards and the effectiveness of controls and the willingness of the employer to comply with recommendations to control hazards.

Reviews loss records of employers in region to determine allocation of service resources and directs resources to those employers with poor or deteriorating experience.

Keeps underwriting apprised of any changes in hazards or exposures through copies of reports to employers and special reports to underwriting.

Communications

Responds to requests from employers, underwriters, and other agencies in a timely fashion regarding safety issues.

Develops and delivers presentations to new and existing employers.

Influencing/Negotiation

Communicates ideas and issues with management and to reach a successful agreement through innovation, creativity, and compromise.

Grievant stated he performs none of the work listed in the Examples of Work of the Inspector III, except that he prepares corrective action plans, which relates to both items three and four. He does, however, also prepare safety plans, and makes recommendations to management to assure compliance with the law, which also fits within item four and item five.

Grievant stated, however, that the first sentence under the Nature of Work section of the SLC Specialist III classification specification describes his job. Under the examples of work listed for the SLC Specialist III, under the topic Teamwork, Grievant testified he does none of the listed items except safety training. Under the topics Technical Knowledge and Analytical/Problem Solving, Grievant testified both sections are descriptive of his role at Sharpe Hospital. He testified that under the topic Leadership, he assists with the leadership and motivation of support staff, primarilythrough training or attending supervisory meetings; but he does not supervise personnel in field offices. Under the topic Account Management, Grievant acknowl edged he has no role with regard to underwriting, but opined he reports on hazards, attempting to fit within a part of the first sentence of that section. None of the rest of that section is applicable to his duties. Grievant explained under the topic Communications, he responds to requests from his employer's management, and to outside agencies relating to safety issues. Grievant testified as regards the topic Influencing/Negotiation, he

communicates ideas to management.

Mr. Basford explained that the Inspector III classification is what is referred to as a generic classification, in that a variety of assignments are included within the classification, one of which is safety inspection, as is listed on the third page of the classification specification. He stated the specification has to be interpreted and applied in relation to the class series. He explained it is the third and highest level of the Inspector series. He stated the Inspector I and II would be primarily hands on inspectors, while the Inspector III is the advanced level. He noted the Inspector II is distinguished from the Inspector III by the Inspector III's responsibility for adminis trative oversight of the functional area, which in this case is safety inspection. He stated the Inspector III has a significant responsibility for the planning and operational aspects of the area, which is why Grievant's position was assigned to this classifica tion. He concluded that, "it is really a mischaracterization of the Inspector III specification to say that it, it is predominantly someone who does inspections. That's not, that's not true. It is someone who predominantly has administrative oversight,ah, and responsibilities for the planning and operational aspects of those kinds of activities."

When asked about the first sentence of the Nature of Work section of the Inspector III classification specification, which states "performs work at the advanced level by conducting inspections in the enforcement of various state and federal regulatory laws and regulations," Mr. Basford stated this does not say the individual conducts inspections, because the Inspector I and II levels contain this same language. Therefore, he stated, it is the Distinguishing Characteristics section which explains what the Inspector III does, and justifies Grievant's classification. He stated the specifications are not meant to be taken literally, but are very general.

Mr. Basford admitted the Inspector III classification specification is not an exact fit for Grievant, but stated it is the best fit of the available classifications. He testified that job classifications have multiple purposes. One of the purposes is to recruit qualified employees, and he opined that the Inspector III classification has served this purpose, as the two state hospitals with this position have been able to recruit highly qualified applicants for the positions. He stated he has received no request from HHR to create a separate classification for hospital safety director.

Mr. Basford stated a SLC Specialist III must conduct inspections, pointing to the language in the Nature of Work section which reads, "conduct loss analysis and research prior to conducting on-site surveys." He also pointed out SLC Specialist III's travel, provide underwriting, and perform as team

leaders overseeing other SLC Specialists, none of which Grievant does. Grievant pointed out the Inspector IIIclassification specification also refers to travel throughout the state, and that Inspector III's with the Department of Labor travel. While the Inspector III classification specification does not refer to the team leader concept, it states the incumbent is a lead worker, which Grievant is not.

Mr. Basford stated the SLC Specialist III classification was created for positions in the Workers' Compensation Division, and that only the Workers' Compensation Division has an underwriting section, and the safety people work with the Underwriting Department to determine premiums. He pointed out the primary function of Grievant's position is to coordinate the implementation and maintenance of the Safety Plan. Grievant's role is to take actions to improve the safety of the workplace. The role of the SLC Specialist is to survey the safety of the workplace in order to assess Workers' Compensation premiums. While this may result in a safer workplace, it is not one of the purposes of the position.

Mr. Basford stated the very first sentence of the SLC Specialist III classification specification disqualifies Grievant from the classification, as persons in this classification conduct "on site surveys." He explained this includes inspections, and the word "surveys" was used because Workers' Compensation wanted to use a broader term than inspections, which had a non-compliance connotation. He testified the very first sentence frames everything else, and the predominant duties of the position are to conduct on site surveys of employers and to assess their safety programs or operations. He also pointed to the underwriting aspects of the position. He explained within the class series, the I's and II's work with smaller, less complex employers,while the III's work with large, complex employers, as well as smaller employers, and emphasized the need for the employee to have knowledge of the safety aspects of, and laws applicable to, many different types of companies and equipment, whereas Grievant only works with the safety aspects of a psychiatric hospital. He explained where the classification specification discusses "Account Management," it is referring to employers, who are the "accounts."

Mr. Basford also pointed out that Huntington Hospital has a position similar to Grievant's, which was filled by Dina Kunzler. Ms. Kunzler grieved her classification as an Inspector II, Grievant testified as to his duties at the hearing in her grievance, and this Grievance Board found Ms. Kunzler should be classified as an Inspector III, which was the classification she sought. See Kunzler v. Dep't of Health and Human Resources, Docket No. 97-HHR-287 (Jan. 8, 1998). That decision stated, "all

parties acknowledge that there is no existing class specification that directly addresses hospital Safety Director positions such as Grievant's." Ms. Kunzler did not seek to be classified as a SLC Specialist III, and indeed that classification was not effective until after her Level III hearing.

Grievant's responsibilities are not accurately described by either of the classification specifications at issue. The Nature of Work section of the Inspector III classification specification, its "most critical section," is not applicable to Grievant at all. He works independently. He rarely conducts inspections, and when he does, they are for the purpose of determining whether additional safety measures should be put in place, or because the inspections are required by law. They are not related toenforcement. He has some contact with public officials in law enforcement, and contact with employees, but no contact with civic or labor groups or the public. He does not travel or work irregular hours, and does not supervise or act as a lead worker. Mr. Basford would disregard this most critical section of the classification specification, and go directly to the first sentence of the Distinguishing Characteristics section, again ignoring the second sentence of that section which states clearly, "[t]his level functions in a lead worker capacity."

Further, Mr. Basford's statement that the Inspector III does not conduct inspections must be disregarded as it contrary to the clear language used in the classification specification. Watts v. W. Va. Dep't of Health and Human Resources, 195 W. Va. 430, 465 S.E.2d 887 (1995). The Nature of Work section plainly says, "performs work at the advanced level by conducting inspections." (Emphasis added.) If the Inspector III does not conduct inspections, this language should be taken out of the classification specification.

Clearly, the SLC Specialist III classification specification was developed for employees in the Workers' Compensation Division, and describes the role of those employees in assessing the safety aspects of the sites of multiple employers and reporting to the underwriting section so that premiums can be set. This is not what Grievant does. Grievant assesses the safety of one site with the goal of making that site as safe as possible, and making recommendations to management to keep the site in compliance with applicable safety standards. However, it is likewise clear that the Inspector III classification was designed for persons who lead other workers whoconduct inspections for the purpose of enforcing the law, and also conduct more complex inspections themselves. This is not what Grievant does, and bears no resemblance to the purpose of his job.

Neither the Inspector III classification specification, nor the SLC Specialist III classification

specification, is a perfect description of Grievant's duties, but that is not what is required. Grievant's role is broader than that of the typical Inspector III, but not as broad as the SLC Specialist III. Even though the Distinguishing Characteristics section of the Inspector III classification specification better describes Grievant's duties than that section of the SLC Specialist III classification specification, the SLC Specialist III classification specification provides better examples of what Grievant does, and its Nature of Work section better describes Grievant's duties than does the Nature of Work section of the Inspector III classification specification. As the Nature of Work section is the most critical section, this difference is significant.

Further, Mr. Basford's comments regarding the ability of HHR to recruit employees into the position overlooks two important facts. First, Grievant was hired at a salary close to the maximum for the pay grade due to recruiting problems. Second, Mr. Kimble has another grievance pending before the undersigned which involves the problem of his salary. Grievant has already reached the maximum salary for the classification. Although he was awarded a merit increase, it placed him over the maximum for the pay grade, and he was not able to receive the merit increase.

The logical conclusion to be drawn is that a classification needs to be created for Grievant's position, and that of the Inspector III at Huntington Hospital, whichbetter describes the advanced duties of these positions, and is in a higher pay grade than persons who perform inspections and are classified as Inspector III's. Grievant has already suffered from not being in the proper pay grade. However, the undersigned has not been asked to create a classification. Accordingly, it is appropriate that Grievant be placed in the classification which better describes his duties, and is more in line with the pay grade to which his position should be assigned.

Finally, HHR argued any documents Grievant did not submit to Personnel when it made its decision on his proper classification were not relevant to the grievance. HHR cited no law to support this proposition, and this argument is rejected. The issue before the undersigned is whether Grievant is properly classified, not whether Personnel's decision on Grievant's classification was correct based upon the information before it. It is within the discretion of the administrative law judge to allow a grievant to present any evidence at a Level IV hearing which tends show what his duties and responsibilities are so that all the facts necessary to a determination of the proper classification may be evaluated. What Personnel knew about Grievant's duties and responsibilities is what is irrelevant to this determination.

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. In order to prevail in a misclassification claim, a grievant must prove by a preponderance of the evidence that his duties for the relevant period more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of NaturalResources, Docket No. NR-88-038 (Mar. 28, 1989). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

2. The "Nature of the Work" section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989).

3. Personnel's interpretation and explanation of the classification specifica tions at issue should be given great weight unless clearly wrong. See, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

4. The Nature of Work section and the Examples of Work section of the SLC Specialist III classification specification better describe Grievant's duties than the Nature of Work and Examples of Work sections of the Inspector III classification specification. Grievant has proven the SLC Specialist III classification is a better fit for his duties than the Inspector III, and that the pay grade for that classification is a better fit.

Accordingly, this grievance is **GRANTED**. Respondents are **ORDERED** to place Grievant's position in the Safety and Loss Control Specialist III classification, effective June 19, 1997, and to pay him any and all back pay to which he is entitled, plus interest, as though he had been in that classification and pay grade since that time. To the extent that Grievant's salary, including merit increases awarded, has been withthe pay range for a pay grade 16, and he actually received that salary, including merit increases awarded, he would be entitled to no back pay for those periods.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Date: September 16, 1999

Footnote: 1 HHR argued Grievant could recover back pay only back to ten days preceding the filing of his grievance; however, neither HHR nor Personnel raised a timeliness defense at or before Level II, or even at Level III, nor did they argue they should be allowed to raise such a defense at Level IV. Accordingly, Grievant'sclaim for back pay will not be so limited. See Kuntzler v. Dep't of Health and Human Resources, Docket No. 97-HHR-287 (Jan. 8, 1998), footnote 7.

Footnote: 2 Grievant's supervisor responded at Level I on March 11, 1999, that he had no authority to grant the relief sought. Grievant appealed to Level II. A Level II decision denying the grievance was issued on March 15, 1999. Grievant appealed to Level III, where a hearing was held on March 31, 1999. The grievance was denied at Level III on April 12, 1999, and Grievant appealed to Level IV on April 14, 1999. A hearing was held at Level IV on July 30, 1999. Grievant was represented by Jack Atchison, Respondent HHR was represented by Tiffany M. Bost, Esquire, and Respondent Personnel was represented by Lowell D. Basford, its Assistant Director. This matter became mature for decision on September 2, 1999, upon receipt of the last of the parties' post-hearing written arguments.

Footnote: 3 The Inspector III classification was recently placed in a pay grade 12.

Footnote: 4 The parties stipulated to this finding of fact. Accordingly, Grievant's education and experience will not be specifically compared to the stated minimum qualifications for the classification.