DEE DEEM CHAPMAN,

Grievant,

v.

DOCKET NO. 02-HHR-204

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Dee Deem Chapman, filed this grievance against her employer, the West Virginia Department of Health and Human Resources/Bureau for Children and Families ("DHHR") on February 21, 2002:

> In light of the recent Title XX Social Service Survey the majority of my time is reflected in Adult Protective Services.
>
> Relief sought: Reclassification to Adult Protective Service Worker. (See footnote 1)

The grievance was denied at level one on March 1, 2002, by Stephen E. Willis, and at level two on March 12, 2002, by Sharon Winkler-Serena. A level three hearing was conducted on June 19, 2002, at which time the West Virginia Division of Personnel ("DOP") was joined as a party. The grievance was denied on June 27, 2002, by David M. Adkins, and Grievant appealed to level four on July 11, 2002. Following several continuances forgood cause, a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on December 9, 2003, at which time this case became mature for decision, the parties declining the opportunity to submit proposed findings of fact

and conclusions of law. Grievant was represented at level three by Kevin Church, AFSCME, and appeared pro se at level four; DHHR was represented at level three by Sharon Winkler-Serena, and at level four by Robert Miller, Esq., Assistant Attorney General; DOP did not appear at level three, and was represented at level four by Karen O'Sullivan Thornton, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

West Virginia APS Law.

Ex. 2 -

Hodge v. Ginsberg, 172 W. Va. 17, 303 S.E.2d 245 (1983).

Ex. 3 -

Social Service Manual, Homeless Services, Chapter 33000.

Ex. 4 -

W. Va. Code § 44A-1-4.

Ex. 5 -

Social Services Manual, Adult Protective Services, Chapter 20000.

Ex. 6 -

November 14, 2001 letter to Providers.

Ex. 7 -

Survey Definitions, Title XX Social Services.

Ex. 8 -

Grant Agreement.

Ex. 9 -

August 18, 1995 memorandum from Lowell D. Basford to Nedra Koval.

Ex. 10 -

Classification Specification for Protective Service Worker.

Ex. 11 -

Classification Specification for Social Service Worker.

Ex. 12 -

Employee Performance Appraisal for Dee Deem, March 2002.

Ex. 13 -

April 11, 2002 letter from Paul L. Nusbaum to Kevin D. Church.

Level Three DHHR Exhibits

Ex. 1 -

March 18, 2002 email from Tom Strawderman to Recipients with attachment titled Title XX Worker Survey.

Ex. 2 -

Division of Personnel Administrative Rules, Section 4. Classification Plans.

Level Four Grievant's Exhibits

Ex. 1 -

Social Services Manual, Adult Protective Services, Chapter 20000.

Ex. 2 -

Adult Service Staff Directory.

Level Four DOP Exhibit

Ex. 1 -

Position Description Form of Dee Deem, March 2003.

Testimony at Levels Three and Four

Grievant testified in her own behalf, and presented the testimony of Stephen Willis, Gary McMullen, and John Grass. DHHR presented the testimony of Tom Strawderman and Grievant. DOP presented the testimony of Lowell D. Basford.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant has been employed by DHHR as a social worker for approximately 14 years. Grievant is classified as a Social Service Worker II, and currently works in Harmony House, a coalition of service agencies serving the needs of the adult homeless population. Grievant also serves as a Health Care Surrogate and Guardian for DHHR.

2. In January 2002, a survey was sent to all social services and protective service workers asking them to estimate the time they spent during that month delivering each of the services described in the West Virginia Title XX State Plan. This information is necessary to estimate the amount of expenditures supporting delivery of each of the Title XX services.

3. Grievant participated in the Title XX Social Services Survey, and submitted her portion of the survey on February 7, 2002. Grievant noted she spent 75% of her time working in the category entitled “Protective Services for Adults” and 25% of her time working in the category entitled “Services to the Homeless.” 4. Based upon the categories listed in the Survey, and her responses, Grievant filed this grievance alleging she is misclassified as a Social Service Worker II, and requesting reclassification to a Protective Service Worker.

5. Grievant does assessment and service planning for homeless individuals who come to Harmony House. Some percentage of the homeless population Grievant handles are incapacitated. With regard to those individuals, as well as others who need a surrogate or guardian appointed, whether voluntarily or through court order, Grievant, in her role as Health Care Surrogate and Guardian, has the authority to make decisions regarding health care, including orders not to resuscitate.

6.

Grievant does not do investigations into alleged abuse and neglect of adults.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant alleges she is misclassified as a Social Service Worker II, and seeks to be reclassified as a Protective Service Worker.

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 match another cited DOP classification specification than that under which she is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989). DOP 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/morecritical 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. Atchison v. W. Va. Dept. of Health, Docket No. 90- H-444 (Apr. 22, 1991); see generally, Dollison v. W. Va. Dept. of Empl. Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievant's current classification constitutes the “best fit” for her required duties. Simmons v. W. Va. Dept. of Health and Human Res., 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).

Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. W. Va. Div. of Personnel Admin. Rule, § 4.04(a); Coates v. W. Va. Dept. of Health and Human Res., Docket No. 94-HHR-041 (Aug. 29, 1994). Even though a job description does not include all the actual tasks performed by a grievant, that does not make the job classification invalid. W. Va. Div. of Personnel Admin. Rule, § 4.04(d). Finally, DOP's interpretation and explanation of the classification specifications at issue, if said

language is determined not to be ambiguous, should be given great weight unless clearly erroneous. See, W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

The classification specifications at issue in this grievance are reproduced below.

SOCIAL WORKER 2

Nature of Work Under general supervision, performs professional social work at the full-performance level in the delivery of social services to clients requiring therapeutic interventions. Responsibility includes planning for and delivery of needed services as well as associated administrative and reporting requirements. The social services at this level are those requiring knowledgeof social and family dynamics, and skill in providing therapeutic interventions. Responsible for overseeing the work of aides and support staff. 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.

Distinguishing Characteristics

The Social Worker 2 provides full-performance level social work services. Work involves managing client caseloads and assessing and documenting client progress. Work may also involve specialized, individual or group counseling or the coordination of placement or discharge activities.

Examples of Work Provides counseling and other support services to clients. Writes a history for each case; keeps it current with all treatments and programs administered. Investigates all reports of abuse or neglect filed against parents, or employees of state institutions given charge of patients. Makes referrals to other agencies, mental health centers, state hospitals, or other sources of assistance. Interviews patients newly admitted to a state hospital, advising them of social services available to patients and their families. Participates in staff meetings pertaining to diagnosis and treatment.

PROTECTIVE SERVICE WORKER

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.

Grievant contends her duties more closely match the Protective Service Worker classification than the Social Service Worker II classification. She argues the works under “limited” supervision, rather than the “general” supervision under which the Social Service Worker II performs. Additionally, she argues she performs four of the seven listed duties of a Protective Service Worker under the “Examples of Work” section of that classification.

Grievant relies heavily upon the definitions found in the Title XX Survey to support her claim of misclassification. The Survey has a category listed as “Protective Services for Adults.” See LIII G. Ex. 7. Grievant alleges that it is under this category that she spends 75% of her time. The purpose of this category is to “assist individuals or maintain or develop a level of competence and functioning that will enable them to manage their own affairs or, if required, to assist in developing the method of handling their affairs which is least restrictive to their rights and freedoms while at the same time

safeguarding the individual." Among the activities in this category, Grievant spends a great deal of time engaged in "guardianship services for those declared in need by judicial process" and in "health care surrogate services for those declared in need accordance with state law by an attending physician." Grievant also relies upon language found in the West Virginia Supreme Court of Appeals case, Hodge v. Ginsberg, 172 W. Va. 17, 303 S.E.2d 245 (1983). See LIII G. Ex. 2. This case defines "protective services" as "casework, treatment and crisis intervention services provided to adults in hazardous situations who, due to physical and/or mental incapacities, are no longer able to care for their basic needs and who have no one else willing to do so." The goal of adult protective services is to remedy neglect, abuse or exploitation for those individuals defined by the Court as "incapacitated adults." An "incapacitated adult" is defined by W. Va. Code § 9-6-1(4) as "any person who by reason of physical, mental or other infirmity is unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health." As Grievant provides services (i.e., treatment) to homeless individuals (i.e., incapacitated adults), then she avers that, according to the West Virginia Supreme Court, she is actually engaged in "protective services" and not just "social services."

There is no dispute that Grievant provides the services described above to homeless individuals, as well as those in need of a health care surrogate or guardian. However, Grievant errs in her contention that the descriptions provided by the West Virginia Supreme Court or the federal government in the Title XX Survey control her classification as an employee of the State of West Virginia. This determination lies solely within the authority conveyed to DOP.

The West Virginia State Personnel Board, a part of DOP, 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. W. Va. Code §29-6-9 (1989). Pursuant to W. Va. 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. W. Va. 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 Personnel Board 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. Moore v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-126 (Aug. 26, 1994). See, Callaghan v. W. Va. Civil Service Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

This standard of entitlement to substantial weight applies when a grievant attempts to review DOP's interpretation of its own regulations and classification specifications to determine if DOP's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-052 (July 10, 1995).

Further, a grievant may prevail by demonstrating his or her reclassification was made in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehabilitation, Docket No. VR-88-006 (Mar. 28, 1989). Generally, an action is consideredarbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE- 081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of DOP. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

DHHR and DOP contend, correctly, that Grievant has misinterpreted the purpose of the Title XX survey. The purpose of the survey is to estimate the amount of Title XX and other funds spent in delivering the services described in the Title XX Plan. The Title XX survey was not designed to override DOP's description of duties for class specifications and classification purposes. Grievant's reliance on Hodge v. Ginsberg, supra, is similarly misplaced. That case was not written to dispute definitions used in DOP classification specifications, but was written by a court who wanted to use

broad definitions to ensure that a wide group of West Virginia citizens would be protected by the scope of its decision requiring the West Virginia Department of Welfare to take care of these downtrodden individuals.

Finally, while some of Grievant's work in the Harmony House may necessarily overlap with some of the examples of work in the Protective Services Worker classification specification in the deliverance of her normal social service work duties, that alone does not render her misclassified. Grievant testified at level three that she does not performinvestigations into alleged adult abuse or neglect, which is the predominant duty and responsibility of the Protective Service Worker. Grievant delivers a wide spectrum of services to homeless adults, and other adults in need of surrogate or guardianship assistance. While these services certainly are designed to “protect” those individuals, in terms of their day to day ability to function in society, they are not the same types of services envisioned within the Protective Service Worker classification.

CONCLUSIONS OF LAW

1. 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 match another cited Personnel classification specification than that under which she is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989).

2. 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. Atchison v. W. Va. Dept. of Health, Docket No. 90- H-444 (Apr. 22, 1991); see generally, Dollison v. W. Va. Dept. of Empl. Security, Docket No. 89-ES-101 (Nov. 3, 1989).

3. The key to the analysis is to ascertain whether Grievants' current classification constitutes the “best fit” for their required duties. Simmons v. W. Va. Dept. of Health and Human Res., Docket No. 90-H-433 (Mar. 28, 1991). The predominant dutiesof 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).

4. Class specifications are descriptive only and are not meant to be restrictive. Mention of one

duty or requirement does not preclude others. W. Va. Div. of Personnel Admin. Rules, § 4.04(a); Coates v. W. Va. Dept. of Health and Human Res., Docket No. 94-HHR-041 (Aug. 29, 1994). Even though a job description does not include all the actual tasks performed by a grievant, that does not make the job classification invalid. W. Va. Div. of Personnel Admin. Rule, § 4.04(d). Finally, Personnel's interpretation and explanation of the classification specifications at issue, if said language is determined not to be ambiguous, should be given great weight unless clearly erroneous. See, W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

5. Grievant has failed to meet her burden of showing by a preponderance of the evidence that her duties more closely match those listed in the Protective Service Worker classification specification.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. 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 appealingparty must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 16, 2003

Footnote: 1

Grievant accepted another position with DHHR effective December 1, 2003, and the only remaining issue in this grievance is whether she is entitled to back pay for the period of the alleged misclassification.