CINDY CARTE, et al.,

Grievants,

v. Docket No. 04-HHR-260

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION

and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Cindy Carte, Elsie Whittington, Teresa Holden, and Robin Roberts ("Grievants") are employed by the Department of Health & Human Resources ("DHHR") as Office Assistants 3 (OA3) assigned to the Office of Health Facility Licensure and Certification. Grievants filed a level one grievance on April 30, 2004, in which they contested the determination by the Division of Personnel ("DOP") that they are properly classified. For relief, Grievants request classification as HHR Associates, with back pay from March 2004. The grievance was denied at all lower levels, and appeal was made to level four on July 2, 2004. Grievants, representing themselves, DHHR represented by Landon R. Brown, Senior Assistant Attorney General, and DOP, represented by Assistant Director Lowell D. Basford, agreed that a level four decision could be made based on review of the record developed at level three. The grievance became mature for decision on September 24, 2004, the due date for submission of proposed findings of fact and conclusions of law.

The following facts have been derived from a preponderance of the evidence.

Findings of Fact

1. Grievants are employed by DHHR, and are classified as OA3s, assigned to the Bureau of Public Health/Office of Health Facility Licensure and Certification (OHFLAC) in Charleston, West Virginia. 2. OHFLAC licenses and inspects more than 1200 health care facilities and agencies to ensure compliance with state and federal regulations. Grievants are assigned to different work units. Grievants Whittington and Carte are assigned to the Medicare Hospital

Program, with Ms. Whittington responsible for hospitals and rural health facilities (Medicare II), and Ms. Carte is responsible for ambulatory surgery centers, hospice, birthing centers and home health agencies (Medicare I). Grievants Holden and Roberts are jointly responsible for Residential Care, which includes assisted living residences, residential care communities and legally unlicensed homes.

3. Grievants' duties consist primarily of entering, monitoring and transmitting data regarding licensure, survey findings, complaints, and change of ownerships relating to health care facilities, using a number of software applications. More specifically their duties include, but are not limited to:

-mailing survey findings to the facilities with a statement of deficiencies and a request for a plan of correction, as required;

-typing complaint intakes, creating folder, tracking the investigation and uploading all information to the appropriate federal office;

-tracking and reviewing all licensure applications, checking for completeness, attachments, and changes in administration, address, etc.;

-ensuring proper fees are received and forwarded to the fiscal office;

-preparing licenses for supervisory approval and signatures-mails to provider;

-answering telephone inquires from potential providers regarding state and federal regulations and requirements.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances 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. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va.Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievants argue that their duties have expanded over the years to include use of several software programs adopted by state and federal agencies to receive and transmit information. Grievants also assert that their duties are substantially similar to that of an OHFLAC employee assigned to the Office of Laboratory Services, who is classified as a Health & Human Resources Associate. DHHR and DOP deny that Grievants are misclassified.

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 match another cited DOP classification specification than that under which they are currently assigned. See generally, Hayes v. W. Va. Dep't 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/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. Dep't of Health, Docket No. 90-H-444 (Apr. 22, 1991); See generally, Dollison v. W. Va. Dep't 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. Dep't 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. Dep't 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. DOP Admin. Rule, § 4.04(d). Finally, DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

Under the foregoing legal analysis, the West Virginia Supreme Court of Appeals' holding in Blankenship presents employees contesting their current classification with a substantial obstacle to overcome in attempting to establish that they are currently misclassified. Further

DOP Rule 4.4 states:

The Director shall consider the class specification in allocating positions and shall interpret it as follows:

(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. The Director shall give consideration to the generalduties, 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 is 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 authority of the appointing authority 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.

In a case such as this, it is necessary to compare the relevant classification specifications, which are restated below:

OFFICE ASSISTANT 3

Nature of Work Under general supervision, performs advanced level, responsible and complex clerical tasks of a complicated nature involving interpretation and application of policies and practices. Interprets office procedures, rules and regulations. May function as a lead worker for clerical positions. Performs related work as required.

Distinguishing Characteristics Performs tasks requiring interpretation and adaptation of office procedures, policies, and practices. A significant characteristic of this level is a job inherent latitude of action to communicate agency policy to a wide variety of people, ranging from board members, federal auditors, officials, to the general public.

Examples of Work

Analyzes and audits invoices, bills, orders, forms, reports and documents for accuracy and initiates correction of errors. Maintains, processes, sorts and files documents numerically,alphabetically, or according to other predetermined classification criteria; researches files for data and gathers information or statistics such as materials used or payroll information. Types a variety of documents from verbal instruction, written or voice recorded dictation. Prepares and processes a variety of personnel information and payroll documentation. Plans, organizes, assigns and checks work of lower level clerical employees. Trains new employees in proper work methods and procedures. Answers telephone, screens calls, takes messages and complaints and gives information to the caller regarding the services and procedures of the organizational unit. Receives, sorts and distributes incoming and outgoing mail. Operates office equipment such as electrical calculator, copying machine or other machines. Posts records of transactions, attendance, etc., and writes reports. Files records and reports. May operate a VDT using a set of standard commands, screens, menus and help instructions to enter, access and update or manipulate data in the performance of a variety of clerical duties; may run reports from the database and analyze data for management.

HEALTH AND HUMAN RESOURCES ASSOCIATE

Nature of Work Under general supervision, performs work at the full- performance level by maintaining responsibility for carrying out complex technical functions necessary for the operation of a statewide Health or Human Resource program, providing technical and/or programmatic assistance to staff, participants, and other user entities of a component of a statewide program or major technical area specific to or characteristic of the Department of Health and Human Resources. Helps assure compliance with laws and regulations governing the program or technical area. Maintains responsibility of operational procedures and policies

related to their technical function. Uses independent judgement to determine approaches to technical or operational problems. Consultation on individual situations related to assigned technical function. Exercises latitude in varying methods and procedures within the parameters of program or technical area guidelines. May assign and review the work of clerical staff. Maintainsresponsibility for application of standards to individual situations as well as the monitoring and evaluation of individual situations. Has responsibility for formulation of training of other staff as related to his/her function. This class may also be used as the entry or beginning level of the professional Health and Human Resources Specialist series. Performs related work as required.

Distinguishing Characteristics The Health and Human Resources Associate is distinguished from the Health and Human Resources Specialist by the assignment to limited technical or operational areas rather than program or broad operational development or consultation. Problems are typically procedural or standard precedents. If used as an entry or beginning level class, work is characterized by more direct supervision and a training and developmental nature. NOTE: Promotion from the class may occur only if and when the job duties and responsibilities change significantly enough to make a higher level classification more appropriate.

Examples of Work Develops new or updates existing forms, paper and/or electronic, to facilitate operations. Sets up and maintains paper and electronic files. Reviews forms for completeness and compliance. Talks with state, federal, and local program participants, or technical area personnel to explain procedural changes, clarify guidelines, and answer general questions. Monitors procedures for effectiveness and efficiency. Advises program participants and/or other staff on changes in operational and procedural policies, regulations, and guidelines, and answers questions regarding those changes. Determines compliance with regulations and or acceptability of a program within context of applicable standards. Assists in development of regulations, standards and procedures as appropriate to the area of technical functioning.

Grievants base their request for a higher classification on the fact that they use more complex software to complete their duties. Lowell D. Basford, Assistant Director of the

Division of Personnel in charge of Classification and Compensation, testified at level two, it was the use of this software that constituted the advanced level of complex clericalsupport work contemplated by the OA3 classification. He further noted that the work of the OA3 is typically complicated and involved, requiring application of state and federal regulations. Mr. Basford concluded that the general function of an OA3 is to provide clerical support for Program Managers, including typing, maintaining files, answering the phone, handling leave, and because Grievants perform these duties, they are correctly classified. By comparison, Mr. Basford noted that HHR Associate is not the proper classification for Grievants as it is the entry level of a class series, progressing to HHR Specialists and HHR Specialist Senior, in which employees are in charge of programs.

Grievants' comparison to Jerry Gross, an HHR Associate in the Office of Laboratory Services, is not useful here for two reasons. First, Mr. Gross is in a different unit of the Bureau of Public Health, therefore he is not similarly situated to Grievants. Second, classification issues require a comparison of the employees' duties to the classification specifications because it would be improper to reclassify Grievants on the basis of the classification of another employee who may himself be misclassified. See Lohr v. Dep't of Health & Human Res./Sharpe Hosp. and Div. of Personnel; Docket No. 03-HHR-408 (May 12, 2004); Akers v. W. Va. Dep't of Tax and Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995).

Because Grievants' are not in charge of a program they do not meet the requirement for HHR Associate. Their duties are complex, and they work independently, functioning at the highest level of the OA series. While Grievants are interested in advancement, there is no higher classification in this series. Their current job function falls squarely within the OA3 class specification, and Grievants are properly classified. In addition to the foregoing, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances 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. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. 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 match another cited DOP classification specification than that under which they are currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Res., Docket No. NR- 88-038 (Mar. 28, 1989).

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

4. Grievants have failed to prove that their position duties more closely fit the classification of HHR Associate than that of their present OA3 classification.

Accordingly, the 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 thegrievance 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 appealing party 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.

DATE: SEPTEMBER 29, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE