YVETTE BARRETT, *et al.*,

Grievants,

v. **Docket No. 04-HHR-306D**

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

Respondents.

DECISION

This grievance was filed on January 14, 2004, by Yvette Barrett, Margaret Vandall, Leona Huffman, Cathleen Wells, and Lois J. Plumley (collectively "Grievants"). Grievants are employed by respondent Department of Health and Human Resources ("DHHR") in the Office Assistant II classification and assigned to the Bureau for Children and Families. An "Order Granting Default" was entered on March 31, 2005, after the grievance evaluator failed to issue the Level III decision in a timely manner. The default gave rise to a statutory presumption that Grievants prevailed on the merits of their grievance.

After the default was entered, DHHR made a timely request to the West Virginia Education and State Employees Grievance Board ("Grievance Board") for a Level IV hearing to ascertain whether the relief requested by Grievants is contrary to law or clearly wrong. The hearing on this remedy phase of the grievance was held on June 29, 2005, in the Grievance Board's hearing room in Beckley.

Grievants, who were present in person at the hearing, were represented by Grievant Vandall. Respondent DHHR was represented by Senior Assistant Attorney General Landon R. Brown. Respondent West Virginia Division of Personnel ("DOP") wasrepresented by Assistant Attorney General Karen O. Thornton. (See footnote 1) This matter matured for decision on August 1, 2005,

upon final receipt of post-hearing submissions on behalf of the various parties.

After careful review of the entire record, including, without limitation, the transcript of the Level III hearing, (See footnote 2) the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievants are all employees of the Department of Health and Human Resources ("DHHR") who are assigned to the Bureau.

2 2. Grievants are all currently within the Office Assistant 2 classification but seek reallocation. Originally, Grievants sought reallocation to the Customer Service Assistant classification but at Level III amended their request for relief to ask, in the alternative, for reallocation to the Office Assistant 3 classification. (See footnote 3) Tr.2.

3 3. Grievants also seek back pay to April 2002. Tr.2.

4 4. Grievant Vandall is the switchboard (also referred to as "console") operator for the Raleigh District office. Tr.17. Grievants Barrett and Huffman are receptionists in the Raleigh County office. Tr.17.

5 5. Grievant Plumley is the receptionist in the Logan District. Grievant Wells is the switchboard operator in the Logan District. Tr.29.

6 6. Historically, the dual responsibilities of a switchboard operator and receptionist have been vested in one position.

7 7. Although Grievants, such as Wells and Plumley, may be cross-trained for each other's positions, the duties are no longer combined. Because those combined duties have been separated, DOP perceives that there has been a dilution of the responsibility attributable to the separate positions of the switchboard operator and the receptionist.

8 8. Reallocation means "reassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.78.

9 9. In April 2003, DOP reviewed Position Description Forms submitted by Grievants and determined that their respective positions were properly allocated within the Office Assistant 2 classification.

10 10. Either on the telephone or at the reception desk, Grievants are the first point of contact for many of DHHR's clients or potential clients. Grievants perform a screening function to assess the client's needs. Grievants may then answer certain questions themselves, provide the client with the appropriate forms or other paperwork, make areferral to another agency for items such as clothing, or refer the client to the appropriate type of employee within DHHR.

11 11. In addition, Grievants function on the front line in terms of office security. They are called upon to assess whether a client or potential client poses a security threat. They are also responsible for notifying the other employees in the office if there are security concerns, such as a telephoned bomb threat.

12 12. Grievants frequently deal with stressful emergency situations.

13 13. Grievants must deal well with the public, demonstrate good judgment, and have a general working knowledge of DHHR, its programs and services.

14 14. Grievants do not make determinations as to whether an applicant is eligible for the various programs or services offered through DHHR.

15 15. Although Grievants may respond to certain types of questions or provide certain types of materials directly to an applicant or client, Grievants' primary function is to redirect applicants or clients to the proper DHHR employee to fully meet their needs. This has been described as a “pass through” function.

16 16. There is no dispute that Grievants' contributions to the operation of their respective offices are recognized and appreciated by their employer.

Discussion

Pursuant to the provisions of West Virginia Code section 29-6A-3(a)(2), where a default has occurred there is a presumption that “the employee prevailed on the merits of the grievance[.]” Grievants are entitled to the benefit of such presumption in this grievance. However, the presumption is not necessarily dispositive of the grievance. As here, a respondent may request a hearing and attempt to prove, by clear and convincing evidence,that granting the requested remedy would be would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2). The clear and convincing evidence standard requires “substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt.” *Lohr v. Div. of Corr*., Docket No. 99-CORR- 157D (Nov. 15, 1999).

A grievant who makes a claim of misclassification bears the burden of proving, by a preponderance of the evidence, the there is a different classification that constitutes a better fit for such employee's position. *Lemley v. Dep't of Health & Human Res*., Docket No. 04-HHR-159 (Aug. 27, 2004). “The key to the analysis is to ascertain whether a grievant's current classification constitutes the 'best fit'” for his duties. *Carroll v. Dep't of Health & Human Res*., Docket No. 04-HHR-245 (Nov. 24, 2004)(quoting *Lemley*, *supra*). In ascertaining which classification constitutes the best fit, DOP looks at the predominant duties of the position in question. These predominant duties are deemed to be “class- controlling.” *Carroll*, *supra* (citing *Broaddus v. W. Va. Div. of Human Serv*., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990)).

Because of the default by DHHR, it is now presumed that Grievants have met this burden and prevailed on their claim that the Customer Service Assistant classification would be a better fit for their positions as receptionists and switchboard operators. Lowell Basford (“Basford”), Assistant Director of DOP and head of its Classification and Compensation Section, provided detailed testimony as to why it would violate the governing principles of the classification system to reallocate Grievants' positions to the Customer Service Assistant classification or the Office Assistant 3 classification, neither of which constitutes the best fit for Grievants' predominant duties. Basford also provideddetailed testimony as to why Office Assistant 2 remains the best fit, and thus the appropriate classification, based upon the predominant duties assigned to Grievants' positions.

In assessing the weight to be given Basford's testimony on these points, it is important to remember that DOP is, by statute, vested with responsibility for establishing a classification scheme for positions in the classified service. W. Va. Code § 29-6-10. As part of this responsibility, DOP maintains specifications for each of the job titles available under the classified system. Therefore, DOP's interpretation and explanation of the classification scheme and the various job specifications are entitled to great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 398, 431 S.E.2d 681, 687 (1993).

DOP is required to review and rely upon Position Description Forms as the official documents for allocating positions within the classification system. 143 C.S.R. 1 § 4.5. The duties described therein are then compared to the classification specifications developed by DOP for each job title. Those specifications generally contain a variety of sections such as “Nature of Work,” “Examples of Work,” and “Knowledge, Skills and Abilities,” among others. For purposes of comparing classification

specifications, the “Nature of Work” section is the most critical. *Atchison v. W. Va. Div. of Health*, Docket No. 90-H-444 (Apr. 22, 1991).

Customer Service Assistant

The Nature of Work section for the Customer Service Assistant classification provides as follows:

> Under general supervision, performs difficult and responsible direct public contact work as the initial point of contact with customers seeking services and assistance related to agency programs. Greets customers in person or by phone, assesses the inquiry using knowledge of agency programs, regulations, policies and forms, provides the requested assistance or directs the customer to the appropriate staff or unit. Operates a variety of office equipment including telephone or switchboard console, telefax machine, computer console, copier and calculator. Issues a variety of public documents such as birth/death certificates, certificates of coverage, applications for licenses or benefits, claims forms, and quarterly reports. Uses a computer console to access database to verify claim/account information. May receive payment for copies of documents; receipts monies and deposits per established procedures. Opens, sorts and routes incoming mail; certifies and processes outgoing mail according to agency and US Postal Service regulations. Maintains logs or records of customers served. Performs related clerical work. Performs related work as required.

A cold reading of the foregoing section would easily give the impression that Grievants' positions could fall within its ambit. However, upon critical examination, this impression must give way.

It is true that Grievants are responsible for “direct public contact” and are frequently “the initial point of contact with customers seeking services and assistance related to agency programs.” However, there appears to be a difference in the depth or complexity of the tasks a Customer Service Assistant is expected to undertake. For example, as described in the Nature of Work section, a Customer Service Assistant “performs **difficult and responsible** direct public contact work[.]” (Emphasis added.)

Of course, as DHHR and DOP readily acknowledged, any employee who has to deal with the public intensively on a daily basis has a difficult job. This is not, however, the point of the above-quoted description. Rather, it is the work that is being described as difficult and responsible, not the public contact. This is consistent with Basford's testimony that DOP perceives the Customer Service Assistant classification as being applicable toemployees who actually undertake to do the more complex business of the agency. He explained that the Customer Service Assistant would be expected to meet all of the inquiring individual's needs or to refer the individual to the Customer Service Assistant's own supervisor. Although Grievants are able to weed out some basic requests for information and forms, they must direct the agency's clients to “another line of workers, [such as] Protective Service Workers, Economic Service Workers who actually perform the service.” Tr.40.

Grievants ascertain the nature of an individual's problem for purposes of putting that individual in contact with the employee within the agency vested with the appropriate expertise to provide assistance. They do not, however, assess the legitimacy of the information being provided or analyze the matter to determine eligibility for services.

By contrast, the Nature of Work section tells us that a Customer Service Assistant “assesses the inquiry using knowledge of agency programs, regulations, policies and forms[.]” To assess something is to determine its value or, in this case, merit. As noted, this exceeds the scope of Grievants' duties. This is, again, consistent with distinctions drawn by Basford in explaining why DOP does not consider the Customer Service Assistant classification a good fit for Grievants' positions. (See footnote 4)

Basford also emphasized the point that, unlike the Office Assistant class series, the Customer Service Assistant classification was never intended to encompass positions that are inherently or predominantly clerical in nature. This point is well-taken in light of the factthat the Nature of Work section for the Customer Service Assistant classification states “Performs related clerical work.” If the classification were grounded in clerical duties, such statement would be superfluous as there would be no “related clerical work.” The implication is that the general nature of the work done by a Customer Service Assistant spawns some clerical tasks but that they are incidental to the primary duties of the Customer Service Assistant.

As noted, Grievants, in essence, route the daily traffic entering DHHR to the appropriate location. DOP describes this as a “pass through” function. Grievants may provide adequate answers or appropriate forms as a first response and, in so doing, spare other types of DHHR employees from having to attend to those issues. Grievants are even able to make referrals to other agencies for specific types of assistance. However, these are fairly routine matters.

Individuals who require a more complex, substantive, or sophisticated level of assistance need to be passed through by Grievants to the appropriate DHHR personnel. Basford describes this pass through function as a key distinction between Grievants' duties and those of a Customer Service Assistant. The other critical distinction is in the ability of the Customer Service Assistant to fully meet and satisfy the client's needs. This is not a level of service that can be provided by Grievants.

In light of DOP's explanation of the specifications and the weight to be accorded DOP's interpretations thereof, it cannot be said that DOP's determination that the Customer Service Assistant classification would not be the best fit for Grievants' positions is erroneous. DOP and DHHR

have met the burden of proving by clear and convincing evidence that reallocation of Grievants' positions to the Customer Service Assistantclassification would be clearly wrong. It would also be contrary to law in that a position is to be classified based on the predominant duties of the position. *Broaddus v. W. Va. Div. of Human Serv*., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). As between the Customer Service Assistant classification and the Office Assistant 2 classification, it is clear that the predominant duties performed by Grievants fit best into the Office Assistant 2 classification.

Office Assistant 3

Grievants seek, in the alternative, to have their positions reallocated to the Office Assistant 3 classification. Basford testified that the Office Assistant class series is clerical in nature, as are the duties of Grievants in answering the telephones and staffing the reception desk. This is reflected in the Nature of Work description for all three of the positions in the class series. The Nature of Work section for the Office Assistant 1 classification provides, in relevant part, “performs entry level work in a variety of **routine clerical tasks** within prescribed procedures and guidelines.” (Emphasis added.)

In Grievants' current classification of Office Assistant 2, the Nature of Work is, in relevant part, “[u]nder general supervision, performs full performance level work in **multiple-step clerical tasks** calling for interpretation and application of office procedures, rules and regulations.” (Emphasis added.) According to DOP's Glossary, which can be found on DOP's web page, full performance level “ can be characterized by the performance of a full range of duties **relative to the work in the class series**. Incumbent has some latitude for independent judgment and may vary work methods and procedures,but usually within prescribed parameters. Work is usually performed under general supervision. Work is frequently of some variety and incumbent may set priorities.” (See footnote 5)

The specifications for the Office Assistant 2 classification identify its distinguishing characteristics as follows:

> Performs tasks requiring interpretation and adaptation of office procedures as the predominant portion of the job. Tasks may include posting information to logs or ledgers, and checking for completeness, typing a variety of documents, and calculating benefits. May use a standard set of commands, screens, or menus to enter, access and update or manipulate data.

> At this level, the predominant tasks require the under standing [sic] of the broader scope of the work function, and requires an ability to apply job knowledge or a specific skill to a variety of related tasks requiring multiple steps or decisions. Day-to-day

> tasks are routine, but initiative and established procedures are used to solve unusual problems. The steps of each task allow the employee to operate with a latitude of independence. Work is reviewed by the supervisor in process, randomly or upon completion. Contacts are usually informational and intergovernmental.

In the main, Grievants' duties conform to the foregoing characteristics and to the nature of the work performed by an Office Assistant 2.

The third, and final, classification in this series is Office Assistant 3, who "[u]nder 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." (Emphasis added.) According to DOP's Glossary, the "advanced level" expected of an Office Assistant 3 relates to "to duties and responsibilities which arecomplex, difficult and varied, **relative to the work in the class series**. Work requires the development and adoption of non-standard procedures and has more impact and consequence of error than the full-performance level. Work may be performed under limited supervision or under limited direction. Incumbent possesses considerable latitude to accomplish tasks; may include lead worker duties."

Basford explained that the two hallmarks that distinguish an Office Assistant 3 are lead worker responsibilities and the complexity of the work performed. Tr.41. A lead worker plans, assigns and reviews work. Tr.41. Basford described the lead worker as a quasi-supervisor. Tr.41. Grievants do not function as lead workers despite the fact that Grievants may, on occasion, train other employees to perform their duties.

In terms of the complexity of the work expected of an Office Assistant 3, Basford explained that "the work is typically such that there are not procedures, rules and regulations that you follow day to day." Tr.41. Grievants duties are not really complex or varied. While it may require patience and good judgment, there is nothing inherently complex about screening callers and visitors to determine who within the agency can best meet their needs. This is the controlling principle of Grievants' work.

With respect to their security functions, Grievants play a role that is dictated by the security policy. Again, it may require good judgment, but Grievants' actions are subject to controlling policy.

All of the foregoing speaks to the fact that, when tested against the specifications for Office Assistant 2 and Office Assistant 3, Grievants' predominant duties most closely align with the work expected of an Office Assistant 2. Therefore, DOP's conclusion that Office Assistant 2 constitutes the

"best fit" for Grievants' duties is well-founded and couldnot be considered erroneous. DOP and DHHR have proven, by clear and convincing evidence, that reallocation of Grievants' positions to this classification would be both clearly wrong and contrary to law. Therefore, such relief will be denied.

Reallocation

In light of the disposition of this grievance, DOP's argument that Grievants' positions have not undergone the type of dramatic changes that give rise to reallocation, will not be addressed further.

Based upon the foregoing facts and upon review of the pertinent law, as well as consideration of the arguments of the parties, the undersigned concludes as follows:

Conclusions of Law

1 1. Once a default has been entered, 'the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption." W. Va. Code § 29-6A-3(a)(2). Grievants are entitled to such presumption.

2 2. DHHR bears the burden of proving, by clear and convincing evidence, that the remedy sought by Grievants would be clearly wrong or contrary to law. *Lohr v. Div. of Corr*., Docket No. 99-CORR-157D (Nov. 15, 1999).

3 3. DOP is, by statute, vested with responsibility for establishing a classification scheme for positions in the classified service. W. Va. Code § 29-6-10. As part of thisresponsibility, DOP maintains specifications for each of the job titles available under the classified system.

4 4. DOP's interpretation and explanation of the classification scheme and the various job specifications are entitled to great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 398, 431 S.E.2d 681, 687 (1993).

5 5. 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).

6 6. DOP's determinations that the Customer Service Assistant classification and the Office Assistant 3 classification do not constitute the best fit for the predominant duties of Grievants' positions are not clearly erroneous.

7 7. DOP's determination that Grievants' positions are properly allocated to the Office

Assistant 2 classification is well-founded and cannot be deemed clearly erroneous.

8 8. DHHR and DOP have established by clear and convincing evidence that it would be both clearly wrong and contrary to law to reallocate Grievants' positions to either the Customer Service Assistant classification or the Office Assistant 3 classification.

Disposition

Accordingly, DHHR and DOP are entitled to prevail on the remedy phase of this default proceeding. The relief requested by Grievants is **DENIED** and an outstanding motion by DOP to dismiss Grievant Yvette Barrett from this grievance is **DENIED** as moot. 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 grievanceoccurred. 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 West Virginia Code section 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: December 30, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Because it deals with classification issues, DOP was made a party to this grievance at Level III at the latest.

Footnote: 2

References to pages in the transcript of the Level III hearing, which was held on July 23, 2004, shall appear herein as "Tr.__."

Footnote: 3

This varies from the normal requirement that an employee in a misclassification grievance must specify the one particular classification the employee is claiming constitutes the best fit for the position in question. Grievants were allowed to proceed on their alternative request for relief solely because, at Level III, DOP expressly stated that there was

no objection to Grievants amending their request for relief to seek, as a fallback position, reallocation to the Office Assistant 3 classification. Tr.2. The normal requirement for specifying a classification remains intact for all other grievances.

Footnote: 4

More illustrations of similar import could be drawn from a close examination of the Nature of Work language, but these few should adequately convey the point that there is a large divergence between the Customer Service Assistant classification and the duties performed by Grievants.

Footnote: 5

DOP's Glossary explains that under general supervision "general guidelines/instructions are provided but employee exercises some discretion in selecting method of work and sources of information; only unusual or unfamiliar situations are referred to supervisor; review typically occurs at the conclusion of assignments."