ROBERT ESTEPP,

Grievant,

v.

Docket No. 05-DJS-272

DIVISION OF JUVENILE SERVICES/

GENE SPADARO JUVENILE CENTER

and DIVISION OF PERSONNEL,

Respondents.

DECISION

The grievant, Robert Estepp ("Estepp"), was initially employed by respondent Division of Juvenile Services ("DJS") as a Recreation Assistant assigned to the Gene Spadaro Juvenile Center. Shortly before this grievance was filed, respondent West Virginia Division of Personnel ("DOP") reallocated Estepp's position to the Correctional Counselor 1 classification. Nonetheless, Estepp remains dissatisfied with his classification. In this grievance he seeks reallocation to the Correctional Counselor 2 classification, as well as back pay to his hire date of October 15, 2004.

Statement of Grievance and Request for Relief

Estepp's statement of grievance reads as follows:

> I have received a ruling from the W.V. Division of Personnel, following a job performance audit and numerous attempts to obtain reclassification, that I would be reclassified as a Correctional Counselor I. I am more eligible for a reclassification as a Correctional Counselor II and submitted the proper paperwork and documentation along with my supervisors' recommendations to support my claim.

> Since my employment began with DJS, I have performed additional duties and been responsible for tasks that were clearly out of my job description. I have performed security and safety functions for residents, which include: transports, room inspections, body searches, intake of new residents, operation of control room, and other security related tasks too numerous tomention. In addition to security tasks, I have also spent an enormous amount of my time performing correctional counselor duties as well. I have conducted individual and group counseling sessions, assisted in new resident orientation, directed therapeutic groups with residents, conducted visitor screening during visitation, conducted phone calls and provided information to parents about our facility and its functions, and completed TAG [database] entries and numerous counseling documents related to resident behavior, education, and necessary treatment. I have been asked to perform these additional duties by my direct supervisors and been bombarded with even more tasks due to staffing problems.

He requests the following relief:

> I would like to receive back pay from my initial date of hire (10-15-2004) due to the performance of additional duties. I would also like to receive reclassification to a Correctional Counselor II position because I have been primarily performing Correctional Counselor II duties and received no additional pay for them. I have performed these duties and other security related functions being classified as a Recreation Assistant. I would like immediate monetary relief due to the extreme financial difficulties I have encountered in being denied the proper reclassification once again. This matter has caused extreme emotional distress and financial hardship in my life. I have been seriously mistreated and deserve a proper adjustment and restitution for the amount of hardships that I have been forced to endure. (See footnote 1)

Procedural Background

Estepp filed this grievance on June 25, 2005. The grievance evaluators at Levels I and II lacked the authority to grant the relief requested. Therefore, the matter was brought to Level III, where an evidentiary hearing was held on July 27, 2005. (See footnote 2) At the Level III hearing, the right of DOP to participate as a party was noted. Tr.10. Nonetheless, DOP was not included as a party in the style of the Level III decision. The Level III decision denying Estepp's grievance was issued on July 29, 2005. On or about August 8, 2005, the West Virginia Education and State Employee Grievance Board (“the Grievance Board”) received documents deemed to be an appeal to Level IV of the grievance process. The Level IV evidentiary hearing was held on September 30, 2005, in the Grievance Board's hearing room in Beckley.

At Level IV, Estepp represented himself. DOP was represented by Assistant Director Lowell Basford , while DJS was represented by attorney Steven R. Compton. This grievance matured for decision at the conclusion of the Level IV hearing when the parties declined the opportunity to submit

proposed findings of fact and conclusions of law.

Factual Background

It would be helpful to view this grievance against the backdrop of Estepp's reallocation to Correctional Counselor 1. As soon as Estepp completed his six-month probationary period as a Recreation Assistant at Spadaro, he prepared and submitted a Position Description Form to DOP in which he reported the official title of his position as Correctional Counselor 2, with a working title of Recreation Assistant. DJS Exhibit 3 at III.

The Position Description Form is “an official record of the duties and responsibilities assigned to a position and shall be used by the Division of Personnel to allocate the position to its proper class.” DOP Rule 4.5(b). Estepp's was received by DOP's Classification and Compensation Section on April 26, 2005.

In a memorandum, dated May 5, 2005, DOP's Assistant Director Lowell Basford (“Basford”) reported to DJS that Recreation Assistant remained the appropriate classification for the position because, although other duties were performed, “thepredominant amount of time is spent in recreation.” Memorandum, dated May 5, 2005, included as part of DJS Exhibit 3 at III.

DJS asked DOP to supplement the review of Estepp's Position Description Form with an on-site job audit. As a result of the audit, which took place on June 2, 2005, DOP determined that Estepp expends approximately 60% of his time on counseling and security, with approximately 40% of his time being devoted to recreation. (See footnote 3) DOP did not distinguish what percentage of time Estepp spends on security duties as opposed to counseling duties. Rather, both were combined in the 60% figure that was compared to the 40% of his time that Estepp expends on recreation-related responsibilities.

Based upon the additional information acquired during the on-site job audit, DOP reallocated Estepp's position to the Correctional Counselor 1 classification, which is a pay grade 10. Memorandum, dated June 6, 2005, included as part of DJS Exhibit 3 at III. According to Basford, DOP was required to “stretch” the interpretation of the Correctional Counselor 1 specification to achieve this result. Tr.11.

As explained by Basford, the “Duty Statements” portion of Estepp's Position Description Form only contains one activity that really falls within the specifications for a Correctional Counselor 1, which is “[p]roviding individual and group counseling services (therapuetic [sic] activities, (See footnote

4) phone calls, treatment evaluation/assessments, TAG).” Tr.11. The instructions on the Position Description Form direct that the duties are to be listed inthe order of their importance. In addition to indicating that it only consumed 35% of his time, Estepp listed the counseling component of his duties in third place behind two recreation-related components of his job.

Therefore, it appears that Estepp was given undue credit for counseling activities when they were “really less than predominate [sic] in the position.” Tr.11. This explains Basford's assertion that DOP stretched its interpretation of the specification “to allow his position to be reallocated to a correctional counselor I in the first place.” Tr.11.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. In 1999, Estepp received a Bachelor of Science degree from Marshall University in Parks and Conservation.

2 2. On October 15, 2004, Estepp was employed by DJS as a Recreational Assistant. Throughout his tenure with DJS, Estepp has been assigned to the Gene Spadaro Juvenile Center (“Spadaro”).

3 3. At the time Estepp was hired, Spadaro, which is a staff-secure (See footnote 5) treatment facility, was new. Its first resident did not arrive until December 13, 2004.

4 4. Although he was hired as a Recreation Assistant, Estepp participated in the same program of training as the employees who were hired as Correctional Counselors 1 and Correctional Counselors 2.

5 5. Prior to his employment at Spadaro, Estepp's experience in “counseling” (See footnote 6) was as a church youth leader. Tr.6. Estepp did not provide any time frame, examples, or explanations to support his statement that he has “done counseling groups with kids” and “conducted therapeutic group with kids.” Tr.6.

6 6. DOP considers “the critical distinguishing characteristic” between a Correctional Counselor 2 position and a Correctional Counselor 1 position to be “the greater degree of skill in counseling and diagnostic evaluation” that is expected of a Correctional Counselor 2. Tr.12.

7 7. The reallocation to Correctional Counselor 1 moved Estepp's position from a pay grade 7

to a pay grade 10. The resulting change in Estepp's salary was made retroactive to the completion of the job audit, which was an unspecified date in June 2005. He still seeks further back pay to the date of his hire, which was October 15, 2004.

8 8. The salary range at pay grade 10 is $19,392 to $35,892.

9 9. Estepp's salary as a Correctional Counselor 1 is approximately $21,700.

10 10. The Correctional Counselor 2 classification is at pay grade 11. The salary range at this pay grade is $20,760 to $38,400.

11 11. Under DOP's classification system, the nature of the work performed by a Correctional Counselor 2 is as follows:

> Under general supervision, performs full performance level work by providing a variety of counseling and psychological services for the inmate population of a correctional facility. Areas of specialization at assigned facility may include vocational counseling, diagnostic testing and evaluation, substanceabuse counseling, and/or guidance for inmates on work release. Performs related work as required.

12 12. Under DOP's classification system, the distinguishing characteristics of the Correctional Counselor 2 classification are as follows:

> This is full-performance level Correctional Counselor work. The employee works independently in conducting clinical interviews, administering and scoring psychological tests and preparing psychological evaluations. The employee may supervise beginning level counselors and office support staff. The classification determinant at this level is the greater degree of skill in counseling and diagnostic evaluation.

13 13. DOP's glossary of classification terms defines a class series as “a grouping of two or more classes having the same kind of work but with ascending levels of difficulty and complexity.”

Discussion

DOP is, by statute, vested with responsibility for establishing a classification scheme for positions in the classified service. W. Va. Code § 29-6-10. A grievant, such as Estepp, who claims that his position is misclassified must prove by a preponderance of the evidence that his duties are a better match for a classification that is different from his current one. *Lemley v. Dep't of Health & Human Res*., Docket No. 04-HHR-159 (Aug. 27, 2004). In this case Estepp is seeking reallocation of his position into the Correctional Counselor 2. The question is whether the evidence adduced by Estepp supports such reallocation.

As succinctly discussed in *Lemley*,

> [t]he key to the analysis is to ascertain whether a grievant's current classification

> constitutes the "best fit" for her required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question areclass-controlling. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89- DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship* , 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

DOP has determined that the Correctional Counselor 1 classification constitutes the best fit for Estepp's position. As reflected above, this determination is entitled to great weight unless it can be considered "clearly erroneous."

The Correctional Counselor 1 and Correctional Counselor 2 classifications are part of a class series. This is defined as "a grouping of two or more classes having the same kind of work but with ascending levels of difficulty and complexity." Thus, the work of a Correctional Counselor 2 is more difficult and more complex than that of a Correctional Counselor 1. DOP considers "the critical distinguishing characteristic" between a Correctional Counselor 2 position and a Correctional Counselor 1 position to be "the greater degree of skill in counseling and diagnostic evaluation" that is expected of a Correctional Counselor 2. Tr.12.

Estepp has not even had time to develop such "greater skill." He has only been with DJS since October 2004. His degree is not in recreation or counseling, but is in Parks and Conservation. He has only been a Correctional Counselor 1 since June 2005, which is a mere six months at the entry level for this class series. Furthermore, his position barely squeaked into that entry-level classification. It is inconceivable that Estepp, since his reallocation in June 2005, could be performing at the "full-performance level" that is required to move into the Correctional Counselor 2 classification, and the evidence does not suggest otherwise. "The key in seeking reallocation is to demonstrate 'a significant change in the kind or level of duties and responsibilities.'" *Ramsell v. Dep't of Health & Human Res*., Docket No. 04-HHR-262 (Sept. 29, 2004). No such change has been shown by Estepp.

As previously noted, DOP's determination that the Correctional Counselor 2 classification is not appropriate for Estepp's position is entitled to deference unless clearly erroneous. Syl. pt. 2, *W. Va. Dep't of Health & Human Res. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993)("Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous."). (See footnote 7) Based upon the foregoing, it is clear that DOP's decision on this point is correct. Estepp has failed to carry his burden to prove by a preponderance of the

evidence that the Correctional Counselor 2 classification constitutes a better fit for his duties than his current classification as a Correctional Counselor 1.

Estepp has failed to offer any legal basis or support for his claim of entitlement to back pay. Accordingly, his request for back pay to his date of hire will be denied.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. To prevail upon a claim of misclassification, a grievant must prove, by a preponderance of the evidence, that a cited classification specification matches the grievant's duties more closely than the current classification for the grievant's position. *Lemley v. Dep't of Health & Human Res*., Docket No. 04-HHR-159 (Aug. 27, 2004) (citing *Hayes v. Dep't of Natural Res*., Docket No. NR-88-038 (Mar. 28, 1989)).

2 2. “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. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3 3. Estepp has failed to demonstrate by a preponderance of the evidence that the Correctional Counselor 2 classification is the "best fit" for his position.

4 4. Estepp has failed to raise any violation of any law, rule, regulation, or policy upon which to challenge DOP's decision that his position may properly be classified as a Correctional Counselor 1. Therefore, it is accepted as correct.

5 5. Estepp has failed to cite or prove any legal basis for his claim of entitlement to back pay.

Accordingly, this grievance is **DENIED**.

Any party 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 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

Estepp's assertions of serious mistreatment are puzzling in that DJS has been extremely supportive and helpful to Estepp in his efforts to move his position into a higher, better-paying classification. In addition, his supervisors testified in a very positive manner about Estepp and his contribution as an employee at Spadaro.

Footnote: 2

References to pages in the Level III transcript shall appear herein as "Tr.__".

Footnote: 3

Memorandum, dated June 6, 2005, included as part of DJS Exhibit 3 at Level III.

Footnote: 4

Based on the record, it is not clear where Estepp would have acquired the requisite depth of knowledge or experience to engage in therapeutic counseling, as that term is understood by the undersigned.

Footnote: 5

The residents are not locked within their rooms or within cells but the external doors to the facility are secured.

Footnote: 6

The term counseling has been used throughout this grievance without any definition or explanation by either party as to its scope. Estepp's supervisor personally defines counseling as any positive interaction in any context with a resident at Spadaro. Tr.15.

Footnote: 7

Internal quotation marks and citations omitted.