ROGER KIMBLE, et al.,

Grievants,

v. Docket No. 05-HHR-015

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

OFFICE OF THE INSPECTOR GENERAL, and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Roger Kimble, Kathy Carr, Edward Eye, Brian Shreve, Debra Roberts, Jennifer Butcher, Louise Law, Mary Ford, Teresa Smith, Leonard Madia, Marshall Daniels, Karen Crossland, Vickie Adkins, and Danita Bragg, ("Grievants"), employed by the Department of Health & Human Resources ("DHHR") as Investigator 1s, filed a level one grievance on October 22, 2004, in which they alleged misclassification. For relief, Grievants request reallocation to Investigator 2, with a salary increase, and back pay to the date the grievance was filed. The grievance was denied at all lower levels, and appeal was made to level four on January 18, 2005. A level four hearing was conducted in the Grievance Board's Westover office on March 24, 2005. Grievants were represented by Roger Kimble and Kathy Carr, DHHR was represented by Jennifer Akers, Assistant Attorney General, and the Division of Personnel ("DOP") was represented by Karen O'Sullivan Thornton, Assistant Attorney General. The grievance became mature for decision upon receipt of post-hearing submissions on or before April 26, 2005.

The following facts are undisputed and may be set forth as findings of fact.

Findings of Fact

1. Grievants are employed by DHHR, and have been classified as Investigator 1s assigned to the Office of the Inspector General, at all times pertinent to this grievance. 2. Grievants' functional title is Repayment Investigator for the Repayment Investigative Unit of the Investigations and Fraud Management Division. Grievants conduct field investigations of suspected recipient misrepresentation, primarily in the Income

Maintenance and Social Services Programs.

3. DHHR employs Investigator 2s in the Criminal Investigative Unit. These employees conduct investigations of alleged recipient fraud. If the fraud is substantiated, the Investigator completes a report for the county prosecutor, and manages the case through final disposition.

4. In August 2004, DOP performed a job audit of the Investigator 2 position. As a result, it was determined that two levels of experience and knowledge were required to process the criminal referrals and cases.

5. A new position, Investigator 3, was created, and those employees currently holding the position of Investigator 2 were reallocated to the new level.

6. The Investigator 2 position is now reserved by DHHR for criminal investigator trainees.

7. Grievants requested that DOP review their job duties, and reallocate their positions as Investigator 2s. DOP denied Grievants' request for the higher classification.

8. Grievants' duties have increased in recent years, due in part to an increase in food stamp trafficking.

Discussion

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 arecurrently 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 Grievants' current classification constitutes the "best fit" for their 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 theyare currently misclassified.

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

INVESTIGATOR 1

Nature of Work

Under general supervision, performs entry level investigative work by obtaining evidence of violations of the rules and regulations of a state agency or of state or federal laws or involving claims for damages by or against a state agency. Involves direct public contact work as well as contact with insurance company representative and lawyers. Work requires the use of a personal automobile for travel. Employee is subject to on-call status during non-business hours. May be required to deal with situations which are potentially dangerous. Performs related work as required.

Examples of Work

Conducts field investigations to ascertain facts and obtain evidence on reported violations; obtains statement concerning alleged violations.

Explains the law or other agency regulations to the party in violation to secure voluntary compliance.

Checks business records to determine amount of tax due to the state and collects delinquent

accounts.

Keeps records and makes oral and/or written reports of all investigations.

Locates witnesses and obtains facts and evidence needed by attorneys in litigation of cases.

Interviews complainants and witnesses using prescribed procedures.

INVESTIGATOR 2

Nature of Work

Under general supervision, performs full-performance levelwork by obtaining evidence of reported fraud or violations of the rules and regulations of a state agency or of state or federal laws or involving claims for damages by or against a state agency. Involves direct public contact work as well as contact with insurance company representatives and lawyers. Work requires the use of a personal automobile for travel. Employee is subject to on-call status during non-business hours. May be required to deal with situations which are potentially dangerous. Performs related work as required.

Examples of Work

Conducts field investigations to ascertain facts and obtain evidence on reported violations; obtains statements concerning alleged violations.

Explains the law or other agency regulations to the party in violation to secure voluntary compliance.

Checks business records to determine amount of tax due to the state and collects delinquent accounts.

Initiates prosecution of violators and testifies in court as an expert state witness.

Investigates business and professional establishments from proper licenses and cites violations.

Keeps records and makes oral and/or written reports of all investigations.

Locates witnesses and obtains facts and evidence needed by attorneys in litigation of cases.

Conducts legal research and locates the section of the West Virginia Code that covers the complaint under investigation.

Interviews complainants and witnesses using prescribed procedures.
Reviews and scrutinizes subpoenaed financial records, documents and records for securities violations.

Performs internal audits to determine misuse of time, funds and/or equipment.

May investigate claims against the state; may prepare reportsand evidence for the Grand Jury.

Grievants argue that DOP has erred in that the entire class series of Investigators was not reviewed, and suggest that employees in the Front End Fraud Unit would be appropriately classified as Investigator 1, as their duties are narrow by comparison. Grievants strongly disagree with DOP's finding that they perform entry-level work under close supervision. Grievants conclude that because the three Investigator levels represent ascending levels of difficulty and complexity, they fall squarely into the Investigator 2 slot. DHHR and DOP assert that Grievants are properly classified.

The two primary factors cited by Grievants as the basis for their argument are that they work at the full-performance level rather than entry-level, and under general, rather than close, supervision. Not surprisingly, Grievants apply a layman's interpretation to the definitions in question. Because they are experienced and competent at their jobs, and do not have daily supervision over each assignment, they believe they perform at the full-performance level, under general supervision. However, the DOP definition of “entry-level” states that it may apply to training capacity or work of limited complexity, relative to the work in the class series. DOP has determined that the administrative work performed by Grievants' is less complex than that of the employees who work in the criminal court system. Further, DHHR had been experiencing difficulty in recruiting Investigator 2s. The amended classification/compensation plan allows for new hires to be compensated as Investigator 2s during a six-month training period, and then move up to Investigator 3. While Grievants'

argument is not without logic, it is simply not the application used by DOP. When considering the entire Investigator series, it cannot be determined that Grievant's duties more closely match those of Investigator 2, or that the DOP's classificationdesignation in this case was clearly erroneous.

Conclusions of Law

1. 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).

2. 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).

3. Grievants have failed to prove that their position duties more closely fit the classification of Investigator 2 than that of their present Investigator 1 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 andState 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: MAY 13, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE