PEGGY ADAMS,

Grievant,

v. **Docket No. 04-HHR-358**

DEPARTMENT OF HEALTH and HUMAN RESOURCES/BUREAU of PUBLIC HEALTH and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Peggy Adams, grieves her classification as a Nurse 3 and asserts she should be reallocated to a Nurse 4 because she believes she performs the duties of that classification. Grievant requests compensation dating back to April 24, 2004, the date of her initial reallocation request. The Division of Personnel ("DOP") argues Grievant is correctly classified, and the Nurse 3 classification is the "best fit" for her duties. The Department of Health and Human Resources ("HHR") defers to DOP in matters dealing with classification.

This grievance was filed on July 9, 2004, waived at Levels I and II, and denied at Level III on September 21, 2004. Grievant appealed to Level IV, and a hearing was held on January 4, 2004. This case became mature for decision on that day, as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Nurse 3 by the Department of Health and Human Resources at Pay Grade 16. (See footnote 2) Grievant has been the Manager of HHR's Diabetes Prevention and Control Program since her date of hire, September 15, 1999. Grievant directly supervises two employees, a Nutritionist 2 and an Office Assistant 2. She programmatically supervises an Epidemiologist 1, an Administrative Services Assistant 1, and a Health and Human Resources

Specialist, meaning these state employees perform work for her, but she does not perform the duties normally associated with supervision, such as approving sick and annual leave, or dealing with the first level of the grievance procedure. Grievant also reviews the work of three nurses who work for the state's medical schools by meeting with them every six weeks.

2. Grievant does not perform any direct patient care, nor does she function as a Nurse Practitioner.

3. The former incumbent in Grievant's position was a nutritionist. When that individual left, HHR indicated it wanted a nurse in the position. The duties of the position were reviewed by the Division of Personnel prior to posting, and the position was classified as a Nurse 3. This posting specified the primary role of the position was to develop and manage a comprehensive diabetes control program. The successful applicant was to manage, coordinate and supervise all activities of the statewide comprehensive diabetes control program. The specific responsibilities of the position were posted and were divided into thirteen different areas. Grievant currently performs these listed duties. 4. At the time Grievant assumed the duties of Manager, the Diabetes Prevention and Control Program was not functioning as a comprehensive program, but was supposeD to be. (See footnote 3)

5. The Center for Disease Control ("CDC") places certain expectations on a comprehensive program in order for it to continue funding at a higher level. A comprehensive program is expected to share information with other states and regions on a national level regarding what information the program has learned through experience.

6. While under Grievant's management, the Diabetes Prevention and Control Program has blossomed into a nationally recognized program and has improved services and increased programs to health care providers in order to improve direct patient care. 7. The Diabetes Prevention and Control Program now meets all requirements to be a comprehensive program, and Grievant is seen as a "star" performer by her supervisors.

8. Grievant's work has resulted in an increase in funding over the past five years, and has generated several innovative programs. Grievant and her supervisees routinely serve on regional and national committees and present papers and other forms of information at conferences.

9. Grievant's supervisor is classified as an HHR Manager, Pay Grade 18. (See footnote 4) The other Managers in Grievant's same position on the organizational chart range from Pay Grade 13 to

Pay Grade 15. The majority of these managers are classified as Health andHuman Resources Specialists and Health and Human Resources Specialists, Senior. Grievant is the only Pay Grade 16 at this management level.

10. On April 23, 2004, Grievant sought reallocation and to support her request she completed a Position Description Form. On June 12, 2004, Grievant was found by Lowell Basford, the Assistant Director of the Classification and Compensation Section of the Division of Personnel to be properly classified.

11. The majority of the duties Grievant currently performs are of the kind or level of duties and responsibilities stated in the position posting.

The pertinent sections of the classification specifications at issue are written below:

NURSE 3

Nature of Work

Under limited supervision, performs professional work at an advanced level providing direct nursing services, administrative review, or program direction. Provides comprehensive services to individuals or groups in a variety of structured or unstructured health care settings. Provides health care including prevention, rehabilitation services, counseling, education, and care of acute and long-term illnesses. Some nursing interventions may be unpredictable in outcome and require frequent reassessment and adaptation of techniques. May provide specialized direct care to patients with complex health problems; intervenes with the emphasis on continuing care. Works inter-dependently with other health professionals. May serve as charge nurse of local health department nursing service or as a head nurse with 24-hour responsibility for a single unit of nursing service and/or supervision of multiple units. Shift work may be required. Travel may be required. Performs related work as required.

Distinguishing Characteristics

This is experienced nursing work where familiarity with the health department programs or the facility unit allows the incumbent to direct the work of licensed and unlicensed staff in addressing patients needs more efficiently. Advanced training or experience in a nursing specialty is recognized as a lead work/ training function for non-supervisory nursing positions. **Examples of Work**

Reviews nursing policies and protocols to evaluate impediments to patient progress; recommends or initiates changes to facilitate health care services.

Reviews patient records to determine effectiveness of nursing care and recommends modifications to nursing practices at the facility; evaluates the facility and recommends the acquisition of new equipment, instruments or medical goods.

Oversees patient care in assigned area; directs other licensed and unlicensed staff in the provision of services, functionally or in a line position.

Interviews patients or their families to complete a medical history and to make

psychosocial and physical assessment.

Identifies and documents changes in patients' health, especially those which interfere with the individuals' ability to meet basic needs.

Establishes a priority of care based on identified needs.

Provides direct patient care to individuals with varied health problems in a structured setting or patient home.

Uses established criteria to evaluate patient care; modifies plan of care as necessary and documents changes.

Carries out the prescribed care according to established nursing practices; contacts physicians to report significant changes in patient health.

Refers patients to alternative public or private agencies for continuing care; negotiates agreements with local service agencies to better serve the community.

Meets with family, significant others, and members of the nursing team to establish and evaluate short- and long range treatment goals.

Evaluates nursing research to determine the applicability of findings to current nursing practices.

Writes management reports and other documentation as needed.

NURSE 4 **(See footnote 5)**

Nature of Work

Under limited supervision, performs professional work at an advanced level providing direct nursing services, administrative review, or program direction.Provides comprehensive services assessing, promoting and maintaining the health of individuals/groups in a variety of structured or unstructured health care settings. Provides health care including prevention, rehabilitation services, counseling, education, and care of acute and long-term illnesses. Nursing interventions require advanced assessment and evaluation techniques, may be unpredictable in outcome and require frequent reassessment. May supervise other health professionals in providing advanced services. May perform as an assistant director of nursing, quality assurance coordinator or in a similar level of nursing specialty in a large facility. Travel may be required. Performs related work as required.

Distinguishing Characteristics

This is advanced nursing where familiarity with the health department or a health facility or recognized nursing specialty allows the incumbent significant latitude to address patient care in a statewide program of limited scope, or in a regional or facility-wide program; or to treat patients as a nurse practitioner. This level is intended for use in leadership roles where the incumbent is expected to train and lead other professionals by virtue of training or experience.

Examples of Work

Reviews nursing policies and protocols to evaluate impediments to patient progress; recommends or initiates changes to facilitate health care services.

Reviews patient records to determine effectiveness of nursing care and recommends modifications to nursing practices at the facility; evaluates the facility and recommends the acquisition of new equipment, instruments or medical goods.

Oversees patient care in assigned area; supervises other licensed and unlicensed staff in the provision of services, functionally or in a line position.

Reviews patients' medical histories and makes a psychosocial and physical assessment; may diagnose and prescribe treatments within prescribed limits.

Identifies and documents changes in patients' health, especially those which interfere with the individuals' ability to meet basic needs.

Establishes a priority of care based on identified needs.

Provides direct patient care to individuals with varied health problems in a structured setting.

Uses established criteria to evaluate patient care; modifies plan of care as necessary and documents changes.

Carries out the prescribed care according to established nursing practices; contacts physicians to report significant changes in patient health.

Refers patients to alternative public or private agencies for continuing care; negotiates agreements with local service agencies to better serve the community.

Meets with family, significant others, and members of the nursing team to establish and evaluate short- and long range treatment goals.

Evaluates nursing research to determine the applicability of findings to current nursing practices.

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 (2004); 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).

Additionally, W. Va. Code § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as HHR which utilize such positions, must adhere to that plan in making their employees' assignments. Toney v. W. Va. Dep't of Health & Human Res., Docket No. 93-HHR-460 (June 17, 1994).

Grievant asserts her position is misclassified, and she has requested her position be reallocated and placed in a higher pay grade. DOP's Rule 3.78 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to adifferent classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties and the number of employees supervised does not necessarily establish a need for reallocation. Kuntz/Wilford v. Dep't of Health and Human Res., Docket No. 96- HHR-301 (Mar. 26, 1997). "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." Id.

Additionally, 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 the one under which she is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989). 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. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991). See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The 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 are class-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 (1993).

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

Further, as stated in Division of Personnel Rule 4.4, "Class Specifications":

> The Director shall consider the class specification in allocating positions and shall interpret it as follows:
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> (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.
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> (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 general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the positions that the class intended to include.
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> (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.

Mr. Basford testified at both Level III and IV that Grievant was correctly classified. He stated Grievant's position did not warrant reallocation because there had been nosignificant change in her duties, her current duties were within the Nurse 3 classification, and her current duties conformed with the original position posting which had been classified as a Nurse 3. Mr. Basford also noted the Nurse 3 classification was the "best fit" because Grievant does perform advanced work, and these were duties contemplated as demonstrated by the posting.

Mr. Basford also testified the major difference between the Nurse 3 and Nurse 4 is the level of

complexity of duties and the scope of responsibility. For example, a Nurse 3 would be a head nurse of a unit or area with 8 to 10 supervisees, and a Nurse 4 would be an Assistant Director of Nursing with 30 to 40 nurses and 100 Health Service Workers for whom she would be responsible. Grievant's position, while important, does not have the same level of accountability, especially as there is no direct patient care involved. Additionally, Mr. Basford noted Grievant's position on the organizational chart. Grievant already has the highest pay grade among her peers, and the number of supervisees and duties compare favorably to those of these other individuals.

After a review of Grievant's Position Description Form, the witnesses' testimony, and the rules and regulations governing reallocation, the undersigned Administrative Law Judge finds Grievant is correctly classified as a Nurse 3, and this classification is the best fit for her duties. While Grievant may perform some duties that are outside her class specification, this is to be expected. Since these duties are not predominant, this difference is acceptable and covered under the catchall phrase which is the last line of the "Nature of Work" Section, "Performs related work as required." As noted by Mr. Basford, the duties Grievant performs fall within those identified in her classification specification and the job posting. Further, Grievant has not demonstrated "a significant change in thekind or level of duties and responsibilities" that would indicate a need to reallocate her position. DOP Rule 3.78.

While it is understandable Grievant would want an increase in pay and classification as a reward for her excellent work, improper reallocation is not the answer. Meritorious service within the state system is to be rewarded by a merit increase. HHR clearly believes Grievant is a "star" performer, the undersigned Administrative Law Judge suggests the parties explore that option. (See footnote 6) However, the undersigned Administrative Law Judge cannot require HHR to give Grievant this raise.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. 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 (2004); 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).

2. 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). 3. The Division of Personnel's determination of its own regulations and classification specifications matters is within its expertise, and these determinations are entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985); Farber v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR-052 (July 10, 1995).

4. An employee who challenges the pay grade or classification to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1995); Bennett v. Dep't of Health and Human Res., Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Res., Docket No. 94-HHR-206 (June 15, 1995); Thibault v. Div. of Rehab. Serv., Docket No. 94-RS-061 (May 31, 1995); Frome v. Dep't of Health and Human Res., Docket No. 94-HHR-140 (Nov. 29, 1994). See O'Connell v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR- 251 (Oct. 13, 1995).

5. Grievant has not demonstrated by a preponderance of the evidence that she is misclassified, or that the position of Nurse 3 is not the "best fit" for her normal duties, as the vast majority of the tasks she performs fall within the class specifications for her position.

6. Grievant has not demonstrated by a preponderance of the evidence that her duties warrant reallocation as there has not been a significant change in her duties. Kuntz/Wilford v. Dep't of Health and Human Res., Docket No. 96-HHR-301 (Mar. 26, 1997).

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 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: February 22, 2005

Footnote: 1

Grievant represented herself, DOP was represented by Lowell Basford, Assistant Director of the Classification and Compensation Section of the Division of Personnel, and HHR was represented by B. Allen Campbell, Senior Assistant Attorney General.

Footnote: 2

At the time Grievant was hired, the Pay Grade for Nurse 3 was 15. It is now Pay Grade 16.

Footnote: 3

A comprehensive program receives greater funding than other types of programs.

Footnote: 4

The Organizational Chart identified the Pay Grade as 17, but the classification specifications indicate the Pay Grade is 18.

Footnote: 5

It is noted that the "Nature of Work" and the "Examples of Work" Sections for Nurse 3 and 4 are similar. It is also noted that the Health and Human Resources Specialist, Senior class specification appears to more closely match the duties Grievant performs than either of the above classifications. Since these classifications are at pay grades 13 and 15 respectively, and HHR wanted a registered nurse for the diabetes program, this issue will not be addressed further.

Footnote: 6

The Pilot program discussed in the Level 3 Decision was not an option according to HHR.