THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

SHELIA SMITH,

Grievant,

v. **Docket No. 07-HHR-021**

DEPARTMENT OF HEALTH and HUMAN
RESOURCES/ WELCH COMMUNITY
HOSPITAL and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Shelia Smith, is employed by the Department of Health and Human Resources ("HHR" or "Agency"), at Welch Community Hospital ("WCH"), and filed this grievance on November 6, 2006. Grievant asserts she has been misclassified since her date of hire and seeks to be reclassified as an Equal Employment Opportunity Officer. Grievant seeks back pay from the day she became employed.

This grievance was denied at all lower levels. Grievant appealed to Level IV on January 22, 2007, and the Level IV hearing was held on May 29, 2007. Grievant was represented by Kathryn Bayless, Esq., HHR was represented by B. Allen Campbell, Senior Assistant Attorney General, and the Division of Personnel was represented by Karen Thornton, Assistant Attorney General. This case became mature for decision on the date of the hearing, as the parties elected not to submit proposed findings of fact and conclusions of law. This grievance was reassigned to the undersigned Administrative Law Judge for administrative reasons on August 6, 2007.

Synopsis

Grievant asserts she should be reallocated from an Administrative Services Assistant 1, Pay Grade 10, to the Equal Employment Opportunity Officer classification, Pay Grade 17, and maintains she has been misclassified since her date of hire. (See footnote 1)

Respondents maintain Grievant is properly classified, and the Administrative Services Assistant 1 classification is the "best fit" for her duties. Respondents note the duties Grievant performs do not rise to the level of complexity and responsibility contained in the Equal Employment Opportunity Officer classification.

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

Findings of Fact

1. Grievant was employed by WCH in 1995, as an Administrative Services Assistant 1, Pay Grade 10. As identified in the original posting, Grievant was to serve primarily as an equal employment opportunity counselor. The state Equal Employment Opportunity Officer and agency Equal Employment Opportunity Coordinator were to provide information and to assist Grievant in performing her duties. Grievant's duties have not changed since her date of hire. Res. No. 1 and Grt. No. 5 at Level IV.

2. Every section/division in HHR has an employee who handles equal employment opportunity complaints. The classifications of these employees vary and can be anything from a Secretary, to an Administrative Services Assistant, to an Administrator. 3. Grievant is to provide a nonthreatening resource for employees in her facility to raise equal employment opportunity/affirmative action concerns, advise employees and management on proper equal employment opportunity/affirmative action procedures, and report equal employment opportunity complaints to the Equal Employment Opportunity Officer and Equal Employment Opportunity Coordinator. While Grievant receives numerous complaints, most of them are not equal employment opportunity/affirmative action issues.

4. Grievant's main duty is to receive complaints from employees at WCH, and investigate these complaints either informally or formally. She is to maintain files on complaints and interviews. After completion of the initial interviews, this report goes to the WCH administrator, and he determines

what action to take. Grievant also plans and presents in-service training for all WCH staff in the areas of equal employment opportunity, affirmative action, and sexual harassment. Additionally, she tracks recruitment and application rates for minorities and females, maintains data on interviewing, hiring, terminating, and promoting, and includes this data in a yearly report. Grievant does not supervise anyone.

5. The class specifications of the two positions are listed below.

ADMINISTRATIVE SERVICES ASSISTANT 1

Nature of Work

Under general supervision, performs administrative work in providing support services such as fiscal, personnel, payroll or procurement in a small division or equivalent organization level. May function in an assist role or in a specialized capacity in a large agency or department. Develops or assists in developing and implements plans/procedures for resolving operational problems and in improving administrative services. Work is typically varied and includes inter- and intra-governmental and public contact. Performs related work as required. (Emphasis added).

Distinguishing Characteristics

Positions in this class are distinguished from the Administrative Services Assistant 2 by the size of the unit served and by the independence of action granted. Positions in a small agency or division may be responsible for a significant administrative component; other positions assist an administrative supervisor in a large state agency. Authority to vary work methods or policy applications or to commit the agency to alternative course of action is limited.

Examples of Work

Confers with inter- and intra-agency personnel to transact business, gather information, or discuss information; may be in a position with public or federal government contact.

Gathers and compiles information for state records; writes reports, balances tally sheets, and monitors inventories, purchases, and sales.

Updates records and contacts employees to gather information; represents the supervisor or unit

in the area of assignment at in-house meetings.

Maintains files of information in hard copy files or electronic format; runs reports for regular or intermittent review.

Assists in determining the need for changes in procedures, guidelines and formats; devises a solution; monitors the success of solutions by devising quantitative/qualitative measures to document the improvement of services.

Assists in the writing of manuals in the area of assignment; clarifies the wording and describes new procedures accurately.

EQUAL EMPLOYMENT OPPORTUNITY OFFICER

Nature of Work

An employee in this class directs the development and implementation of an extensive program for an individual agency or acts as coordinator of programs from the Division of Personnel to insure Equal Employment Opportunity within state service. Incumbent may supervise technical and clerical employees and review the practices of the delivery of services to clients and contract recipients to insure non discrimination. Work is reviewed by an administrative superior. Performs related work as required.
(Emphasis added).

Examples of Work

Develops and implements an Affirmative Action Plan designed to eliminate discriminatory practices and ensures Equal Employment Opportunity for a large agency. Discusses the goals of Equal Employment Opportunity with agency administrators and managers to develop an awareness of the problems and to resolve problems involving the development of the programs or the implementation of new practices.

Coordinates actions on federal, state, and departmental provisions concerning Equal

Employment Opportunity requirements, and recommends courses of action if program, licensure, or contract requirements are not met.

Directs the investigation of, or investigates grievances of complaints which allege discrimination.

Meets with federal, state, department, and civic leaders to discuss Equal Employment Opportunity programs and approaches.

Determines courses of action to be taken in cases involving discrimination practices.

Advises management in all aspects of Equal Employment Opportunity.

Assigns and reviews the work of subordinate employees.

Completes reports and maintains paperwork.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). 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). (See footnote 2) 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 to match her current duties. 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 Division of Personnel classification specification than the one to 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 the 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 theclassification 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 an employee, contesting her current classification and/or pay grade, with a substantial obstacle to overcome in attempting to establish she is currently misclassified.

143 C.S.R. 1 § 3.78 defines "Reallocation" as "[r]eassignment 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." 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.

Lowell Basford, the Assistant Director of the Division of Personnel's Classification and Compensation Section, testified at both the Level III and IV hearings that Grievant was correctly classified. He stated Grievant's position did not warrant reallocation because there had been no significant change in her duties. Mr. Basford also found Grievant's current duties were within her classification, and her current duties conformed with the Position Description Form. Mr. Basford noted Administrative Services Assistants providesupport services in many areas, including personnel. Equal employment opportunity /affirmative action issues are categories within personnel work.

Mr. Basford also pointed out Grievant does not perform the duties of an Equal Employment Opportunity Officer. The "Nature of Work" Section of the Equal Employment Opportunity Officer classification requires the holder to "direct the development and implementation of an extensive program for an individual agency" or to "act as coordinator of programs from the Division of

Personnel. . . ." Grievant does neither of these things. Grievant does her equal employment opportunity work only at WCH and is an employee of the Department of Health and Human Resources, not the Division of Personnel.

Further, a review of the Examples of Work Section reveals that while Grievant does some activities similar to those of the Equal Employment Opportunity Officer, these duties are not of the same degree of complexity and responsibility. Additionally, those of the Equal Employment Opportunity Officer are much higher up the chain-of-command. For example, the Equal Employment Opportunity Officer "[d]evelops and implements an Affirmative Action Plan designed to eliminate discriminatory practices and ensures Equal Employment Opportunity for a large agency." Grt. No. 2 at Level IV. The duties of Grievant's position are to apply this Affirmative Action Plan to WCH.

After a review of Grievant's Position Description Form, the witnesses' testimony, and the rules and regulations governing reallocation, the undersigned Administrative Law Judge concludes Grievant is correctly classified, and her current classification is the "best fit" for her duties. Grievant has not demonstrated "a significant change in the kind or level of duties and responsibilities" that would indicate a need to reallocate her position. DOP Rule3.78. Further, Grievant has not established she performs the duties of an Equal Employment Opportunity Officer.

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. 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 did not demonstrate by a preponderance of the evidence that she was misclassified, or that the position of Equal Employment Opportunity Officer was the "best fit" for her normal duties, as 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 may appeal this decision to the Circuit Court of Kanawha County or the county in which the event occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. Va. Code § 29-6A-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). 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.

_____**Janis I. Reynolds**

Acting Chief Administrative Law Judge

Date: October 31, 2007

Footnote: 1

At Level III, there was a question whether Grievant wanted a new classification established for her duties, and whether Grievant wished to identify additional classifications in which she believed she should be placed. These issues

were not raised at Level IV and are deemed abandoned.

Footnote: 2

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.