THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ELLA MULLINS,

Grievant,

v. **Docket No. 07-HHR-059**

DEPARTMENT OF HEALTH and HUMAN

RESOURCES/OFFICE OF PERSONNEL

SERVICES and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Ella Mullins, is employed by the Department of Health and Human Resources ("HHR" or "Agency"), Office of Personnel Services, and filed this grievance on October 23, 2006. Grievant's Statement of Grievance reads:

> I submitted my Position Description Form to the WV Division of Personnel and it was determined that my position was correctly classified as an Administrative Services Assistant I. I accepted the responsibility to coordinate the implementation of the on-line (NEOGOV) register system throughout DHHR and the county health departments in April 2005. Some of the new duties include developing training materials and providing on-site the classes to various offices. These and other more complex duties, I feel, are above the realm of an Administrative Services Assistant I.

Relief sought was, "To be reallocated to Personnel Specialist which is the working title of my position and which is more suited to my complex duties. I also request back pay from when I began the new duties in April 2005."

This grievance was denied at all lower levels. Grievant appealed to Level IV on February 16, 2007, and the Level IV hearing was held on May 10, 2007. Grievant represented herself, HHR was represented by Jennifer Akers, Assistant Attorney General,and the Division of Personnel was represented by Karen O'Sullivan 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.

Synopsis

Grievant asserts she should be reallocated to the Personnel Specialist classification, Pay Grade 12, and maintains her duties have increased in complexity since 2002, when she last requested and was denied reallocation. At the Level IV hearing, Grievant also averred she met the requirements to be classified under the "Exemption to the Predominant Duty Rule."

Respondents maintain Grievant is properly classified, and that the Administrative Services Assistant 1 classification is the "best fit" for her duties. Respondents note Grievant does work in the area of personnel, but her duties do not rise to the level of professional personnel work. Additionally, Respondents contends Grievant's duties with the new system do not meet the requirements of the "Exemption to the Predominant Duty Rule."

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 an Administrative Services Assistant 1, Pay Grade 10, by HHR in the Office of Personnel.

2. In 2002, she submitted a Position Description Form to the Division of Personnel and requested reallocation. Division of Personnel found the "best fit" forGrievant's duties and responsibilities was Administrative Services Assistant 1. Grievant did not grieve this finding.

3. In April 2005, Grievant assumed the duties of the Recruitment Selection Applicant Tracking System ("NEOGOV"). This system computerized a prior paper system and allowed HHR offices to view, request, and receive registers and to receive job applications on-line. It is in essence an "on-line hiring system."

4. Grievant's NEOGOV duties include granting employees the correct access to NEOGOV, after someone tells her what the duties of the employee are; (See footnote 1) answering questions about the system in person, online, and by phone; occasionally conducting information sessions demonstrating how the system works; checking information and documents for accuracy and correctness; and removing employees from the system as they leave state employment. These duties take up approximately 40% of Grievant's time. The NEOGOV system is "highly structured," "very routine," and "user friendly." Test. Basford, Level III & IV Hearings.

5. At the time of this grievance, 60% of Grievant's duties were the same as the ones she had performed since 1998 and/or 2002. These duties included coordinating the Human Resources Information System ("HRIS") job posting system; reviewing and consolidating reports in the donated leave program; approving and checking WV 11's for three hospitals; and compiling information for several reports.

6. In her 2002 Position Description Form, Grievant listed her primary duty as, "Coordinates department-wide computer program including HRIS and the job postingsystem." In her 2006 Position Description Form, Grievant listed her primary duty as, "Coordinates department-wide computer program including HRIS job posting system and NEOGOV."

7. The class specification 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.

PERSONNEL SPECIALIST

Nature of Work

Under general supervision, performs professional personnel work in any one or more of the designated areas in the Division of Personnel. Work requires the use of specific acquired knowledge and analytical techniques in a variety of job assignments. Performs related work as required. (Emphasis added).

Distinguishing Characteristics

The work is characterized by its complexity with broad discretion and strict accountability for results. Full responsibility is delegated for planning, organizing, and completing assignments within established procedural framework and time constraints.

Examples of Work

Uses any of a number of accepted job analysis methods to compile specific information on the duties, responsibilities and requirements of jobs in state government.

Identifies job class categories and writes class specifications, including classification and/or selection standards.

Makes recommendations on the allocation of positions to classes and may recommend basic staffing patterns.

Collects and computes wage and fringe benefit data and assists in developing salary schedules and compensation plans.

Develops and validates employment examinations based on job analysis information and in accordance with legal and professional standards.

Informs employees and/or job applicants, via telephone, correspondence, or personal contact, information concerning requirements, benefits, career opportunities, rules and regulations; advises appropriate course(s) of action or refers questions to appropriate area.

Evaluates job applicants' education and work experience in relation to established standards for admission to examinations and/or to compute applicants' scores on unassembled examinations.

Composes correspondence, job announcements, informational pamphlets, forms and work reports.

Conducts specialized recruitment efforts for hard-to-fill positions; develops resources for identifying qualified applicants; serves as a source of referral of job applicants to the user agencies.

Visits state offices in a designated region to review personnel procedures, conduct training, investigate complaints and advise managers and supervisors on personnel procedures. Investigates employee complaints or grievances; records facts and impressions of events; makes recommendations to employee and management on resolution of grievances.

Develops basic training courses and course evaluation techniques for staff and user agencies' employees; instructs groups of employees in a variety of subjects and procedures.

Reviews proposed personnel actions for conformity to budget amounts, personnel policies and merit system rules and regulations; assures timely processing of personnel transactions.

Drafts revisions of personnel policy and procedures manuals and employee handbook.

May represent the Division in grievance hearings, or other governmental/public events.

Researches and writes informative articles on topics of interest for statewide publications.

Reviews and edits policy statements for conformance to established guidelines, regulations, laws.

Conducts limited special projects in a variety of personnel areas requiring the collection of technical or confidential information and the writing of comprehensive reports.

May assign and review the work of others.

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).

I. Reallocation

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. Stateagencies, 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). (See footnote 2)

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 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.

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 Division of Personnel classification specification than the one 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 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 an employee, contesting her current classification and/or pay grade, with a substantial obstacle to overcome in attempting to establish she is currently misclassified.

Lowell Basford, the Assistant Director of the Division of Personnel's Classification and Compensation Section, testified at both Level III and IV hearings that Grievant was correctly classified. He stated Grievant's positions did not warrant reallocation because there had been no significant change in her duties. Mr. Basford also found Grievant'scurrent duties were within her classification, and her current duties conformed with the Position Description Form. His testimony was clear, the duties involved in coordinating NEOGOV are no more complex than other similar systems that Grievant currently uses.

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, and her classification is the "best fit" for her duties. While Grievant is currently working with a new computer system, this system is not more complex than prior systems Grievant has utilized. As described by Mr. Basford at Level III, the NEOGOV system is "highly structured," "very routine," and "user friendly," and her duties in the NEOGOV system fall within those identified in her classification specification. See Kuntz, supra. 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 Rule 3.78. Further, Grievant has not established she performs the duties of a Personnel Specialist.

II. "Exemption to the Predominant Duty Rule"

Generally, in determining an employee's proper classification, the predominant duty rule applies, which means the duty which the employee performs more than half the time forms the basis for her classification. However, when a position has mixed duties, the duties performed 25% of the time can be class controlling, if those duties are significantly more complex than the other duties, there is a recognizable difference in the skills required to perform these duties, and the pay grade for a position performing these duties is higher. If these duties would form the basis for selecting an applicant to fill the position, the"Exemption to the Predominant Duty Rule" applies. Hall v. Div. of Nat'l Res., Docket No. 00-DNR-053 (Apr. 28, 2000).

Grievant did not establish the duties relating to NEOGOV were more complex than her other duties, that there was a recognizable difference in the skills required to perform the NEOGOV duties, and the pay grade for a position performing these duties would be higher than her current pay grade. Accordingly, Grievant has not met her burden of proof on this issue.

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 Personnel Specialist 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).

7. When a position has mixed duties, the duties performed 25% of the time can be class controlling, if those duties are significantly more complex than the other duties, there is a recognizable difference in the skills required to perform these duties, and the pay grade for a position performing these duties is higher. If these duties would form the basis for selecting an applicant to fill the position, the "Exemption to the Predominant Duty Rule" applies. Hall v. Div. of Nat'l Res., Docket No. 00-DNR-053 (Apr. 28, 2000). 8. Grievant did not establish the duties relating to NEOGOV were more complex than her other duties, that there was a recognizable difference in the skills required to perform the NEOGOV duties, and the pay grade for a position performing these duties would be higher.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. Va. Code § 18-29-7 (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.

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Janis I. Reynolds

Acting Chief Administrative Law Judge

Date: September 28, 2007

Footnote: 1

There are only a few options.

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.