THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

BILLIE MILLER,

Grievant,

v.

Docket No. 2008-0235-DOC

WORKFORCE WEST VIRGINIA

and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant Billie Miller filed a grievance on August 8, 2007, in which she claims that her position of Employment Programs Specialist, Senior is misclassified, and should be classified as Employment Programs Manager 1. As relief, she is seeking reallocation to the Employment Programs Manager 1 classification, and to be "compensated for the class change. Including back to when I first asked for this classification March 31, 2007."

This grievance proceeded directly to level three by agreement of the parties. A level three hearing was held in the Grievance Board's Charleston office on October 7, 2008, before the undersigned Administrative Law Judge. Grievant appeared in person and by her counsel, Katherine L. Dooley, Esq. Respondent WORKFORCE WEST VIRGINIA ("WORKFORCE") appeared by counsel, Anthony Eates, Assistant Attorney General. The Division of Personnel ("DOP") appeared by counsel, Karen O. Thornton, Assistant Attorney General. The matter became mature for decision on November 17, 2008, the deadline for the parties to submit their proposed findings of fact and conclusions of law.

Synopsis

Grievant has been employed as an Employment Programs Specialist, Senior since 1997, and in

that time her job duties have changed. Grievant is responsible for theoperation of the Quarterly Census of Employment and Wages Program. Given the increasing duties of Grievant since her previous supervisor retired, the predominance of her duties shifted to fall more within the Employment Programs Manager 1 classification than her former classification. The grievance is granted.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact:

Findings of Fact

1. Grievant has been employed by WORKFORCE in the Research, Information and Analysis Division as an Employment Programs Specialist, Senior since 1997. Grievant is responsible for the operation of the Quarterly Census of Employment and Wages Program ("QCEW"). This unit generates quarterly computerized reports containing employment totals, taxable wages, and amounts of contributions and contribution rates which are generated by state industry.

2. The DOP Classification Specification for Employment Programs Specialist, Senior reads in part:

> **Nature of Work**
>
> Under general supervision, performs work at the advanced level by providing administrative coordination of and complex technical assistance in a component of a major statewide program, a statewide program in it[s] entirety, or a major technical area specific to or characteristic of the Bureau of Employment Programs. Acts as liaison to facilitate problem resolution and assure compliance with federal, state, and local regulations, laws, policies, and procedures governing the program or technical area. Uses independent judgement in determining action taken in both the administrative and operational aspects of the area of assignment. Exercises considerable latitude in varying methods and procedures to achieve desired results. May supervise or act as lead worker. Performs related work as required.
>
> **Distinguishing Characteristics**
>
> The Employment Programs Specialist, Senior is distinguished from the Employment Programs Specialist by the broader scope of administrative oversight and responsibility for planning and operational aspects of program or technical area. This level may function in a lead or supervisory capacity.

3. The DOP Classification Specification for Employment Programs Manager 1 reads in part:

> **Nature of Work**
>
> Under limited supervision, performs administrative and professional work at the full-performance level as the manager of a program unit or an organizational unit of

> equivalent size and complexity in the Bureau of Employment Programs. Responsible for developing and implementing methods related to program specialty area. Has limited authority to act independently. Provides important advice, information or data to higher management for program decisions; requires ability to persuade superior on actions related to the program area. Performs related work as required.
>
> **Distinguishing Characteristics**
>
> Positions in this class have responsibility for a primary unit in the Workers' Compensation Division or a secondary program section in the Division of Employment Service. Typically, the operation, policy, work processes, and regulatory requirements of the unit are predictable and stable. The positions normally supervise technical and clerical positions.

4. In May of 2007, Grievant submitted a new Position Description Form to the DOP for review. DOP determined the position was correctly classified as an Employment Programs Specialist, Senior classification. Grievant appealed that determination, and the classification was upheld by DOP in July of 2007.

5. The Position Description Form contains a section wherein the employee lists their duties, in order of importance, along with the estimated percent of time spent on each duty. Grievant attached a list of seven duties to the form she filled out; one of thecategories encompasses many different duties which include oversight of the Unit's employees.

6. Grievant: 1) completes the Annual Refiling Survey and codes the new North American Standard Industry System codes to all employers to be filed with the Bureau of Labor Statistics; 2) reviews micro and macro data editing done by subordinate staff to evaluate their analysis of problem areas for completeness and accuracy; 3) supplies data and information to Current Employment Statistics staff, Occupational Employment Statistics staff, Labor Market Information staff, Workers' Compensation Research staff, and Unemployment Insurance staff; 4) responds to requests from the Bureau of Labor Statistics; 5) schedules the Unit's work time and manages time off requests so as to not interfere with the workflow; 6) trains subordinate staff on new procedure and other employees within the agency on the use of new coding systems; 7) creates and maintains a quarterly work plan which must be approved by the Bureau of Labor Statistics; 8) monitors the work of other employees to maintain the workload on time standards to meet filing due dates.

7. Grievant has had primary responsibility for the QCEW program since her previous Supervisor, Tom Weblin, retired in 2000.

8. Grievant performs the full range of duties outlined in the Employment Programs Manager 1

Nature of Work set out in Finding of Fact 3. Grievant has responsibility to assist superiors related to the program budget, and managing the time for employees that are shared or temporary employees needed to complete work of the QCEW Program. 9. Grievant is not a supervisor as defined by DOP, but does work at the full- performance level as the manager of her program unit.

Discussion

In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work she is doing is a better fit in a different classification than the one in which her position is currently classified. *See Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001).

When an employee requests reclassification or reallocation, DOP normally makes its classification determination based on the Position Description Form completed by the employee. Classification is a highly technical matter, based on carefully drafted class specifications and a complex pay plan, using terms of art to describe duties and job types defined by the DOP. To do this DOP fits positions into specifications based on a lengthy technical document, the aforementioned Position Description Form. This document is completed by a person the DOP invariably points out has no training or expertise whatsoever in the arcane field of classifying jobs. In some instances, DOP conducts a desk audit of the position. Such is not the case in the instant grievance. Therefore, while DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous, DOP's interpretation of what the employee is trying to communicate with the Position Description Form does not carry that weight. *See W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993). 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. *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

Grievant alleges she has been performing the duties of an Employment Programs Manager 1 and should be reallocated to that position. DOP argues Grievant is properly classified. (See footnote 1) 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." *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. *Id*.

Grievant has demonstrated that, when examining her duties compared to the "Nature of Work" examples for the relevant classifications, there exists a significant change in her job duties to warrant a reallocation. Compared to the Employment Programs Specialist, Senior, the Employment Programs Manager 1 performs administrative and professional work as the manager of a program unit. That position is responsible for developing and implementing methods related to program specialty area, i.e., editing datacriteria to determine if further research is needed and returning those accounts to staff for compliance; developing the unit work plan for the year; and, working with agency programmers to develop new programming jobs needed to maintain the flow of QCEW data. Conversely, the Employment Programs Specialist, Senior classification relevant to this grievance only provides administrative coordination of and complex technical assistance specific to the Bureau of Employment Programs. This is one of the key distinctions that appears to be lost on DOP.

A comparison of the two job class specifications immediately distinguishes that, where an Employment Programs Specialist, Senior works under "general supervision," the Employment Programs Manager 1 works under "limited supervision." Another additional distinction is that the Employment Programs Specialist, Senior "uses independent judgement in determining action taken in both the administrative and operational aspects of the area of assignment." The Employment Programs Manager 1, however, "provides important advice, information or data to higher management for program decision; requires ability to persuade superior on actions related to the program area." Grievant's current job duties are performed under very limited supervision, and she works with her superior to establish, monitor and modify the unit's budget. In addition, Grievant is responsible for providing higher management with data collection information and important advice concerning analysis and dissemination of the information to meet the agency's objectives.

Since Grievant's job began in 1997, it has evolved and changed over time to keep up with the constantly changing filing requirements of the Bureau of Labor Statistics to maintain consistency and accuracy. In addition, Grievant has assumed primary responsibility for the QCEW program since her

previous Supervisor, Tom Weblin, retiredin 2000. Grievant's current supervisor does no work on the QCEW program. Grievant has complete responsibility for the data collection, editing, analysis, and dissemination of the employment data. Grievant has responsibility for the unit's budget preparation, and advises the Director of Research, Information, and Analysis accordingly.

Since Grievant was first classified, the QCEW program unit in which she works has changed, according to Alan Brant, its Assistant Director and Grievant's supervisor. The Bureau of Labor Statistics filing requirements are constantly changing, and Grievant is responsible for developing methods to comply with the requirements for consistency and accuracy. After 2000, and the retirement of Mr. Weblin, Grievant has had the sole responsibility of editing criteria that address filing concerns, and makes the sole determination if subordinate staff are needed to further research accounts. This development is poorly represented on the Position Description Form on which DOP relied. Nevertheless, DOP made no concessions at level three that the original classification determination was in error.

Debbie Anderson of DOP testified that in order for an individual position to be a manager of a unit, the person would have subordinate employees they would be responsible for supervising. Ms. Anderson further testified that it is Mr. Brant and not Grievant that is the manager of Grievant's unit. However, the evidence submitted at level three demonstrates Grievant oversees her unit; provides extended planning of work activities to accomplish the assigned area of responsibility; coordinates the work of the unit with the agency head; and, is responsible for establishing and meeting the objectives and goals of the unit. The record also clearly demonstrates that Grievant's duties include scheduling staff based on requests and deadlines; training and reviewing the work of herstaff; preparation of work unit plans; and, working with programmers to maintain the flow of data. The undersigned concedes the DOP's contention that Grievant is not a “Supervisor” as set out in the DOP definition due to the limited number of employees in her unit. (See footnote 2) However, Grievant does satisfy the definition of “Manager,” and that satisfies the management component of the “Nature of Work” requirements set out in Grievant's requested classification. (See footnote 3)

Given that Grievant's work has progressed to the stage where she is predominately responsible for the QCEW program, she carries out these responsibilities under limited supervision, she has authority to act independently, she provides important advice, information, or data to higher management for program decisions, and she manages technical positions, she has met her burden of

proving the Employment Programs Manager 1 is a better fit for her position. However, she did not present sufficient evidence to determine exactly when the balance shifted, so it is impossible to determine whether she was entitled to reallocation at any time prior to the filing of her grievance. As previously stated, Grievant's Position Description Form did not adequately describe her duties in sucha way that an accurate determination could be made. In fact, Grievant's requested relief dates to March 31, 2007, the time that she first asked to be reallocated.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work she is doing is a better fit in a different classification than the one in which her position is currently classified. *See Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001).

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, 348, 431 S.E.2d 681, 687 (1993).

3. 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. *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

4. Grievant has met her burden of proving her position is a better fit in the Employment Program Manager 1 classification.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is ordered to reallocate Grievant's position to Employment Programs Manager 1, retroactive to the dateshe filed her grievance, and to compensate her for all the back wages and benefits she would have earned had she been reallocated at that time.

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 § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: December 23, 2008

_____

Ronald L. Reece

Administrative Law Judge

Footnote: 1

Respondent WORKFORCE's counsel essentially deferred to DOP at level three, and did not file proposals.

Footnote: 2

Supervisor - formally delegated responsibility for planning, assigning, reviewing and approving the work of three or more full-time employees which also includes initiating disciplinary actions, approving sick and annual leave requests, conduct performance evaluations, recommend salary increases, and is a step in the grievance process. DOP Glossary of Classification Terms.

Footnote: 3

Manager/Managerial - oversees a formally designated organizational unit or program that requires extended planning of work activities, control of resources, and all the means used to accomplish work within the assigned areas of responsibility. Coordinates the work of the unit or program with the agency and external interest groups. Is held accountable of establishing and meeting the objectives and goals of the unit or program. DOP Glossary of Classification Terms.