WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHIRLENE ADKINS,
Grievant,

v. **Docket No. 2009-1457-DOC**

WORKFORCE WEST VIRGINIA
and DIVISION OF PERSONNEL,
Respondents.

D E C I S I O N

Grievant, Shirlene Adkins, filed this grievance protesting her classification as an Employment Programs Interviewer 2 and asserts she should be reallocated to an Employment Programs Interviewer 3. WORKFORCE West Virginia and the Division of Personnel ("DOP"), Respondents, assert Grievant is correctly classified, and the Employment Programs Interviewer 2 classification is the "best fit" for her duties. This grievance as filed on April 16, 2009 was waived by agreement of the parties directly to level three. A level three hearing was held before the undersigned Administrative Law Judge on September 29, 2009, in the Grievance Board's Charleston office. Grievant appeared *pro se*, and the Division of Personnel was represented by Karen Thornton, Assistant Attorney General, and WORKFORCE West Virginia was represented by Stacy DeLong, Assistant Attorney General. As the parties elected not to file Findings of Fact and Conclusions of Law in this matter, this case became mature for decision at the conclusion of the hearing.

Synopsis

Grievant asserts there has been a change in her duties and responsibilities and seeks reallocation. Respondents assert Grievant is correctly classified as an Employment

Programs Interviewer 2, and while there have been additional duties added to her position, they were minimal at best and there has not been an increase in the complexity and difficulty so as to warrant reallocation to the Employment Programs Interviewer 3 classification. Grievant did not meet her burden of proof and demonstrate she should be reallocated to an Employment Programs Interviewer 3.

Based upon 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 Employment Programs Interviewer 2 with WORKFORCE West Virginia.

2. In the Spring of 2007, Grievant, in addition to her duties as an Interviewer 2, took on additional duties as an “alternate deputy” in her office.

3. In September of 2008, Grievant sought reallocation. She completed a Position Description Form that was submitted to the DOP for a classification determination.

4. On December 4, 2008, the Division of Personnel's Classification and Compensation Section made a determination that Grievant’s position was properly classified as an Employment Programs Interviewer 2 and denied her reallocation.

5. On December 19, 2008, Grievant appealed DOP's classification determination to the Director of the DOP. On April 2, 2009, the Director concluded Grievant’s position was indeed properly classified as an Employment Programs Interviewer 2 stating “[t]he duties and responsibilities assigned to your position are within the scope and nature of the Employment Programs Interviewer 2 class specification; therefore, your position should remain classified as such.”

6. Debbie Anderson, for the Classification and Compensation Section of the Division of Personnel testified at the Level III hearing. DOP is required to find a significant change in the duties and responsibilities of a position before a reallocation can occur. In review of Grievant's position the DOP did not find a significant change in her duties and responsibilities.

7. DOP is required to classify a position based on predominant duties, not duties that are performed on an occasional and intermittent basis. DOP determined that the additional duties performed by Grievant were of the same level of complexity as those originally assigned to the position or were of an occasional and intermittent nature.

8. The pertinent sections of the classification specifications at issue provide:

EMPLOYMENT PROGRAMS INTERVIEWER 2

Nature of Work
Under general supervision, performs work at the full performance level using standardized interviewing methods to obtain, verify, or interpret information from claimants and/or employers in a local office or itinerant point. Performs related work as required.

Distinguishing Characteristics
Work at this level is characterized by the emphasis placed on greater knowledge of laws, regulations, and/or procedures. In the Unemployment Office, the interviewer is able to take a variety of initial claims in the Unemployment Office, the ability to process complex claims, and can perform various office activities including initial claims, continued claims, fact finding statements, appeal, eligibility review and other activities. Typically, duties at this level do not involve lead work. In the Job Service Office, work at this level is characterized by the emphasis placed on more specialized program knowledge.

Examples of Work
Interviews claimants to determine appropriate claims and takes an Intrastate, Interstate, UCEF, UCX, Combined Wage, New, Additional, Re-open, Partial or Total Claim. May also involve TRA, DUA, EUC, EB, etc.
Interviews applicants to obtain or verify employment history, complete or update applications, or obtain or verify reason for unemployment.
Assigns occupational title and code to application using the Dictionary of Occupational Titles or other approved classification system.

Takes job information from prospective employers by telephone, mail or in person and writes job orders.
Recognizes possible separation and availability issues and takes appropriate fact-finding statements.
May conduct eligibility review interviews.
Verifies claimants' continued claim forms checking for possible issues, completeness, and work search activities before unemployment payment is released.
May appear as a witness for Board of Review hearings, Magistrate Court hearings or trials.
May perform more complex interviews such as fraud and cross match interviews.
May issue non-monetary determinations and may assist with solving on more complex claims.
May conduct predetermination review hearings to gather additional facts on each side of the issue necessary to render separation and non-separation determinations.
Contacts employers to explain services available in order to solicit job orders.
Coordinates referral activities on job orders.
Interprets policies and guidelines.
Prepares reports as requested by the manager.
May be required to travel statewide.

EMPLOYMENT PROGRAMS INTERVIEWER 3

Nature of Work

Under general supervision, performs advanced level work planning and carrying out claims taking activities, deputy duties, planning an effective employer relations program and/or supervisor/managerial duties in supervisor's absence. Must have ability to read, interpret and apply State/Federal Laws, Regulations, and Policies. Performs related work as required.

Distinguishing Characteristics

May be in charge of a specialized function, i.e. initial claims taking process, employer relations programs or performs lead-work duties. Adjudicates a substantial amount of unemployment compensation claims. In a job service office, works on a specialized function or lead work duties.

Examples of Work

Interviews claimants to determine appropriate claims and takes an Intrastate, Interstate, UCEF, UCX, Combined Wage, New, Additional, Re-open, Partial or Total claim. May also involve TRA, DUA, EUC, ET, etc.
Interviews applicants to obtain or verify employment history, complete or update applications, or obtain or verify reason for unemployment.
Assigns occupational title and code to application using the Dictionary of Occupational Title or other approved classification system.
Takes job information from prospective employers by telephone, mail or in person and writes job orders may be in charge of the Job Service Office in the manager's absence.

Contacts employers to explain services available in order to solicit job orders and their participation in Job Service Advisory Committees.
Recognizes possible separation and availability issues and takes appropriate fact-finding statements.
Verifies claimants continued claim forms checking for possible issues, completeness, and work search activities before unemployment payment is released.
May file complaints in Magistrate Court and attend hearings/trials involving prosecution of fraud cases.
May coordinate activities with prosecutor, public defenders, and Magistrate Court regarding any legal action concerning unemployment fraud.
Processes documents for potential relief of charges applying knowledge of Unemployment Compensation Laws and Regulations.
Promotes the use of placement and technical services offered to employers by the agency.
Reviews employer and placement records and consults other staff members to plan the most effective approach to secure employer acceptance of agency service.
Maintains continuing plan service for individual employers, employer record files, and visit control schedules.
Selects and refers applicants on the basis of qualifications.
Contacts employer organizations, unions, civic and other community groups to explain the agency's employment service activities.
May be required to respond to legal action, i.e., subpoenas.
Work as a problem solver on complex claims.
Appears as a witness before Board of Review hearings.
Will conduct predetermination review hearings to gather additional facts on each side of the issue necessary to render separation and non-separation determinations.
May adjudicate contested unemployment compensation claims.
May assign work to lower level employees, may review work of others.
Serves as lead worker over claim activities and may be in charge of office in manager's absence.
Will be required to travel to outside training statewide.
May conduct meetings to train or discuss procedural changes.

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. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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). 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 WORKFORCE 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 requests her position be reallocated to an Employment Programs Interviewer 3 classification. Grievant did not put on any witnesses to testify other than herself and Grievant failed to put on any specific testimony as to her job duties and responsibilities. Grievant provided limited testimony for the majority of the documents she wished to enter into evidence. Over objection of Respondents, the undersigned permitted all of Grievant's documents to be admitted into evidence. The appropriate weight was accorded to each.

DOP's Rule, W. Va. Code R. § 143-1-3.78 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 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." *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997).

In order for a 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 DOP 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 his 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, DOP'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.

Debbie Anderson, employed by the DOP since its inception in 1989, testified that based upon the Division's review of Grievant's Position Description Form, the Grievant's position was correctly classified as an Employment Programs Interviewer 2. Ms. Anderson testified she has reviewed hundreds, if not thousands, of Position Description Forms during her tenure with the Division of Personnel. Ms. Anderson noted the predominant duties of the Grievant's position had not changed; there had been no significant change in duties and therefore a reallocation was not warranted. Ms. Anderson pointed out that the new duties purported to be added to Grievant's position were occasional and intermittent or of the same level and complexity as those originally assigned to the position. Ms. Anderson testified unequivocally that the Employment Programs Interviewer 2 classification was the "best fit" within the current State Classification and Compensation Plan for the work Grievant performs.

After a review of Grievant's Position Description Form, witnesses' testimony, and the rules and regulations governing reallocation, the undersigned Administrative Law Judge

finds Grievant is correctly classified as an Employment Programs Interviewer 2, and this classification is the “best fit” for her duties. The duties Grievant performs fall within those identified in the classification specification, and Grievant failed to demonstrate "a significant change in the kind or level of duties and responsibilities" that would indicate a need to reallocate her position. W. Va. Code R. §143-1-3.78. In summary, Grievant's duties and responsibilities fall squarely within the Employment Programs Interviewer 2 classification specification.

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. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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).

2. In a misclassification grievance, the focus is upon whether the grievant’s duties for the relevant period more closely match those of another cited classification specification than the classification to which she is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Resources,* Docket No. NR-88-038 (Mar. 28, 1989).

3. The key to the analysis is to ascertain whether the grievant's current classification constitutes the "best fit" for his required duties. *Simmons v. W. Va. Dep't of Health and Human Resources,* 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). Importantly, the Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. *See W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

4. 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).

5. The Division of Personnel's determination of its own regulations and classification specifications matters are 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).

6. 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); *Frame 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).

7. Grievant has not demonstrated by a preponderance of the evidence that she

is misclassified, or that the position of Employment Programs Interviewer 2 is not the "best fit" for her predominant duties, as the majority of the tasks she performs fall within the class specification to which her position is currently assigned.

8. Grievant has not demonstrated by a preponderance of the evidence that her duties warrant reallocation. While there have been some changes to her position since she first began her employment, there has not been a significant change in the complexity and difficulty of 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. 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: October 13, 2009

Landon R. Brown
Administrative Law Judge