WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARLA RAMSEY,

Grievant,

v. **Docket No. 2009-0555-DHHR**

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

Respondents.

DECISION

_____Carla Ramsey ("Grievant") grieves the decision of the Department of Health and Human Resources/Welch Community Hospital ("DHHR") and the Division of Personnel ("DOP") denying her request for reallocation[1] to the classification of Nurse 3. Grievant's October 21, 2008, "Statement of Grievance" provides as follows:

> In accordance with established policy and past practice, (as explained to me by Kathy Addiar) as it concerns elevation to Nurse level 3 status, I recently passed a written certification which in fact elevates me to a certified status, thus making me a Nurse Level 3. I presented all required documentation to my personnel department and at that time I was advised that I would not be accorded my Level 3 status and therefore I would not be paid accordingly. My personnel dept[.] could not provide me with any written changes to current policy or any other reasonable explanation. Therefore[,] I am requesting that this decision be reviewed and I be rightfully elevated to Level 3 status with its accompanying raise in pay. If I'm denied my rightful status I request that I be provided with the appropriate dated, written change to the current policy or practice and I be told if this is selective enforcement or across the board.

As relief, Grievant seeks "[e]levation to Nurse III status with accompanying raise in pay."

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[1] Reallocation is the "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.75.

This grievance was denied at Level One. A Level Two mediation was held on February 27, 2009. A Level Three evidentiary hearing was held on August 21, 2009, before the undersigned Administrative Law Judge ("ALJ") in Beckley, West Virginia. Grievant appeared in person and through her counsel Derrick W. Lefler, Esquire. Respondent DHHR appeared by and through its counsel, B. Allen Cambell, Senior Assistant Attorney General. Respondent DOP appeared by and through its counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 1, 2009.

Grievant maintains that her position is improperly classified in the Nurse 2 classification. She argues that the Nurse 3 classification is the "best fit" for her position. To support her argument, Grievant relies upon certain minimal additional duties she has assumed since beginning her employment and her recent national certification as a Maternal Newborn Nurse.

Grievant's duties primarily involve patient care and fit within the Nurse 2 classification. Respondent DOP's classification determination was not unreasonable or otherwise arbitrary and capricious. The Nurse 2 classification is the "best fit" for the Grievant's position in light of the duties of her position. This grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant has been a licensed registered nurse since 1990. Since 2002, she has been employed at Welch Community Hospital as a Nurse 2, and has worked under such classification since being hired. Grievant works as a maternal newborn nurse.

2. On September 26, 2008, Grievant was certified as a "Maternal Newborn Nurse" by the National Certification Corporation. Level Three, Grievant's Exhibit 1.

3. Prior to obtaining her certification as a "Maternal Newborn Nurse," Grievant was informed by Kathy Addair, the Human Resources Director at Welch Community Hospital, that obtaining certification would qualify her for the classification of Nurse 3. This general representation was a significant factor in the Grievant's decision to pursue certification.

4. Grievant completed a Position Description Form (hereinafter "PD Form")[2] on or about June 9, 2009. The DOP reviewed the PD Form and on July 13, 2009, made a determination that Grievant's position was properly allocated to the Nurse 2 classification. *See* Level Three, Respondent DOP's Exhibit 1; Grievant's Exhibit 3.

5. The PD Form contained the following "Duty Statements" which accurately represents the duties performed by the Grievant and the weekly percentage of time the Grievant spends performing the duties:

20% - Evaluation monitoring and tracking changes in condition of patients

15% - Instruction and encouraging patients regarding postpartum issues

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[2] Pursuant to 143 C.S.R. 1 § 4.5, the PD Form is the official document utilized by the DOP to allocate a position to the proper classification within the Classification and Compensation Plan.

15% - Patient teaching regarding prenatal, labor, postpartum and neonatal care and patient education and information regarding contact with other agencies (WIC, right from the start, etc.)

10% - Assist patient and labor coach with reference to breathing exercises, pain management, administration of medication as directed by physician. Birthing room preparation, physician notification regarding progress and problems related to labor.

10% - Patient chart review for continuity of care reporting findings to nurse manager

10% - Mentoring new RNs and LPNs

10% - Filling schedule gaps to provide for recertification mandatory in-service relating to OB and nursery

5% - Oversee completion of West Virginia immunization program data

5% - Review of OB/GYN and neonatal policies and procedures with nurse manager.

Level Three, Respondent DOP's Exhibit 1; Testimony of Carla Ramsey. In addition to these duties, Grievant also serves on two hospital committees: (1) the National Healthcare Safety Network and (2) the Barcode Medication Administration. *Id*. Grievant spends approximately 3-4 hours per month participating in these activities. Level Three, Testimony of Carla Ramsey.

6. The nature of the Grievant's job has not changed significantly since she was hired for the Nurse 2 position. Grievant's duties likewise have not changed significantly.

7. The specification for the Nurse 2 classification provides, in part, as follows:

Nature of Work
Under general supervision, performs professional work at the full-performance level providing direct patient care to individuals within structured health care settings, usually within acute, intermediate and long-term care facilities public health clinics, or home health care agencies. Patients are individuals with fairly common and varied health problems who need information or support to regain and maintain health. Work requires preventive, habilitative or rehabilitative interventions. Nursing interventions may be adapted from

established nursing practices with predictable outcomes. Works independently with other health professionals; may serve as leader of a nursing team of licensed and unlicensed personnel. May serve as a charge nurse at a less diverse local health department or with shift responsibility for a single nursing unit. Shift work may be required. Travel may be required. Performs related work as required.

Distinguishing Characteristics

This is experienced nursing where familiarity with the patient population and the community allows the incumbent to quickly identify less routine health problems and to evaluate lifestyle to determine contributing factors. The assessment for the more varied medical problems require the incumbent to utilize additional medical knowledge to complete a patient history for the attending physician.

Examples of Work

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 well-defined and 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.
Meets with family, significant others, and members of the nursing team to establish and evaluate short- and long range treatment goals.
Provides direction to and may supervise other licensed and unlicensed workers such as contract personnel, LPNs and aides as needed.
Provides direction to and may supervise other licensed and unlicensed workers such as contract personnel, LPNs and aides as needed.
Continues to learn more nursing theory through self development such as reading, seminars and practice.
Assists new or contract nursing personnel in orientation to agency/facility policy and procedures.

Knowledge, Skills and Abilities

Knowledge of the organization's rules and regulations.
Knowledge of the theory, principles, and practices of nursing.
Knowledge of the signs and symptoms of a variety of common and acute health disorders.
Knowledge of medications, their effects, and their side effects.
Knowledge of community and other service resources available to patients.
Skill in the application of nursing techniques and instruments.
Ability to assess and document physical and psychosocial conditions.

Ability to develop patient care plans.
Ability to motivate patients and their families to practice healthier lifestyle behaviors.
Ability to utilize knowledge of the pathology of prevalent diseases and health problems.
Ability to communicate effectively with patients and their families.

8. The specification for the Nurse 3 classification provides, in part, as follows:

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.

Knowledge, Skills and Abilities
Knowledge of the organization's rules and regulations.
Knowledge of the theory, principles, and practices of nursing.
Knowledge of the signs and symptoms of a variety of common and acute health disorders.
Knowledge of medications, their effects, and their side effects.
Knowledge of community and other service resources available to patients.
Skill in the application of nursing techniques and instruments.
Ability to assess and document physical and psychosocial conditions.
Ability to develop patient care plans.
Ability to motivate patients and their families to practice healthier lifestyle behaviors.
Ability to utilize knowledge of the pathology of prevalent diseases and health problems.
Ability to communicate effectively with patients and their families.
Ability to negotiate with service organizations and others.
Ability to evaluate nursing services and recommend solutions.
Ability to write narrative reports.
Ability to provide specialized care for a specific patient population.
Ability to select and apply relevant health information to health needs of individuals or groups.
Ability to supervise nursing personnel.

Discussion

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

In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. 156 C.S.R. 1 § 3

(2008). In this misclassification grievance, the focus is upon whether the Grievant's duties for the relevant period of time 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 Res.*, Docket No. NR-88-038 (Mar. 28, 1989). The key to the analysis is whether Grievant's current classification of Nurse 2 constitutes the "best fit" for her position's required duties. *See Simmons v. W. Va. Dep't of Health & Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominate duties of the position in question are controlling. *Broaddus v. W. V. Div. of Human Servs.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Moreover, class specifications are descriptive only and are not meant to be restrictive. The mention of one duty or requirement does not preclude others. 143 C.S.R. 1 § 4.4(a); *Coates v. W. Va. Dep't of Health & Human Res.*, Docket No. 94-HHR-041 (Aug. 29, 1994).

Analysis of the "best fit" for the Grievant's position begins with consideration of the two job classification specifications at issue. The duties of the Grievant's position must be compared to the DOP job specifications. Generally, personnel job specifications contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These classification 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 the purpose of position comparison, the "Nature of Work" section of a classification

specification is its most critical section. *See generally Dollison v. W. Va. Dep't of Employment Sec.*, Docket No. 89-ES-101 (Nov. 3, 1989).

Upon consideration of the Grievant's duties, the Nurse 2 classification is the best fit for her position. Grievant's position does not serve as a head nurse with 24-hour responsibility for supervision of multiple units within the hospital as is anticipated by the "Nature of Work" section of the Nurse 3 classification specification. Nor does the position function in an administrative capacity. Grievant's duties generally are to provide direct patient care. Finding of Fact 5 *supra*. As Barbara Jarrell, Senior Personnel Specialist, with the Classification and Compensation section of DOP explained, the predominant duty of Grievant's position is primarily responsibility for direct patient care which is what the DOP anticipated for the Nurse 2 classification as set out in the very first sentence of the Nature of Work section. Level Three, Testimony of Barbara Jarrell.

Insofar as the Grievant assumes some duties that could arguably be classified within the Nurse 3 classification, namely administrative-type tasks, her position is still appropriately classified in the Nurse 2 classification. Employees who simply perform some duties normally associated with a higher classification may not be considered misclassified per se. *See generally* 143 C.S.R. 1 § 4; *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (April 15, 1996). Incidental duties which require an inconsequential amount of employees' time will not warrant a higher classification if the remainder of their duties are accurately described by their classification. *Id*. As aforementioned, the analysis is "best fit" and the Nurse 2 classification is the "best fit" for the Grievant's position.

To support her claim of reallocation, the Grievant testified that when she interviewed for the position in 2002, she was told by Welch Community Hospital's Director of Human Resources that by merely obtaining national certification, the Grievant's position would be reallocated to the Nurse 3 classification.[3] Level Three, Testimony of Carla Ramsey. Further, Grievant has produced a memorandum from 1995, nearly seven years before her employment with DHHR, that informs nurses that if they have received certification in a specialty area and qualify for "the next level of classification through the WV Division of Personnel" they may be eligible for reallocation. Level Three, Grievant's Exhibit 2. Insofar as Grievant's reliance upon these averments could be construed as an argument based upon the doctrine of equitable estoppel, this grievance still must be denied. "Ordinarily, unlawful or *ultra vires* promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity." Syl. Pt. 1, *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970). *See Brown v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-384 (Mar. 26, 2008); *Guthrie v. Dep't of Health & Human Serv.*, Docket No. 95-HHR-297 (Jan. 31, 1996); *Franz v. Dep't of Health & Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998). *See generally Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 420 (1985)(recognizing that the public policy behind the *ultra vires* act doctrine is to ensure that the will of the legislature is not thwarted by the executive branch). However, where the act is not in violation of rule

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[3] Grievant testified that on May 9, 2008, she spoke with the Director of Human Resources and asked whether the organization she sought certification through was "recognized as a national certification." The Director of Human Resources replied "yes." Level Three, Testimony of Carla Ramsey. It is not clear whether the Director of Human Resources again told the Grievant that her position would be reallocated if Grievant obtained national certification.

or statute, *or* where justice so requires, the doctrine of equitable estoppel may apply. *See Herland v. Dep't of Health & Human Res.*, Docket No. 92-HHR-416 (Aug. 9, 1993)(recognizing that estoppel may apply where the statement is not in violation of statute); *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711(2007)(per curiam).

"The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine against the state.' Syllabus Point 7, *Samsell v. State Line Development Company*, 154 W.Va. 48, 174 S.E.2d 318 (1970)." Syl. Pt. 3, *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711. "The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.' Syllabus Point 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956)." *Id.* at Syl Pt. 4. *See also Underwood v. Dep't of Health & Human Res.*, Docket No. 2008-1254-DHHR (May 5, 2009).

When considering the case at hand, the doctrine of equitable estoppel is inapplicable. The specific facts of this grievance present no basis that would warrant departure from the doctrine of *ultra vires* act. The Director of Human Resources has no

authority over how DOP classifies state employees. Indeed, our Legislature has granted the DOP with general powers over classification and compensation issues, and the process of classification is guided by both statute and the WEST VIRGINIA CODE OF STATE RULES. *See* W.VA. CODE § 29-6-10(1); 143 C.S.R. 1. *See also Parsons v. W.Va. Bureau of Employment Prog.*, 189 W.Va. 107, 428 S.E.2d 528 (1993). It is unfortunate and regrettable that Grievant was somewhat mislead; however, the statement made by the Director of Human Resources constitutes an *ultra vires* act and this scenario does not present a situation where justice requires the application of equitable estoppel.

DOP's interpretation and explanation of the classification specifications at issue, if the language is determined to be ambiguous, should be given great weight unless clearly erroneous. *See W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993). The clearly wrong standard requires the reviewing authority to presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W.Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W.Va. 485, 655 S.E.2d 204 (2007); *Bennet v. Insurance Comm'n & the Div. of Personnel*, Docket No. 07-INS-299 (June 27, 2008). In this grievance, it cannot be said that the DOP's interpretation is unreasonable or otherwise erroneous. The Nurse 2 classification is the "best fit" for the Grievant's position. The doctrine of equitable estoppel does not apply. This grievance must be denied.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In order to prevail upon a claim of misclassification, a grievant must prove by a preponderance of the evidence that her duties for the relevant period of time 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 Res.*, Docket No. NR-88-038 (Mar. 28, 1989).

2. The predominant duties of the position in question are class-controlling. *Thomas v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-187 (July 10, 1996); *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

3. In order for a position to be reallocated to a different classification there must be "a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.75. *See Keys v. Dep't of Envtl. Prot.,* Docket No. 06-DEP-307 (Apr. 20, 2007); *Kuntz/Wilford v. Dep't of Health & Human Res.*, Docket No. 96-HHR-301(Mar. 26, 1997); *Siler v. Div. of Juvenile Serv.*, Docket No. 06-DJS-331 (May 29, 2007).

4. The Division of Personnel's interpretation of its own regulations and class specifications matters are within its expertise, and these interpretations are entitled to substantial weight. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Farber v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR- 052 (July 10, 1995).

5. The Grievant has not established, by a preponderance of the evidence, that the Nurse 3 classification is the "best fit" for her position because the predominant duties of her position fall within the Nurse 2 classification and there has not been a significant change in her duties.

6. "Ordinarily, unlawful or *ultra vires* promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity." Syl. Pt. 1, *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970). *See Brown v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-384 (Mar. 26, 2008); *Guthrie v. Dep't of Health & Human Serv.*, Docket No. 95-HHR-297 (Jan. 31, 1996); *Franz v. Dep't of Health & Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998).

7. The statement concerning national certification and reallocation by Welch Community Hospital's Director of Human Resources constitutes an *ultra vires* act and justice does not require the application of equitable estoppel in this scenario.

Accordingly, this grievance is hereby **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 WEST VIRGINIA 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 21, 2009

Mark Barney
Administrative Law Judge