THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TINA DILLON, ET AL,
Grievants,

v. **Docket No. 2010-0779-CONS**

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

DECISION

Grievants, Tina Dillon, Lafayta Ely, Tracey Fruia, Melissa Bishop, Tommie Mongeni, and Mary Mitchem, filed grievances on or about the dates of December 11 through December 14, 2009.[1] All Grievants asserted that they were working out of their classification of an Office Assistant II (OA2), in the classification of an Office Assistant III (OA3). Grievants asserted that they had been working out of classification since December 2008 and sought backpay as relief. On December 14, 2009, the Chief Administrator waived to level two of the grievance process. These grievances were submitted as a group by the Grievants and were consolidated for purposes of hearing and decision on December 30, 2009. The Division of Personnel was joined as a Respondent party on July 15, 2010. A level two mediation was conducted in Beckley, West Virginia, on October 14, 2010. On or about December 2, 2010, Grievants filed a Motion to Restate

[1]Grievant Mitchem no longer works for Welch Community Hospital.

Grievances clarifying their relief sought as seeking "to be made whole, including back pay and interest..."

A level three hearing was conducted by the undersigned on October 3, 2011, in Beckley, West Virginia. Grievants were represented by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent Department of Health and Human Resources/Welch Community Hospital (WCH) was represented by Anne B. Ellison, Assistant Attorney General. Respondent Division of Personnel (DOP) was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on November 14, 2011.

Synopsis

Grievants assert that during a period of time when a supervisory OA3 position was vacant, that they performed duties of an OA3. Respondents assert that Grievants did not perform work outside of their job classification of an OA2 and are properly classified as OA2s.

Grievants did not assume the duties and responsibilities of an OA3 during the time the OA3 position was vacant. The predominant duties of Grievants' positions did not significantly change in kind or level while the OA3 position was vacant. Grievants have not met their burden of proof. Respondent DOP's determination that the OA2 classification is the best fit for the Grievants' positions was not clearly wrong or arbitrary and capricious. Accordingly, this grievance is DENIED.

Findings of Fact

1. At the time of the filing of this grievance, Grievants were all employed by WCH in positions classified as OA2s, serving as Admissions Clerks in the Admissions Department.

2. The role of the Grievants' positions as Admissions Clerks is to register patients, follow through with reports, check to see that registration is done correctly and verify insurance.

3. During a few months period of time[2], the Assistant Supervisor in WCH's Admissions Department, whose position is classified as an Office Assistant III (OA3), was vacant.

4. In December 2009, Grievants completed Position Description Forms (PDFs).

5. The PDF is the document the DOP must utilize when classifying positions. It is the basic source of official information about a position; containing official duties, responsibilities, supervisory relationships and other pertinent information relevant to a position.

6. The DOP is the only entity in State government charged by law with classifying positions in the Classified Service.

7. On February 1, 2010, the DOP determined the positions were all properly allocated to the OA2 classification.

8. During the period of time the OA3 position was vacant, Grievants worked

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[2]It is unclear by the different testimonies provided at the level three hearing exactly what months the OA3 position was vacant. However, all testimonies generally have the time frame beginning around December 2008.

together as a group to come up with a schedule for two months. Johnny Brant, Chief Financial Officer for WCH, approved the schedules.

9. Mr. Brant supervises the Admissions Supervisor. The Admissions Supervisor supervises the Assistant Supervisor who, in turn, supervises the Admissions Clerks.

10. During the time when there was not an OA3, Mr. Brant assumed the direct supervisory duties over the Grievants, including approving the OA2s' time off, conducting their evaluations, approving their schedule, reviewing and approving their time sheets, and was responsible for employee discipline.

11. During the period of time the OA3 position was vacant, Grievants collected and turned in time sheets to the Human Resources Department. None of the Grievants reviewed any of the other Grievants' time sheets before they were submitted.

12. During the period of time the OA3 position was vacant, Mr. Brant signed the Grievants' leave slips.

13. Filling out "green sheets", i.e. calling to verify patient insurance, is listed in the OA2 functional job description[3] at WCH and is part of the admissions process.[4]

14. The OA3 position serves the dual role of assisting the supervisor position with supervisory responsibilities and assisting the OA2 positions with the admissions process. At WCH, the OA3 position serves as the lead worker for the unit.

15. The PDFs[5] submitted by the Grievants did not contain lead worker

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[3]No party bothered to submit into evidence a functional job description or class specification description for an OA2 or OA3.

[4]*See* level three hearing testimony of Mr. Brant.

[5]*See* DOP Exhibit No. 1, PDF.

responsibilities. Lead worker responsibilities include assigning work, reviewing work, leading work, doing the scheduling, signing the leave slips, etc. None of the Grievants performed these duties.

16. Drafting a schedule as a group is not considered lead work.[6]

17. During the period of time the OA3 position was vacant, the OA3 duties were assigned upward to a position with a higher classification than OA3, rather than downward to an OA2 position.

Discussion

In a misclassification grievance, the Grievants must prove by a preponderance of the evidence that the work they are doing is a better fit in a different classification than the one in which their positions are 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). 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.*

Grievances contesting a grievant's current classification are therefore decided under rules of law which give DOP's interpretation of classification specifications great weight unless that interpretation is shown to be clearly erroneous. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an

[6]*See* level three hearing testimony of Barbara Jarrell, Assistant Director, Classification and Compensation section of the DOP.

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)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). It is fair to say that a grievant challenging her classification has an uphill battle. *Bennett v. Insurance Comm'n and Div. of Pers.,* Docket No. 07-INS-299 (June 27, 2008).

Grievants assert that during a period of time when the OA3 position was vacant, that they performed duties of an OA3. Respondents assert that Grievants did not perform work outside of their job classification of an OA2 and are properly classified as OA2s. The DOP Legislative Rule 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." 143 C.S.R. 1 § 3.75. To receive a reallocation, an employee must demonstrate "a significant change in the kind or level of duties and responsibilities." Additionally, Grievants must prove by a preponderance of the evidence that their duties more closely match another cited Division of Personnel classification specification than the one under which they are currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989). *See Campbell v. Dep't of Transp./Div. of Highways,* Docket No. 05-DOH-385 (May 26, 2009).

The Grievance Board's role is not to act as an expert on matters of classification of positions. *Moore v. W.Va. Dept. of Health & Human Resources*, 94-HHR-126 (Aug. 26, 1994). Employees have a substantial obstacle to overcome when contesting their classification, as the grievance board's review is supposed to be limited to determining

whether or not the agency's actions in classifying the position were arbitrary and capricious. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

Grievants did not assume the duties and responsibilities of an OA3 during the time the OA3 position was vacant. Mr. Brant, a supervisor to the vacant OA3 position, assumed the direct supervisory role over Grievants and the responsibilities of the OA3 position. The predominant duties of Grievants' positions did not significantly change in kind or level while the OA3 position was vacant.

Grievants have not met their burden of proof. Respondent DOP's determination that the OA2 classification is the best fit for the Grievants' positions was not clearly wrong or arbitrary and capricious. Accordingly, this grievance is DENIED.

Conclusions of Law

1. In a misclassification grievance, the Grievants must prove by a preponderance of the evidence that the work they are doing is a better fit in a different classification than the one in which their positions are 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. 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.*

3. Grievances contesting a grievant's current classification are decided under rules of law which give DOP's interpretation of classification specifications great weight unless that interpretation is shown to be clearly erroneous. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which 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)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). It is fair to say that a grievant challenging her classification has an uphill battle. *Bennett v. Insurance Comm'n and Div. of Pers.,* Docket No. 07-INS-299 (June 27, 2008).

4. To receive a reallocation, an employee must demonstrate "a significant change in the kind or level of duties and responsibilities." Additionally, Grievants must prove by a preponderance of the evidence that their duties more closely match another cited Division of Personnel classification specification than the one under which they are currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989). *See Campbell v. Dep't of Transp./Div. of Highways,* Docket No. 05-DOH-385 (May 26, 2009).

5. The Grievance Board's role is not to act as an expert on matters of classification of positions. *Moore v. W.Va. Dept. of Health & Human Resources*, 94-HHR-126 (Aug. 26, 1994). Employees have a substantial obstacle to overcome when contesting their classification, as the grievance board's review is supposed to be limited to determining whether or not the agency's actions in classifying the position were arbitrary and capricious. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d

681, 687 (1993).

6. Grievants did not assume the duties and responsibilities of an OA3 during the time the OA3 position was vacant. The predominant duties of Grievants' positions did not significantly change in kind or level while the OA3 position was vacant.

7. Grievants have not met their burden of proof. Respondents' determination that the OA2 classification is the best fit for the Grievants' positions was not clearly wrong. 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: December 12, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge