WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARY MICHELLE WHITE,
Grievant,

v. **Docket No. 2010-1337-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR BEHAVIORAL HEALTH AND HEALTH FACILITIES
and DIVISION OF PERSONNEL,
Respondents.

DECISION

This grievance was filed by Grievant, Mary Michelle White, against Respondent, West Virginia Department of Health and Human Resources/Bureau for Behavioral Health and Health Facilities (DHHR/BHHF) on April 6, 2010. Statement of Grievance reads:

> Working out of classification for an extended period of time. Performing responsibilities of Secretary I and HHR Specialist.

As relief, Grievant seeks "back pay and reclassification to Secretary I or Health and Human Resource Specialist".

On April 13, 2010, a level one hearing was waived by DHHR's Grievance Management Unit Manager, Christopher B. Amos, stating lack of authority to determine classification and compensation matters. A level two mediation was held on January 12, 2011. On January 26, 2011, Division of Personnel was joined as a party respondent. On May 6, 2011, a level three hearing was held at the Grievance Board's office in Charleston, West Virginia. Grievant appeared *pro se.* Respondent West Virginia Department of Health and Human Resources/Bureau for Behavioral Health and Health Facilities (DHHR/BHHF)

was represented by Harry C. Bruner, Jr., Assistant Attorney General. Respondent Division of Personnel (DOP) was represented by Karen O'Sullivan Thornton, Assistant Attorney General. At the level three hearing, Grievant clarified that she is seeking reallocation of her position from an Office Assistant III (OA3) to the classification of Health and Human Resource Specialist (HHR Specialist). This matter became mature for decision on June 23, 2011, upon final receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant seeks to have the position she holds for the Department of Health and Human Resources/Bureau for Behavioral Health and Health Facilities (DHHR/BHHF) reallocated from an Office Assistant III to a Health and Human Resources Specialist. Respondents, DHHR/BHHF and DOP, assert that Grievant's position is properly classified as an Office Assistant III.

Grievant did not prove that the classification determination made by DOP was clearly wrong, therefore, the grievance must be denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant began working for Respondent's Children's Mental Health division (CMH) as an Office Assistant III (OA3) on or about October 18, 2009.

2. On December 7, 2009, Grievant was transferred as an OA3 to Respondent's DUI unit.[1]

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[1]The DUI unit was established by the legislature. The unit essentially assists individuals who have been charged with a DUI in going through the proper steps and

3. Sometime prior to April 20, 2010, Grievant completed a Position Description Form (PDF)[2] requesting reallocation to a Health and Human Resources Specialist. The PDF was submitted to the DOP for review and a classification determination.[3]

4. On October 18, 2010, DOP determined the position should remain allocated in the OA3 classification.[4]

5. On October 29, 2010, Grievant submitted a request for reconsideration of the classification.

6. On December 13, 2010, Sara P. Walker, Director of DOP, advised Grievant of her decision to affirm the original classification determination that the position was properly allocated to the OA3 classification.[5]

7. Barbara Jarrell, Assistant Director of the Classification and Compensation section of DOP, conducted a desk audit for Grievant's position. While conducting the desk audit, Ms. Jarrell observed Grievant's job duties and determined the position should remain classified as an OA3.

8. The DOP Classification Specification for Office Assistant 3 (OA3)[6] reads in

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procedures, including attending the appropriate classes, counseling or treatment, in order to regain their driver's license.

[2]DOP's Exhibit No. 1.

[3]Grievant did not date her PDF, though testified she filled out and signed the document just prior to giving it to her supervisor for review and signature. Her supervisor signed and dated the form on April 20, 2010.

[4]*See* DOP's Exhibit No. 2

[5]*See* DOP's Exhibit No. 3.

[6]DOP's Exhibit No. 4.

part:

Nature of Work

> Under general supervision, performs advanced level, responsible and complex clerical tasks of a complicated nature involving interpretation and application of regulations. May function as a lead worker for clerical positions. Performs related work as required.

Distinguishing Characteristics

> Performs tasks requiring interpretation and adaptation of office procedures, policies, and practices. A significant characteristic of this level is a job-inherent latitude of action to communicate agency policy to a wide variety of people, ranging from board members, federal auditors, officials, to the general public.

Minimum Qualifications

> **Training**: Graduation from a standard high school or the equivalent.
> **Experience:** Four (4) years of full-time or equivalent part-time paid experience performing routine office work.
> **Substitution:** College hours, related business school, or vocational training may be substituted through an established formula for the required experience.

9. The DOP Classification Specification for Health and Human Resources Specialist[7] (HHR Specialist) reads in part:

Nature of Work:

> Under general supervision, performs work at the full-performance level by providing development of program, as well as associated policy and procedures based on standards and regulation, administrative oversight of and complex technical assistance with a program or a particular major component of a statewide program, or major technical area specific to or characteristic of the Department of Health and Human Resources. Assures compliance with federal, state, and local regulations governing the program or technical area. Uses independent judgement to determine appropriate action taken to achieve desired results. Has responsibility for providing consultation on highly complex individual problem situations. Develops and

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[7]DOP's Exhibit No. 5.

delivers training programs related to assigned program or component. Monitors and evaluates the operation of the assigned program or program component. Exercises considerable latitude in determining approaches to problem solving. Work may be performed independently and/or in conjunction with other program or technical area staff. Performs related work as required.

Distinguishing Characteristics

The Health and Human Resources Specialist is distinguished from the Health and Human Resources Associate by the responsibility for development and management of a statewide program or operational area or a significant segment of a major statewide program or operational area. This class is distinguished from the Health and Human Resources Specialist, Senior, by the fact that although the Specialist may oversee clerical or support staff in relation to the completion of his/her own work, this class does not function in a regularly assigned lead or supervisory capacity over professional classes as a significant segment of their total assignment nor does he/she have responsibility related to entire programmatic or operational systems.

Minimum Qualifications

Training: Graduation from an accredited four-year college or university.
Substitution: Additional experience as described below may be substituted for the required training on a year-for-year basis.
Experience: Two years full-time, equivalent part-time paid or volunteer experience in a technical or program area that is related to the area of employment.
Substitution: Post-graduate education in a field related to the technical or program area may be substituted for the required experience on the basis of fifteen semester hours for one year of experience.
OR
Master's Degree in social work from an accredited social work program in a four-year college or univeristy.

10. Grievant graduated from the Charleston Job Corp in 1985 with a Clerk Typist degree. Grievant attended Garnet Career Center, but did not graduate.

11. Grievant does not give clinical judgments and does not make clinical assessments. Grievant does not set the recommended course of treatment for individuals

who have been charged with a DUI.

12. Grievant has no clinical background.

13. For the DUI unit only, Grievant transcribes letters, opens mail, files, answers and makes phone calls, acts as a receptionist, attends meetings and takes notes, inputs information into databases, and responds to emails.

14. Grievant follows a checklist of required documentation to ensure that individuals have completed the appropriate forms in order to regain their driver's license. If an individual has not submitted all appropriate forms, Grievant mails the forms to the individual. After Grievant ensures all the required forms have been received, an HHR Specialist Senior staff member reviews the individual's file of documentation to determine if the assessment meets clinical standards. Grievant does not have the authority to determine whether an individual regains their driver's license.

15. Ginny Fitzwater, Human Resources Director for Respondent DHHR/BHHF, believes the position is properly classified as an OA3.

16. Grievant does not meet the Minimum Qualifications's education or experience requirements to be classified as an HHR Specialist.

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). 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 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).

Grievant asserts she should be reallocated to the HHR Specialist classification. Grievant argues that her duties and responsibilities changed when she was transferred from Respondent’s CMH division to Respondent’s DUI unit. Respondents DHHR/BHHF and DOP assert that Grievant is properly classified as an OA3. 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, Grievant must prove by a preponderance

of the evidence that her duties more closely match another cited Division of Personnel 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). *See Campbell v. Dep't of Transp./Div. of Highways,* Docket No. 05-DOH-385 (May 26, 2009).

The predominant duties of this position have not significantly changed in kind or level since Grievant was transferred to Respondent's DUI unit. Grievant's predominant responsibilities involve speaking with individuals on the phone regarding the DUI program and ensuring all documents on the checklist are in the individual's file so that an HHR Specialist can review the file. Grievant's duties are complex clerical responsibilities which fall within the OA3 classification. Consequently, a reallocation of this position was not consistent with the DOP rules.

Grievant does not possess the required minimum training or substitute experience to qualify for the HHR Specialist classification. Grievant asserts other employees for DHHR/BHHF hold positions which require graduation from an accredited four-year college or university without satisfying the requirement. Classification determinations are not made based upon comparison to other employees, but upon which classification description is the best fit for that employee's duties. *Baldwin v. Dep't of Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999), *See also, Harmon v. Dep't of Health and Human Resources and Div. of Personnel*, Docket No. 99-HHR-432 (May 15, 2000). Classification determinations do not involve a comparison of the duties of a grievant to those of other employees in the classification sought. Those to whom the grievant compares himself may

themselves be misclassified, or, they may have some duties and responsibilities which the grievant has no knowledge of. Further,

> "[t]he remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that she performs, is not to similarly misclassify the grievant. *Akers v. W.Va. Dept. of Tax and Revenue*, 194 W.Va. 956, 460 S.E. 2d 702 (1995)." *Myers v. Dep't of Health and Human Resources*, Docket No. 00-HHR-392D (2001).

Stihler, supra., citing Bender v. Dep't of Health and Human Res., Docket No. 00-HHR-305 (April 26, 2001); *See also, Kunzel v. Dep't of Health and Human Resources*, Docket No. 97-HHR-287 (Jan. 8, 1998), *Smith v. Dep't of Health and Human Resources*, Docket No. 94-HHR-1077 (Nov. 9, 1998). The key is to compare Grievant's duties and responsibilities to the classification at issue, utilizing the clearly wrong standard. *Stihler, supra*.

Respondent DOP's determination that the Office Assistant III classification is the best fit for Grievant's position was not clearly wrong. Accordingly, this grievance is DENIED.

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. 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 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 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)).

4. 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).

5. Classification determinations are not made based upon comparison to other employees, but upon which classification description is the best fit for that employee's duties. *Baldwin v. Dep't of Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999), *See also, Harmon v. Dep't of Health and Human Resources and Div. of Personnel*, Docket No. 99-HHR-432 (May 15, 2000).

6. Classification determinations do not involve a comparison of the duties of a grievant to those of other employees in the classification sought. Those to whom the grievant compares himself may themselves be misclassified, or, they may have some duties and responsibilities of which the grievant has no knowledge. Further,

> "[t]he remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that she performs, is not to similarly misclassify the grievant. *Akers v. W.Va. Dept. of Tax and Revenue*, 194 W.Va. 956, 460 S.E. 2d 702 (1995)." *Myers v.*

Dep't of Health and Human Resources, Docket No. 00-HHR-392D (2001). *Stihler, supra., citing Bender v. Dep't of Health and Human Res.*, Docket No. 00-HHR-305 (April 26, 2001); *See also, Kunzel v. Dep't of Health and Human Resources*, Docket No. 97-HHR-287 (Jan. 8, 1998), *Smith v. Dep't of Health and Human Resources*, Docket No. 94-HHR-1077 (Nov. 9, 1998). The key is to compare Grievant's duties and responsibilities to the classification at issue, utilizing the clearly wrong standard. *Stihler, supra*.

7. Grievant did not prove by a preponderance of the evidence that the classification determination made by DOP was 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: July 22, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge