THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PHILIP E. MYERS,
Grievant,

v. **Docket No. 2012-0225-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ WILLIAM R. SHARPE, JR. HOSPITAL and DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, Phillip E. Myers, filed this grievance on May 12, 2011, in which he challenges a "verbal warning for refusal to sign policy requiring the employee to work out of classification." He seeks "to be made whole, including (but not limited to) abrogation of illegal work assignments and pay upgrade for work done out of classification." The Grievance Evaluator waived the grievance to level two due to being unable to grant the relief sought. The Division of Personnel was joined to this grievance as an indispensable party by Order entered September 2, 2011. A level two mediation session was conducted on January 27, 2012. Grievant perfected his appeal to level three on February 14, 2012. A level three hearing was conducted before the undersigned Administrative Law Judge on September 24, 2012, at the Grievance Board's Westover office location. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. The Department of Health and Human Resources appeared by its counsel, James "Jake" Wegman, Assistant Attorney General. The Division of Personnel appeared by its counsel, Karen O'Sullivan Thornton, Assistant Attorney

General. The case became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on December 6, 2012.

Synopsis

Contrary to Grievant's Statement of Grievance, this case is not disciplinary in nature. At level three, Grievant argued that he was being forced to work out of his classification. Grievant failed to establish by a preponderance of the evidence that he was eligible for reallocation. In addition, Grievant failed to establish by a preponderance of the evidence that he met the necessary requirements to be eligible for a temporary upgrade.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant is employed at Sharpe Hospital as a Health Service Worker. Grievant had previously been employed as a Health Service Assistant; however, he accepted a voluntary demotion from Health Service Assistant to Health Service Worker for personal and health reasons.

2. Grievant argued that since February 2012, he and other Health Service Workers have been asked to fill in as a Programmer or Charge Aide. Grievant asserts that Charge Aide and Programmer duties are typically performed by Health Service Assistants.

3. Grievant was asked to place his signature on a sheet of paper indicating that he had read and understood Sharpe Hospital's policy regarding completing and updating the shift log. Grievant refused to sign the document acknowledging that he understood and was willing to adhere to the policy. Grievant noted on the sign off sheet that "Do not agree out of job discription [sic]." Respondent's Exhibit No. 1.

4. The record does indicate that Sharpe Hospital, periodically, will ask employees to fill in and perform extra duties. Sharpe Hospital concedes that it has staffing issues and occasionally assigns employees to fill in and perform a variety of different job duties and responsibilities for other employees during absences from work.

5. The record did not demonstrate that Grievant's assignments constituted a significant change in duties requiring reallocation. In addition, Grievant did not demonstrate that a temporary upgrade was in order because he was not performing the duties of a different higher level position on a permanent full-time basis for more than thirty consecutive days.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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).

Grievant argues that he proved that Programmer and Nurse Aide duties were those properly assigned to a Health Service Assistant rather than a Health Service Worker. The undersigned agrees with the Division of Personnel's assessment that it was difficult at level

three to discern what Grievant was complaining about or what relief he was seeking. In any event, it would appear from his fact/law proposals that he is seeking either reallocation or a temporary upgrade.

In order for Grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant time period more closely match another cited Division of Personnel classification specification than that under which he is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989). Division of 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. *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

Grievant alleges he has been performing the duties of a Health Service Assistant and should, in some fashion, be classified as such. Respondents argue Grievant is properly classified. Division of Personnel's Rule 3.72 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 not demonstrated a significant change in job duties to warrant a reallocation. Grievant failed to establish by a preponderance of the evidence that his day in and day out job duties more closely fit with a Health Service Assistant. Employees who simply perform some duties normally associated with a higher classification may not be considered misclassified *per se*.[1] Grievant failed to establish by a preponderance of the evidence that he was being made to work out of classification and eligible for a reallocation.

The purpose of the Division of Personnel's temporary upgrade policy is:

> [t]o provide for the approval of a pay differential, as provided in Section 5.4(d) of the Administrative Rule, 143CSR1, for employees who, during a specified limited period of time, perform work on a full-time basis that is envisioned in a Division of Personnel job class of a higher rank as measured by salary range and an increased level of duties and/or responsibilities.[2]

The assignment is for no less than thirty calendar days and no more than six months. DOP-13, II.C.2.

The record established that in order for a temporary upgrade to occur, an employee must be performing the duties of a different higher level position on a permanent full-time basis for more than thirty calendar days. It was undisputed by Grievant that the facts of this case did not establish such a scenario. In addition, an agency can assign employees

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

[2]West Virginia Division of Personnel, Temporary Classification Upgrades, Policy Number: DOP-13.

other duties than those typically assigned to the position, and Grievant's predominant duties were within the Health Service Worker classification.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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. The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *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. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id*.

3. Grievant has not met his burden of proof and has failed to demonstrate a significant change in the kind or level of duties and responsibilities to warrant a reallocation.

4. Grievant failed to establish by preponderance of the evidence that he met the requirements necessary to be eligible for a temporary upgrade.

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: January 11, 2013

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Ronald L. Reece
Administrative Law Judge