

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CHRIS THOMAS,
Grievant,**

v.

Docket No. 2017-2110-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.**

DECISION

Grievant, Chris Thomas, is employed by Respondent, Department of Health and Human Resources within the Bureau for Children and Families. On April 24, 2017, Grievant filed this grievance against Respondent stating, "On 2/1/2017 hired as an APS investigator, but still working as a SSII." For relief, Grievant sought "[t]o be made whole including worked within classification.

By *Notice of Level 1 Waiver*, the level one grievance evaluator found she lacked authority to decide the matter and waived it to level two of the grievance process. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on April 18, 2018. A level three hearing was held on August 3, 2018, before Administrative Law Judge Carrie H. LeFevre¹ at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on September 11, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

¹This case was reassigned to the undersigned on October 16, 2018 for administrative purposes.

Synopsis

Grievant is employed by Respondent in its Wood County office as an Adult Protective Services Worker. Although Grievant was promoted to her Adult Protective Services Worker position, due to high turnover, she continued to be assigned the duties of her previous Social Service Worker II position. Grievant requested “the immediate and continued removal of assignments that are clearly not within her classification.” Grievant is not entitled to the removal of the out-of-class duties she is required to perform as those duties comprise no more than five percent of her total duties. Grievant’s request for the continued removal of out-of-class duties due to her concern that the out-of-class duties may again become predominant is speculative and would constitute an advisory opinion, which is unavailable. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent in its Wood County office as an Adult Protective Services Worker, which is a pay grade 13.
2. Grievant was previously employed by Respondent as a Social Service Worker II, which is a pay grade 11.
3. On February 1, 2017, Grievant was promoted from her position as a Social Service Worker II to her present position as an Adult Protective Services Worker.
4. At that time, the Wood County office was experiencing an extraordinary shortage of staff.

5. As a result, Community Services Manager Delbert Casto assigned Grievant Social Service Worker II duties in addition to her new duties as an Adult Protective Services Worker.

6. At the time Grievant assumed her new position as an Adult Protective Services Worker in February 2017, she estimates she continued to perform 85% Social Service Worker II duties.

7. As new Social Service Worker IIs were hired and Mr. Casto was able to cover some Social Service Worker II cases by assigning the same to supervisors and employees from other county offices, those cases were removed from Grievant's caseload, reducing the amount of Social Service Worker II duties she was performing. By August 2017, Grievant estimates she was performing mostly Adult Protective Services Worker duties, and, by the level three hearing, Grievant was performing no more than 5% Social Service Worker II duties.

8. The nature of work for a Social Service Worker II is as follows:

Under general supervision performs full-performance level social service work in providing services to the public in one or multiple program areas. Work requires the use of a personal automobile for local travel. Employee is subject to on-call status during non-business hours. May be required to deal with situations which are potentially dangerous to client and worker. Performs related work as required.

9. The nature of work for an Adult Protective Services Worker is as follows:

Under general supervision, performs advanced and complex social casework in the area of Adult Protective Services. Work is characterized by cases involving abuse/neglect/exploitation of adults. The nature of the situations requires expertise and judgment to deal with problems that are potentially dangerous to the client and the worker. Work requires the use of personal automobile for travel. Employee is subject to being on-call

during non-business hours and must be available and have access to a telephone. Performs related work as required.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008). “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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant asserts she was deliberately worked out of her classification and requests “the immediate and continued removal of assignments that are clearly not within her classification.” Respondent asserts the grievance is moot because Grievant is now performing no more than 5% of her duties outside of her classification.

“Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].” *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)). The grievance is not moot. Grievant is still being assigned duties outside of her classification and asserts she is entitled to have all such duties removed. Thus, the issue is still in controversy and the question is whether Grievant has proved she is entitled to the relief she seeks.

The Division of Personnel establishes and applies “a system of classification for positions in the classified and classified-exempt service.” W.VA. CODE § 29-6-5(b)(2).

“State agencies. . .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). *Guertin v. Tax Dep't and Div. of Personnel*, Docket No. 2009-1687-DOR (July 27, 2010). *Newhouse v. Insurance Commission and Div. of Personnel*, Docket No. 2016-0104-CONS (July 26, 2016).” *Barker v. Dep't of Health and Human Res.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016). “A supervisor or administrator responsible for a willful act of bad faith toward an employee or who intentionally works an employee out of classification may be subject to disciplinary action, including demotion or discharge. W. VA. CODE § 6C-2-3(i).

The Grievance Board has previously found that agencies may occasionally and intermittently assign employees work outside their normal classification to help in areas of need. See *Broaddus et al. v. Dep't of Health & Human Ser.*, Docket No. 89-DHS-606/607/608/609 (Aug, 31, 1990); *Adkins v. Workforce W. Va. and Div. of Personnel*, Docket No. 2009-1457-DOC (Oct. 13, 2009). However, “If an employer assigns “out of class” duties to an employee on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification. *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996); *Shremshock v. W. Va. Dept. of Trans.*, Docket No. 94-DOH-095 (Aug. 31, 1994). *Reed v. WV Div. of Corrections*, Docket No. 97-CORR-127 (May 22, 1998).” *Hall v. Div. of Natural Res. and Div. of Personnel*, Docket No. 00-DNR-053 (Apr. 28, 2000).

In *Barker v. Dep't of Health and Human Res.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016) the Grievance Board ordered the removal of all duties outside of the grievant's

classification after finding that “[a]ssigning [an employee] duties that are outside her classification and which take up nearly half of her work day is not adherence to the Division of Personnel classification plan.” In the instant grievance, Grievant was clearly being worked outside of her classification for a period of time, as 85% of her duties were that of a Social Service Worker II rather than an Adult Protective Services Worker. However, since August 2017, no more than 5% of Grievant’s duties are outside of her classification. Grievant cites *Barker* in support of her argument that she is entitled to have all Social Service Worker II duties removed.

In a recent decision, *Crowder et al. v. Div. of Corr.*, Docket No. 2018-0417-CONS (Oct. 4, 2018), the Grievance Board has clarified that, despite the “frequent or long-term” language of *Hall* and *Barker*, it has ordered the removal of out-of-class duties only when such duties became the predominant duties of the position. This is consistent with the *Administrative Rule of the West Virginia Division of Personnel* which states, “A class specification is a general description of the kinds of work characteristic of positions properly allocated to that class and does not prescribe the duties of any position. It does not limit the expressed or implied authority of the appointing authority to prescribe or alter the duties of any position.” W.VA. CODE ST. R. § 143-1-4.3.a (2016). As Grievant is currently being assigned no more than 5% out-of-class duties, she is not entitled to the removal of those duties.

Grievant further requests the Grievance Board order the continued removal of assignments not within her classification as she is concerned that, due to turnover, she may again be assigned predominantly Social Service Worker II duties. The Grievance Board will not decide matters that are “speculative or premature, or

otherwise legally insufficient.” *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm’n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012). As Grievant requests relief for a circumstance that has not occurred, any decision of the Grievance Board would be speculative and an advisory opinion, which is unavailable.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. Agencies may occasionally and intermittently assign employees work outside their normal classification to help in areas of need. *See Broaddus et al. v. Dep’t of Health & Human Ser.*, Docket No. 89-DHS-606/607/608/609 (Aug. 31, 1990); *Adkins v. Workforce W. Va. and Div. of Personnel*, Docket No. 2009-1457-DOC (Oct. 13, 2009).

However, “If an employer assigns “out of class” duties to an employee on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification. *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996); *Shremshock v. W. Va. Dept. of Trans.*, Docket No. 94-DOH-095 (Aug. 31, 1994). *Reed v. WV Div. of Corrections*, Docket No. 97-CORR-127 (May 22, 1998).” *Hall v. Div. of Natural Res. and Div. of Personnel*, Docket No. 00-DNR-053 (Apr. 28, 2000).

3. The Grievance Board has only ordered the removal of out-of-class duties when those duties became the predominant duties of the position. *Crowder et al. v. Div. of Corr.*, Docket No. 2018-0417-CONS (Oct. 4, 2018).

4. “A class specification is a general description of the kinds of work characteristic of positions properly allocated to that class and does not prescribe the duties of any position. It does not limit the expressed or implied authority of the appointing authority to prescribe or alter the duties of any position.” W.VA. CODE ST. R. § 143-1-4.3.a (2016).

5. Grievant is not entitled to the removal of the out-of-class duties she is required to perform as those duties comprise no more than five percent of her total duties.

6. The Grievance Board will not decide matters that are “speculative or premature, or otherwise legally insufficient.” *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994).

7. The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm'n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012).

8. Grievant's request for the continued removal of out-of-class duties due to her concern that the out-of-class duties may again become predominant is speculative and would constitute an advisory opinion, which is unavailable.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: October 23, 2018

Billie Thacker Catlett
Chief Administrative Law Judge