MARSHA A. ARTHUR, .

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Grievant, .

.

v. . Docket No. 93-BEP-527

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WEST VIRGINIA STATE DEPARTMENT OF .

COMMERCE, LABOR AND ENVIRONMENTAL .

RESOURCES, BUREAU OF EMPLOYMENT .

PROGRAMS, .

.

Respondent. .

D E C I S I O N

Marsha A. Arthur (hereinafter Grievant) filed a grievance at Level I on July 23, 1993, contending that the Bureau of Employment Programs had not properly designated an Equal Employment Opportunity (EEO) Officer in compliance with federal regulations and its own policy, that Grievant had been performing the duties of the EEO Officer since the departure of Betty Huffman in January 1992, and that Grievant should be formally designated as the EEO Officer and awarded an appropriate salary adjustment and back pay. After her grievance was denied at Levels I through III, Grievant submitted a timely appeal to Level IV on December 17, 1993. Thereafter, ahearing was held in the Board's offices in Charleston, West Virginia, on March 3, 1994. (See footnote 1)

Background

The facts in this case are essentially undisputed. Grievant has been employed by BEP since September 1984 and has been assigned to the Employment Service Validations/EEO Unit as a Quality Control Reviewer since September 1991. T at 7-8. [Transcript references relate to Grievant's

Level III hearing on Sept. 23, 1993.] As of that date, three employees, including Grievant, were assigned to that unit. The other employees assigned were Betty Huffman, the unit supervisor, and David Gillespie. T at 8-9. Prior to Grievant's assignment to the unit and up until her resignation from employment with BEP in January 1992, Ms. Huffman was designated as the EEO Officer for BEP. Additionally, BEP issued an Employment Service Operations Manual (ESOM) to its employees, current as of January 1992, which indicated that "[t]he EEO Officer is assigned to the Agency's Management Analysis Section, and is located at 1321 Plaza East, Charleston, WV 25305 (Mail Code 5604)."

The ESOM also contains a provision setting forth the responsibilities of the division's EEO Officer as follows:

> The Equal Employment Opportunity (EEO) Officer is responsible for assuring that the Agency's equal employment opportunity policy is implemented and maintained. The EEO Officer performs various functions to assist in assuring that the Agency is in compliance with all EEO-related laws, rules and regulations affecting Employment Security.
>
> Responsibilities of the Officer includes, but are not limited to, the following:
>
> - Monitoring the equal employment opportunity priori ties of the Agency.
>
> - Reviewing the operations of local offices to assure equality of service to the public.
>
> - Preparing required reports.
>
> - Conducting EEO training for Agency staff.
>
> - Gathering and interpreting material pertaining to civil rights and equal employment opportunity.

- Preparing civil rights/EEO information and direc tives for distribution to Agency staff.

- Investigating complaints alleging discrimination.

The EEO Officer is responsible for putting into daily action the broad objectives outlined by the Agency's formal EEO policy.

Ms. Huffman's vacant position was posted in November 1992 as an Employment Programs Specialist, Senior. Grievant, who was then classified as a Quality Control Reviewer, applied for and was interviewed for the vacant position in December 1992. However, BEP elected not to fill the vacancy. T at 15-16. Mr. Gillespie transferred to another agency at the end of 1992, leaving Grievant as the only employee in the unit. T at 9-10. Accordingly, Grievant assumed most of the day-to-day duties relating to EEO matters previously performed by Ms. Huffman.

Grievant's job essentially involves reviewing the operation of local employment service offices to assure compliance with federal, state and agency policies, many of which involve EEO-related issues. T at 21-22. For example, Grievant provides technical assistance to local offices, reviewing employment application formssubmitted by private employers for compliance with EEO-related mandates. T at 12. Grievant reviews intake, placement and counselling activities to verify that services are being provided on a non-discriminatory basis. T at 18-20. Grievant also performs building accessibility reviews to verify compliance with the Americans with Disabilities Act (ADA) for job service offices, unemployment insurance offices and some workers compensation offices within the BEP. T at 19-20. She has investigated accessibility complaints under the ADA by patrons of the BEP, including complaints against the Unemployment Compensation Division. See G Ex 1. Grievant further reviews new legislation and federal regulations to identify changes that would impact on BEP policies and procedures. T at 12. Grievant provides training to various BEP personnel on EEO matters. T at 14. She independently refers EEO complaints that fall under the jurisdiction of the Human Rights Commission directly to that agency. All correspondence addressed to the EEO unit is reviewed by Grievant. Grievant estimates that she spends approximately one-third of her time on

EEO activities.

Donald Pardue, Director of BEP's Management Analysis Division, testified that he assumed Ms. Huffman's supervisory duties upon her departure. Initially, Grievant and Mr. Gillespie shared the routine EEO duties with Mr. Pardue as their immediate supervisor. Following Mr. Gillespie's departure, Grievant was assigned to work under the immediate supervision of Donald Washburn, Manager of the Governor's Oversight Unit. This reassignment became effective inMarch 1993. A Ex 12. Mr. Pardue indicated that he considered himself to be the current EEO Officer.

As of June 1993, Mr. Pardue was listed as the "EEO Director" for the West Virginia Department of Employment Security on a national listing of EEO points of contact. A Ex 3. Grievant indicated that she appeared as the point of contact on this same listing during the previous year because she represented West Virginia at a national conference that year. In correspondence from the Commissioner of Employment Programs, Andrew N. Richardson, to the Director of the Directorate of Civil Rights for the U.S. Department of Labor, dated March 17, 1993, Mr. Pardue was listed as the point of contact for additional information. A Ex 1. Likewise, in a written report to the Civil Rights Directorate dated August 9, 1993, Mr. Pardue was designated to serve as "Equal Opportunity Liaison with the Directorate of Civil Rights for Unemployment Insurance and Employment Service activities." A Ex 4.

Mr. Pardue assigns personnel to conduct investigations into complaints relating to EEO matters and makes decisions as to which cases are formally investigated. Mr. Pardue noted that the Mail Code designations are simply used to direct the flow of mail within the Bureau. Likewise, Grievant acknowledged that the Cost Center Codes (which match the Mail Codes) are part of an accounting system used to track allocation of expenses or costs to various units within the Bureau. There are 15 Quality Control Reviewers under Mr. Pardue's supervision, several of whom devote part of their time to EEO-related matters.

Mr. Lowell Basford, Assistant Director of the Division of Personnel, testified that he has statewide responsibility for classification and pay matters regarding state employees. In Mr. Basford's opinion, Grievant is properly classified as a Quality Control Reviewer based upon the predominant duties and tasks she performs compared against the stated requirements of the pertinent position classification specification. (Mr. Pardue also testified that Grievant performed the duties of a Quality Control Reviewer although he personally believes that Pay Grade 10 does not adequately compensate BEP

personnel in that classification.) Mr. Basford concluded that the EEO program is one of the elements of the quality control function performed by the unit where Grievant works. While explaining why Grievant is properly classified as a Quality Control Reviewer, Mr. Basford noted that the employer retains discretion to determine Grievant's "working title."

Discussion

Grievant is contending that she should be officially recognized as the EEO Officer for BEP. Her primary basis for this contention is that she performs most of the day-to-day responsibilities of the EEO Officer as set forth in Sections 9002B and 9003 of BEP's Employment Service Operations Manual. While Grievant does perform the vast majority of those duties, she does so under the general supervision of Mr. Washburn and Mr. Pardue. Grievant indicated that she should have the authority that goes with being designated as the EEO Officer, implicitly acknowledging that shepresently possesses neither the total authority nor the full responsibility commensurate with that designation.

Certainly, BEP should not be faulted for electing to maintain the EEO Officer designation at the Division Director level, as this indicates management emphasis on EEO issues that would be diminished if this responsibility was delegated to a non-supervisory employee. Grievant is not just asking this Board to award her a "working title" consistent with her duties; she effectively seeks to override her employer's inherent authority to assign work by requiring BEP to designate a specific employee to perform a particular function for the agency. Should Grievant's request be granted, it would be necessary to revise her Position Description to reflect the higher level of responsibility and authority incumbent upon the individual formally designated as EEO Officer. Consequently, it is likely that Grievant's classification would be elevated, as she would be performing at a level above that of her current classification of Quality Control Reviewer. Grievant has presented no persuasive reasons for compelling such a result.

Grievant further notes that BEP's Employment Service Operations Manual states that the agency's EEO Officer is assigned to 1321 Plaza East, Charleston, West Virginia 25304 at Mail Code 5604. Because Grievant is the only employee now working at that particular Mail Code, she reasons that she must be designated as the EEO Officer to comply with agency policy. However, the preponderance of the evidence indicates that BEP management has effectively designated Mr. Pardue to serve as the EEO Officer without revisingits policy manual to reflect that designation. In

any event, there was no evidence that this manual was intended to override the employer's authority to select someone other than Grievant, including an employee with a different Mail Code, as its designated EEO Officer. Accordingly, this argument is without merit.

Grievant also contended that she should prevail in her grievance because Commissioner Richardson did not issue his Level III decision within the time limits specified in BEP's Personnel Policies and Procedures Manual. Likewise, the Level III decision was not issued within the time frames set forth in W. Va. Code § 29-6A-4(c) (1992) (five days following the Level III hearing). However, the grievance procedure for state employees does not contain a default provision like that in the grievance procedure for education employees set forth in W. Va. Code § 18-29-3(a) (1994). Accordingly, Grievant is not entitled to prevail by default because of any delay in processing her grievance. See Coddington v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-265/266/267 (May 19, 1994).

Implicit in Grievant's allegation is a claim that she is presently misclassified as a Quality Control Reviewer since the duties and responsibilities flowing from her EEO duties represent work normally performed by an employee in a higher classification.

In order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely matched another cited Personnel classification specification than that under which she iscurrently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). 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. Atchison v. W. Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991).; See generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievant's current classification constitutes the "best fit" for her required duties. Simmons v. W. Va. Dept. of HHR/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Services, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. W.

Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687, 189 W. Va. 342, 348 (1993).

While Grievant is presently classified as a Quality Control Reviewer, the position vacated by Ms. Huffman was advertised as an Employment Program Specialist, Senior (EPS). The classification specifications for those two positions are attached hereto as Appendixes A and B, respectively. The EPS classification was theonly specific position suggested as a more appropriate classification for Grievant's duties. After comparing Grievant's duties with those set forth in the pertinent classification specifications, and considering the relevant testimony of Mr. Basford from the Division of Personnel, the undersigned concludes that Grievant failed to demonstrate that Personnel's decision to classify her as a Quality Control Reviewer was clearly wrong. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 189 W. Va. 342 (1993).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

Findings of Fact

1. Since September 1991 Grievant has been employed by the Bureau of Employment Programs (BEP) in its Management Analysis Division.

2. Grievant is presently classified as a Quality Control Reviewer, Pay Grade 10.

3. Grievant spends approximately one-third of her time performing EEO-related activities.

4. BEP's Employment Service Operations Manual indicates that the agency's EEO Officer is assigned to the Management Analysis Section at Mail Code or Cost Center 5604. Grievant is the only employee presently assigned to Mail Code/Cost Center 5604.

5. Following the departure of the former EEO Officer, Betty Huffman, in January 1992, Grievant and David Gillespie performed most of the day-to-day responsibilities of the EEO Officer, except for preparing the Agency's Affirmative Action Plan. After Mr.Gillespie transferred to another agency in late 1992, Grievant continued to perform these day-to-day duties, with general supervision from Charles J. Washburn, Manager of the Governor's Oversight Unit, and Donald Pardue, Director of the Management Analysis Division.

6. Grievant has never been formally designated as the EEO Officer for BEP.

Conclusions of Law

1. In a grievance of this nature, the Grievant bears the burden of proving his or her claim by a preponderance of the evidence. Parker v. W. Va. Dept. of Health & Human Resources, Docket No.

91-HHR-282 (Apr. 22, 1992); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant has not demonstrated that the Respondent has violated any applicable statute, rule or regulation by failing or refusing to designate her as the EEO Officer for the agency.

3. Grievant failed to prove that the Division of Personnel's decision to classify her as a Quality Control Reviewer rather than an Employment Program Specialist, Senior, based upon the duties she performs, was clearly erroneous. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 189 W. Va. 342 (1993).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: July 13, 1994

QUALITY CONTROL REVIEWER

Nature of Work

Under limited supervision, performs work at the full-performance level in the comprehensive and investigative review of selected cases and/or programs in the assigned area of responsibility. Communicates with all parties necessary to obtain or substantiate needed information, including individual contacts and review of records to determine compliance with federal and state guidelines. May provide presentations or training in areas

of concern. Performs related work as required.

Examples of Work

Reviews and verifies assigned program areas, including compliance from employer's and individual's standpoint.

Examines case records and/or program information, including mathematical computations, to gain an understanding of what has transpired and to note any deficiency or discrepancy in the information.

Makes necessary contacts to substantiate case records and/or program information.

Analyzes case determinations for adherence to laws, rules, regulations, policies and procedures of applicable program area.

Writes a summary of each case reviewed, stating whether or not an error has been identified, and if so, detailing the nature of the error both for federal/state reporting and for the local agency.

Keeps records of all cases received, including the initiation and completion date of each review conducted for a particular program area.

Completes special reviews of programs as assigned.

APPENDIX A

EMPLOYMENT PROGRAM SPECIALIST, SENIOR

Nature of Work

Under general supervision, performs work at the advanced level by providing administrative coordination of and complex technical assistance in a component of a major statewide program, a statewide program in its entirety, or a major technical area specific to or characteristic of the Bureau of Employment Programs. Acts as liaison to facilitate problem resolution and assure compliance with federal, state, and local regulations, laws, policies, and procedures governing the program or technical area. Uses independent judgement in determining action taken in both the administrative and operational aspects of the area of assignment. Exercises considerable latitude in varying methods and procedures to achieve desired results. May supervise or act as lead worker. Performs related work as required.

Distinguishing Characteristics

The Employment Program Specialist, Senior is distinguished from the Employment Program Specialist by the broader scope of administrative oversight and responsibility for planning and operational aspects of program or technical area. This level may function in a lead or supervisory capacity.

Examples of Work

Interprets federal and state laws, regulations, and guidelines for staff which provides services; guides others in developing and utilizing plans and recommends methods of improvement.

Effects or recommends operational changes to facilitate efficient and effective accomplishment of goals or delivery of service.

Informs director of technical area, program, or service deficiencies and recommends improvements.

Consults with other program or technical area staff supervi sors, or managers concerning projects and priorities.

Develops rules, policies, and legislation regarding specific work projects.

Reads, reviews, and responds to correspondence or distributes to appropriate staff.

Develops research, information, or training programs.

Evaluates program or technical area effectiveness.

Writes, edits, or contributes to policy and procedure manuals.

Has contact with federal, state, local program representatives and officials, Bureau management and staff, and legisla ture.

Plans and develops budget requests and short- and long-range work plans.

May lead or supervise professional and/or support staff.

APPENDIX B

Footnote: 1*At the conclusion of the Level IV hearing, both parties waived the opportunity to make written submissions and this case became mature for decision at that time.*