MARILYN THIBAULT, ET AL., and

IRA L. DADISMAN, III

v. **Docket Nos. 94-RS-061/404**

DIVISION OF REHABILITATION SERVICES

and DIVISION OF PERSONNEL

D E C I S I O N

The Grievants are all former Disability Examiner I's ("DE I") who were reclassified to Disability Examiner Specialists ("DES"). They argue they are now doing the same work as former Disability Examiners II's ("DE II") for less pay. This grievance was denied at all levels. The Thibault, et al., and Granata, et al., grievances were consolidated at Level III. The grievance of Mr. Dadisman (See footnote 1) was consolidated with the other two at Level IV. Hearings were held on December 5, 1994 and February 16, 1995. This case became mature for decision on March 30, 1995, after the submission of proposed findings of facts and conclusions of law.

Issues

Grievants state that under the reclassification plan the duties of all DE I's and DE II's were combined and placed under the position title of DES. Grievants argue a violation of W. Va. Code §29-6-10(2) stating they are not receiving equal pay for equal work. Grievants also argue the complexity of their work has substantially increased without their prior approval and without adequate compensation. They also argue they lost the right to a promotion, and the higher pay that accompanied it.

Respondent Division of Personnel ("DOP") argues the goal of the reclassification project was to decrease the number of job classifications and to develop clear differences between each job description, even those within a class series. This was done with the Disability Examiner series. DOP also argues promotion to the next step in a former class series, and the additional compensation that goes with such promotion, is not a right.

Respondent Division of Rehabilitation ("DR") states it could not justify to DOP maintaining both positions in the class series as the duties were essentially the same. DR also notes the former DE II's make more money because they had met the prior standards for promotion required by the old system. DR maintains the current system and compensation plan comply with the holdings in Largent, et al. v. W. Va. Div. of Health/W. Va. Div. of Personnel, 452 S.E.2d 42 (W. Va. 1994).

It must be noted that no Grievants' salary was decreased, and if Grievants had been making the starting salary on the DE I scale,they would have received an increase of approximately $500 upon reclassification to DES.

Discussion of Facts

The testimony in this case, especially concerning the type of work required of DES's and its complexity, was in conflict. A review of the testimony will be helpful before setting out specific findings of fact.

Prior to reclassification, the Disability Examiner Series had four separate classifications. The DE Trainee ("DET") was the lowest rung on the ladder. Any individual accepting this position was a DET for one probationary year while he learned the system and demonstrated the ability to do the work. After one year, the DET, if retained, was promoted to a DE I, with a substantial pay increase, and an increase in caseload and production and quality standards. DE I's only worked on "Initial" cases: Cases which were claimants' first or initial request to receive benefits.

Apparently, during the 1980's, any DE I who met specified production and quality standards for six consecutive months was automatically promoted to a DE II and given a $1,000 raise. DE II's had a higher caseload and worked only on Recon cases. In Recon cases claimants ask to be reconsidered after being turned down during the initial review. Also during this time, DE II's could be automatically promoted to DE III's following similar guidelines.

At some point the practice of automatic promotions ceased, openings at the DE II and DE III level were posted, and individualswere selected based on written standards. During all the years before and after reclassification, the caseloads of the DE's have varied depending on the number of claimants requesting and receiving benefits.

At the time of the reclassification project, the difference between DE I's and DE II's was the type of cases they were assigned and the assigned caseload. Although DE II's had received a pay raise

upon their promotion, the actual comparison of the DE I's and the DE II's salaries was not submitted.

Ms. Jane Johnstone, Director of the Disability Determination Section, testified that when she met with DOP during the reclassification process, she was unable to justify having both DE I's and DE II's in the class series. She stated that although the Initial and Recon cases are different, the process of assessing and deciding them was the same. Both types require the DE to decide whether the claimant should receive benefits. She also testified that while Recon cases usually have more medical information in them than Initial cases, some DE's actually find Recon cases easier, because a decision has already been made, and a new DE then decides if this decision was correct.

Grievants Janice Hutter and Jean Eddy also testified on this issue. They stated Recon cases were harder and more complex, involving an increased amount of medical data and the necessity of deciding onset dates if the claimant is found eligible. Both Grievants also testified their production and quality standards did not change when they were promoted to DES's. Further, afterapproximately four months, neither had any problems meeting these standards even though 30% of their DES caseload was Recon cases.

Discussion of Issues

A. **Equal Pay for Equal Work**

The West Virginia Supreme Court of Appeals recently discussed the issue of equal pay for equal work in Largent, supra. Largent held "W. Va. Code 29-6-10 [1992], does not provide that employees who are performing the same tasks with the same responsibilities be placed at the same step within a job classification." Syl. Pt. 4. The Court further stated "that it [did] not violate the principle of pay equity for the state to pay employees within the same classification differing amounts." Id. at 47.

The Court also noted that to pay everyone in the same class equally would be in direct conflict with the intent of the basic premise of the Civil Service system, which is to recognize "merit and fitness." Id. As with all jobs and occupations "merit and fitness" are usually rewarded through additional compensation.

In this grievance, the former DE II's were rewarded through promotion and increased compensation for their past merit--meeting and maintaining identified standards; and for their fitness--demonstrating abilities consistent with written promotional guidelines. Thus, Grievants' equal pay for equal work argument must fail. All DES's are within the same class and are performing the same

work. Differences in salary are directly related to prior recognition for merit and fitness. See Id. at 12. Thus Grievants' equal pay for equal work argument must fail.

B. **Right to Promotion**

Essentially, Grievants' argument on this issue is they no longer have the right or the opportunity to be promoted to DE II's and receive a $1,000 pay increase. No statute or case law was cited to support this "right." Although a state employee can acquire a property interest in a benefit, "there must exist rules or understandings which allow the claimant's expectations to be characterized as a 'legitimate claim of entitlement to [the benefit]'." Waite v. Civil Service Comm'n, 241 S.E.2d 164, 168 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). No such property interest in promotion from DE I to DE II can be found here. Grievants are not entitled to promotion; a promotion must be earned. Further, there are no rules which prevent the State of West Virginia from reworking the employee classification system if it is done properly. Silver v. W. Va. Dept. of Health and Human Resources, Docket No. 90-DHS-445 (Mar. 10, 1993). Finally, it must be remembered, the Grievants are not prevented from being promoted. This new class series has a level above DES: DES, Sr.

C. **Increased Duties**

As with all non-disciplinary grievances, Grievants must prove their claim by a preponderance of the evidence. Unrebutted testimony indicates the caseload per employee increased at the time of the reclassification. This increase was not related to the reclassification, but to agency workload. Additionally, Grievants' production and quality standards did not change.

The only change in Grievants' duties was the requirement to process Recon cases as 30% of their caseloads. Ms. Johnstone stated the Initial and Recon cases are similar, requiring the same process and the same assessments. She stated in some cases the Recon cases are easier. All parties agreed the Recon cases usually have more medical data to review and different forms to complete. Grievants testified these cases were more complex, but also stated they had maintained their production standards throughout and had no quality control problems after only four months.

The pertinent sections of the DE I and DE II job description are written below:

DISABILITY EXAMINER I

Nature of Work: This is a professional level position requiring considerable technical skill and knowledge in disability determination. An employee in this class works under the general supervision

of a Disability Examiner Supervisor. He examines, develops when indicated, and adjudicates claims for Disability Insurance Benefits received from the Social Security Administration. Employees are assigned claims of moderate difficulty and complexity involving a variety of controversial and/or conflicting medical, legal, and vocational issues which must be resolved on the basis of Federal laws, regulation, and precedent [sic] Federal Court decisions. Prepares a written personalized paragraph explaining to the claimant the basis for the decision. Determines if the claimant should be referred for VR service and supervises the referral process. Performs duties as assigned.

Knowledge, Skills and Abilities:

Thorough knowledge of Federal laws and regulations pertaining to the Disability Insurance Program under the Social Security Act.

Thorough knowledge of a wide range of occupations suitable for handicapped persons.

Thorough knowledge of, and ability to summarize, analyze, synthesize, and interpret complex medical data.

Considerable knowledge of Workmen's Compensation, Veterans Administration, Railroad Retirement, and Public Welfare and other disability programs.

Above average skill in preparing written communications and quasi-legal documents.

Ability to establish and maintain effective relationship with claimants, Public officials, physicians, hospital administrators, attorneys and other professional personnel.

Ability to develop and evaluate pertinent facts and evidence related to claims adjudication.

Ability to present ideas clearly and concisely.

Minimum Training and Experience Requirements:

TRAINING: Bachelor's Degree from an accredited college or university.

EXPERIENCE: One year of experience as a Disability Examiner.

SUBSTITUTION: Master's Degree in Disability Determination may be substituted for the experience requirements.

DISABILITY EXAMINER II

Nature of Work: This is a professional level position requiring a high degree of skill and technical knowledge. An employee in this class works under the general supervision of a Disability Examiner Supervisor. He examines, develops when indicated, and adjudicates claims for Disability Insurance Benefits received from the Social Security Administration. Employee is assigned claims of moderate difficulty and complexity involving a variety of controversial and/or conflicting medical, legal and vocational issues which must be resolved on the basis of Federal laws, regulation and precedent [sic] Federal Court decisions. Prepares a written personalized paragraph explaining to the claimant the basis for the decision. Determines if the claimant should be referred for VR service and supervises the referral process. Performs related duties as assigned.

Knowledge, Skills, and Abilities:

Thorough knowledge of Federal laws and regulations pertaining to the Disability Insurance Program under the Social Security Act.

Thorough knowledge of a wide range of occupations suitable for handicapped persons.

Thorough knowledge of, and ability to summarize, analyze, synthesize and interpret complex medical data.

Considerable knowledge of Workmen's Compensation, Veterans Administration, Railroad Retirement and Public Welfare and other disability programs.

Above average skill in preparing written communications and quasi-legal documents.

Ability to establish and maintain effective relationships with claimants, public officials, physicians, hospital administrators, attorneys and other professional personnel.

Ability to develop and evaluate pertinent facts and evidence related to claims adjudication.

Ability to present ideas clearly and concisely.

Minimum Training and Experience Requirements:

TRAINING: Bachelor's degree from an accredited college or university.

EXPERIENCE: Two years of full-time paid experience as a Disability Examiner.

SUBSTITUTION: Master's degree from an accredited college may be substituted for one year of required experience.

There are only two differences between these job descriptions. The first is in the "Nature of Work" section. The DE I position requires "considerable technical skill and knowledge in disability determination", while a DE II position requires "a high degree of skill and technical knowledge."

The second difference is the DE II position requires two years of experience instead of one for the

DE I, or a Master's degree in Disability Determination versus a Master's degree of any type for the DE I. There is no discussion about the types of cases, and nothing in the prior job descriptions would have prevented DR from assigning Recon cases to DE I's, or Initial cases to DE II's.

The pertinent sections of the Grievants' new classification is written below:

DISABILITY EVALUATION SPECIALIST

Nature of Work: Under general supervision, performs professional work at the full-performance level examining and evaluating data to determine eligibility for disability benefits under Titles II and XVI of the Social Security Act. Secures and analyzes medical, psychological, vocational and other evidence, utilizingknowledge of federal policies, regulatory codes, legislation, directives, court precedents or other guidelines. Assigned claims involve complex medical, legal and vocational issues. May request consultative medical examinations to assure adequacy of documentation and/or resolve inconsistencies in submitted evidence. Performs related work as required.

Distinguishing Characteristics: Work at this level is distinguished by the assignment of a more significant amount of difficult cases such as those with conflicting medical, legal and vocational issues. These cases involve researching federal court decisions to determine precedents in the issues.

Examples of Work

Develops initial and or reconsideration cases by sending letters requesting information to agencies, hospitals, sources and the claimants.

Reviews and analyzes medical and vocational evidence upon receipt.

Telephones doctors, hospitals and claimants to clear up conflicting information or to obtain further medical information.

Requests a consultative medical examination if there is not enough evidence to determine a case; authorizes a travel expense payment for the claimant.

Files information and evidence into appropriate case files.

Evaluates claimant's vocational background, age and education to decide the types of work the claimant could perform in cases where physicians indicate the claimant has residual functional capacities; makes referrals to Handicapped Children's Services or Vocational Rehabilitation.

Writes final determinations of entitlement, personalized explanations of wholly or partially unfavorable determinations and technical rationales; designates appropriate notices of the determination to be mailed to the claimant by the DDS or SSA.

Meets with supervisor as necessary to discuss difficult cases and to resolve problems.

Update Program Operations Manuals and other information to keep abreast of changes in policy and procedure.

A comparison of the current job description with the two prior job descriptions does not reveal any major differences. Thus, no significant changes were made.

The following West Virginia Administrative Rules on the Classification Plans are pertinent to this issue:

4.02.

Revision of Plans: The Board may abolish or change existing classes of positions, or may add new classes in the same manner as the classification plans were originally adopted.

4.04.

Class Specifications: The Board shall consider the class specification in allocating positions and shall interpret it as follows:

(a)

Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.

(b)

In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole. Consideration shall be given to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the positions that the class intended to include.

(c)

A class specification shall be construed as a general description of the kinds of work characteristics [sic] of positions properly allocated to that class and not as prescribing what the duties of any position are nor as limiting the expressed or implied power of the appointing authority now or hereafter vested with the right to prescribe or alter the duties of any position.

(d)

The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position isnecessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position shall be allocated to the class.

The above-cited sections make it clear the DOP may abolish, change, or collapse existing positions. Just because a class specification, either before or after reclassification, listed a duty or requirement, did not or does not exclude others not mentioned. Class specifications are and have been a "general description of the kinds of work characteristic of positions." They do not limit the "power of the appointing authority . . . to prescribe or alter the duties of any position."

Given these rules and regulations, and the specified job descriptions, it appears DR could have always requested DE I's to process Recon cases. Smith v. W. Va. Dept. of Health and Human Resources, Docket No. 91-DHS-207 (Feb. 28, 1992). The fact that it did not do so, and chose instead to differentiate between DE I's and DE II's in the manner it did, does not now preclude it from requiring all DES's to process both Initial and Recon claims. "[A]n agency cannot be prohibited from revising the duties of a position to more efficiently utilize [sic] its personnel." Mills v. W. Va. Dept. of Environmental Protection, Docket No. 93-CLER-067 (Aug. 31, 1993). Also it is clear DOP had the authority, after consultation with DR, to collapse this class series.

The remainder of this opinion will be set out as formal findings of fact and conclusions of law.

Findings of Fact

1. Grievants, all former DE I's, were reclassified as DES's and required to process Recon claims.
2. Recon claims now make up approximately 30% of each DES's caseload.
3. No changes were made in production or quality assurance requirements.
4. Recon claims have more medical data to process, and are slightly more complex than Initial cases, but require the same assessment process.

Conclusions of Law

1. Grievants have the burden of proving their case by a preponderance of the evidence. Silver v. W. Va. Dept. of Health and Human Resources, Docket No. 90-DHS-445 (Mar. 10, 1990).
2. DOP has the authority to collapse a class series and write job descriptions for each position. W. Va. Administrative Rule 4.02.

3. Grievants have no "right" to a specific promotion. See, Waite v. Civil Service Comm'n, 241 S.E.2d 164, 168 (Mar. 10, 1993).

4. Grievants proved no violation of equal pay for equal work. Largent, et al. v. W. Va. Div. of Health/W. Va. Div. of Personnel, 452 S.E.2d 42 (W. Va. 1994).

5. Although Grievants' duties were made slightly more complex after the reclassification, this adjustment was possible both under the old and new classifications, thus no violation of either statute or rules and regulations is found.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 31, 1995

Footnote: 1In the alternative Mr. Dadisman argues he had been misclassified for many years. This argument is found to be without merit as no evidence was presented that Mr. Dadisman was performing duties outside of his classification, either as a DE I or a DES.