RONALD C. JOHNSTON, et al.

v. Docket No. 94-HHR-206

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/DIVISION OF PERSONNEL

D E C I S I O N

Grievants are employed by the Department of Health and Human Resource's (HHR) Office of Health Facility Licensure and Certification (OHFLAC) as Health Facilities Surveyors (HFS). They challenge certain aspects of the West Virginia Division of Personnel's (Personnel) reclassification project and seek salary parity with nurse personnel who are employed by OHFLAC to perform surveying work but whose classes are placed at a higher pay grade (PG) designation. This case became mature for judge ment upon receipt of the entire lower level record on March 23, 1995.1

1Levels one and two of the grievance procedure were waived by the parties. Following an adverse decision on their case at level three on May 17, 1994, Grievants appealed to level four on May 23, 1994 and requested a record decision. The material record consists of the transcript and exhibits of the level three hearing, some of which was transmitted in November 1994, and remaining portions (some missing exhibits) in March 1995, as noted above. Grievants filed a supporting brief on October 5, 1994; HHR's response brief was filed on October 17, 1994. Some brief, preliminary information about the reclassifica tion project is necessary. As reflected in the record, when Personnel completed the procedure within HHR, most workers who

inspected and surveyed health-related facilities and programs for OHFLAC on a statewide basis under varying job classes were reclassified under one job class, HFS, and placed at PG 14 (annualized salary range of $24,000.00 to $39,432.00), effective December 16, 1992. An exception was made with respect to the nurses who were employed by OHFLAC for surveying work, and these workers were not reclassified as HFSs. The nurse series con tains Nurse I through Nurse IV (N1, N2, N3, N4). The salary level for the N2 class is PG 14 (comparable to the HFS title), for the N3 class, PG 15, and for N4, PG 16. In conjunction with the reclassification, at least some of OHFLAC's nurse surveyors were promoted to either N3 or N4, the two classes of nurses that OHFLAC apparently decided to utilize as surveyors.2

At this juncture, it is necessary to provide some initial information about the level three grievance proceedings (two sessions).3 Grievants Ronald C. Johnston, Ira Gangopadhyay, Ronald A. Kelemen, Rosanne R. Lowther, Dillard G. Mills, Paula F. Geer and Marianito R. Montero were represented at the hearing

_____

2While not entirely clear from the record, it appears that, due to the reclassification process, OHFLAC will only hire N3s and N4s for survey work.

3The level three hearing was conducted December 20, 1993, and April 20, 1994. Terry Ridenour presided at the first session, and George W. Lilley, Jr., presided at the second session and also served as grievance evaluator.

by a union advocate; HHR was represented by OHFLAC Director Linda Kramer; and Personnel was represented by its Assistant Director of Classification and Compensation, Lowell D. Basford.4

The parties presented opening statements and submitted a posi tion description form (PD) for a surveyor, Personnel's class specifications (CS) for HFS and the nurse series, N1, N2, N3, and N4, and copies of some sections of Personnel's Adminis trative Rules (Regs).

In her lengthy opening statement, Grievants' representative discussed Personnel's Regs, reviewed the various CSs and PDs submitted by the parties, and compared and contrasted the work performed by nurse and non-nurse surveyors. In her view, the facts did not support a decision that OHFLAC's nurse surveyors be separately classed in any pay grade higher than that of an HFS. She also amended the relief sought from that of HFSs' being placed at PG 15, to a request that they be placed at PG 16, and/or that another, higher-level HFS title be established at a PG level commensurate with N4 (PG 16).

As HHR's representative, Ms. Kramer discussed the reclassi fication procedure in her opening statement. Ms. Kramer men tioned her initial request to have a "career ladder" established for the HFS class. Among other things, Ms. Kramer stated that, prior to the reclassification, the educational requirements for

---

4It is unclear from the record whether any of the grievants appeared at the December 1993 session, but Mr. Johnston appeared at the April 1994 session. Mr. Basford did not attend the second session.

a "certification officer" had been lowered from masters level to bachelors level, purportedly on a par with the N2 (PG 14) requirements. Therefore, when the reclassification occurred, the HFS was created as a single title (at PG 14), and the

request for additional PG levels was not acted upon.

Mr. Basford also presented some information in his opening statement. He explained that nurses were differentiated from other workers who were reclassified as HFSs, i.e., that "market forces" demanded that they retain their nurse titles and higher PGs. According to Mr. Basford, the answer to the issues raised by Grievants would be to reclassify OHFLAC's nurses as HFSs. Given that circumstance, he stated, OHFLAC could become short-handed if Ms. Kramer could not competitively hire surveyors who were registered nurses. Finally, Mr. Basford stated that it was impossible to create a "career ladder" for the HFS title, despite the fact that OHFLAC desired this move, because, in his opinion, the HFS position was a "generic" position with no distinguishing entry level, full-performance level, or advanced level.

At that point in the first hearing session, Grievants' representative stated that Grievants would rest. T.10. HHR then presented its witnesses, several of OHFLAC's nurses who perform survey work, namely, Bonnie Bruaner, N4, who serves as OHFLAC's training coordinator, Sylvia Watkins, N3, and Lesa Bostic, N4. The only witness at the second hearing session was Bobbie Miller, N4, who, based on the fact that she had been directly questioned by Grievants' representative, apparently was called on behalf of Grievants.

Finally, it would be helpful to present Personnel's PD for HFS, in its entirety, with emphasis in certain areas. The Nature of Work section generally outlines OHFLAC's mission:

Health Facility Surveyor

Nature of Work

Under general supervision, performs advanced level profes

sional work conducting surveys of hospitals, extended care facilities, home health agencies, sheltered care homes, day care providers and laboratories. As part of a team, surveys facili ties through observation and reviews documentation such as policy and procedures, floor plans, and financial records. Work involves frequent overnight travel. There is considerable latitude of judgment in the performance of a survey. Determines compliance with state and federal licensure requirements and recommends changes to facilities, standards, and procedures in order to improve client/patient services. Performs related work as required.

Examples of Work

Conducts on-site surveys of health care facilities; dis cusses survey procedures and practices with administrators and department directors.

Observes client/patient care, records objective data, review medical records, and interviews clients/patients in a group or individually.

Reviews financial records including accounts receivable, accounts payable, payroll, and billing practices to determine compliance with regulatory standards.

Reviews organizational charts, personnel records, and policies and procedures to determine appropriate staffing levels and qualifications of staff to perform services.

Tours the facility to evaluate areas such as laboratory, food service, physical plant, sanitation and pharmacy.

Evaluates social services to ensure that activities, recreation and patient rights counseling are being adequately provided.

Enters data into laptop system to compile document and

record data; prints preliminary findings.

Discusses areas of non-compliance with team members to compile recommendations concerning licensure and/or certifica tion status; edits final report including corrective measures.

Meets with survey team to research facility history, review appropriate regulations and delegate survey duties for each survey; reviews accommodation and travel plans; submits detailed expense and activity reports.

Reviews and develops health care regulations based on changes in state or federal regulations or studies; submits drafts of proposed changes to various organizations and agencies for comment.

Knowledge, Skills and Abilities

Knowledge of a technical health-related field.

Knowledge of medical terminology, health service personnel, medical facilities and organization, and medical treatments.

Knowledge of practices and procedures in medical care administration.

Ability to comprehend, interpret and apply complex informa tion and program material.

Ability to work well with a variety of people.

Ability to communicate well, both orally and in writing.

Ability to exercise good judgment in evaluating situations.

Ability to manage time effectively.

Minimum Qualifications

TRAINING Graduation from an accredited four-year college or university with a major in social work, nursing, vocational rehabilitation, hospital administration or related health/social services field.

EXPERIENCE Three years of full-time or equivalent part-

time paid experience in public health, social work, nursing, vocational rehabilitation, hospital administration or related health program.
SUBSTITUTION A Master's degree in one of the above subject areas may substitute for one year of the required experience.

Interestingly, the data contained in the "Nature of Work" and "Examples of Work" sections of the CS are nearly identical to that found in Grievant Johnston's PD which he completed in February 1990.5 However, it is apparent that the general duties outlined in that 1990 PD and the current HFS CS are those which are presently performed by both nurse and non-nurse surveyors. While it would also be helpful to review certain portions of Personnel's CSs for N3 and N4, the "Examples of Work" and "Knowledge, Skills and Abilities" sections will be omitted

_____

5Prior to reclassification, Grievant Johnston was classified as a "Certification Officer."
because they speak to work performed by a nurse in a clinical situation, in terms of either hands-on patient care or health care related administration. Emphasis has been added in perti nent sections.
Nurse III

Nature of Work
Under limited supervision, performs professional work at an advanced level providing direct nursing services, administrative review, or program direction. Provides comprehensive services to individuals or groups in a variety of structured or unstruc tured health care settings. Provides health care including

prevention, rehabilitation services, counseling, education, and care of acute and long-term illnesses. Some nursing interven tions may be unpredictable in outcome and require frequent reassessment and adaption of techniques. May provide special ized direct care to patients with complex health problems; intervenes with the emphasis on continuing care. Works indepen dently with other health professionals. May serve as charge nurse of local health department nursing service or as a head nurse with 24-hour responsibility for a single unit of nursing service and/or supervision of multiple units. . . . Performs related work as required.

Distinguishing Characteristics

This is experienced nursing work where familiarity with the health department programs or the facility unit allows the incumbent to direct the work of licensed or unlicensed staff in addressing patient needs more efficiently. Advanced training or experience in a nursing speciality is recognized as a lead work/training experience for non-supervisory nursing positions. Included at this level are specialized positions such as facili ty surveyors and other independent nursing reviewers.

Nurse IV

Nature of Work

Under limited supervision, performs professional work at an advanced level providing direct nursing services, administrative review, or program direction. Provides comprehensive services assessing, promoting and maintaining the health of individu als/groups in a variety of structured or unstructured health care settings. Provides health care including prevention, rehabilitation services, counseling, education, and care of

acute and long-term illnesses. Nursing interventions require advanced assessment and evaluation techniques, may be unpredict able in outcome and require frequent reassessment. May perform as an assistant director of nursing, quality assurance coordina tor or in a similar level of nursing speciality in a large facility. Travel may be required. Performs related work as required.

Distinguishing Characteristics

This is advanced nursing work where familiarity with the health department or a health facility or recognized nursing speciality allows the incumbent significant latitude to address patient care in a statewide program of limited scope, or in a regional or facility-wide program; or to treat patients as a nurse practitioner. This level is intended for use in leader ship roles where the incumbent is expected to train and lead other professionals by virtue of training or experience.

The "Minimum Qualifications" for a N3 are a baccalaureate degree (BS) in nursing and two years' experience as a registered nurse (RN), or completion of an associate degree (AA) in nursing and three years' experience as a RN, or professional certifica tion from a national nursing certifying organization as a nurse practitioner in the assignment area plus two years' RN experi ence, or an AA in nursing plus a BS in health or behavioral sciences and two years' RN experience, or a Master's degree (MS) in nursing.

The "Minimum Qualifications" for a N4 are the BS in nursing and four years' RN experience, or an AA plus BS and four years' RN work, or an AA plus professional certification from a nation al nursing certifying organization as a nurse practitioner in the assignment area and five years' RN experience, or a MS in

nursing.

Basically, HHR's evidence in this case focused upon justi fying the manner in which OHFLAC's nurse surveyors were treated in the reclassification process and deflecting the suggestion made by Mr. Basford that simply reclassifying nurses as HFSs would resolve the issues raised by Grievants. Therefore, while HHR's testimonial and documentary evidence was somewhat informative, the appearance of the three nurse witnesses at the first session of the level three hearing was largely self-serv ing.6

The nurses' testimony in this case as well as other evi dence of record establishes that surveyors, including nurse surveyors, are formally trained on-the-job with respect to surveying techniques and related regulations. After training, a surveyor is generally assigned to survey a particular type of facility, alone, as part of a team, or as the designated leader of a team, according to his or her training and experience, whatever the case might be. The evidence also establishes that nurse surveyors may receive on-the-job training in surveying techniques by non-nurse surveyors, may often perform the same type of inspections as non-nurse surveyors and may be subordi nate to a non-nurse "team leader" on a survey team.

As would be expected, while nurse surveyors may be required to perform the tasks performed by non-nurse surveyors, they may also be utilized during a survey to exercise clinical judgment and skill based on knowledge and application of nursing princi ples, clinical experience and medical expertise relative to the patient care process, including an assessment of medication

_____

6For example, during Ms. Brauner's testimony, HHR proffered a copy of a September 17, 1993, memorandum from Ms. Brauner to Ms. Kramer, referenced, "Professional Nursing" and identified as "a compilation of input from nurses when asked what makes us different from a social worker." The memo contained an assertion that a nurse is required by "HCFA" to be on certain survey teams, and that a survey could be done by nurses alone, without the help of any "social workers."

administration, levels of care, and invasive procedures and other medical concerns. In general, the testimony of HHR's nurse witnesses who work within OHFLAC suggested that nurses were necessary to determine a patient's "quality of care" and that non-nurse surveyors, more concerned with a client's or patient's "quality of life," were not really necessary in the survey process.

HHR's witnesses also alluded to the fact that some govern mental regulatory agency (or agencies) require a nurse for certain types of surveys. However, no regulation was specifi cally cited, nor was any corroborative documentary evidence proffered on the subject. In addition, while HHR's nurse witnesses attempted to establish that their duties as nurse surveyors within OHFLAC were unique due to the medical component relative to some clients or patients, Ms. Watkins, for instance, admitted that nurse and non-nurse surveyors can work rather interchangeably on any survey team, regardless of the nature of the entity being reviewed.

Interestingly, Ms. Miller, the N4 who testified on behalf of Grievants during the second hearing session, identified herself as a "generalist" surveyor within OHFLAC. She did not wholly agree with the nurses who appeared at the first hearing

session that nurses alone could work totally without a non-nurse surveyor in every situation. In fact, Ms. Miller, who is the only nurse surveyor in her work unit, appeared to be quite supportive of Grievants' contentions that both nurse and non-nurse surveyors provided critical components in the survey process and in accomplishing OHFLAC's mission.

The Parties' Positions

Grievants offer a variety of theories to support their allegation that Personnel's actions on the issue of their PG was arbitrary, capricious and discriminatory, and improper in all respects. In part, Grievants rely on the definition of "Class or Class of Positions" contained in Personnel's Administrative Rules and Regulations (Regs):

One or more positions sufficiently similar in duties, training, and responsibilities so that the same titles, the same qualifications, and the same schedule of compensation and benefits may be equitably applied to each position.

Grievants also cite Section 5.04(a) of Personnel's Regs:

Assignment of Classes: The [Personnel] Board shall assign each class of positions to an appropriate pay grade consistent with the duties outlined in the class specification. No salary shall be approved by the Director of Personnel unless it conforms to one of the pay rates in the pay grade assigned to the employee's class of position.

Based on the above cited Regs, Grievants argue that all employees performing surveying work, including nurses, consti tute a "class" and that, as a class, all surveyors should be

compensated in a like manner. They argue that Personnel misclassified N3s and N4s who perform surveying work and violated its own Regs by assigning two different pay grades to the same "class of positions."

Grievants theorize that it is highly relevant that Personnel's CSs for the nurse series describe representative duties for nurses working in health care facilities who provide hands-on, direct patient health care or related administrative functions, but do not list the surveying duties which match those found in the HFS classification specification. According to Grievants, it is also highly relevant that Personnel's CS for the HFS class describes duties performed by them, but these duties are also performed by nurse surveyors who are classified as N3s or N4s. They maintain that, while nurse surveyors are necessary to determine the "quality of care" which is delivered to clientele and are thus a critical component of OHFLAC's staffing needs, non-nurse surveyor staff with backgrounds in other disciplines are necessary to measure the "quality of life" experienced by the various recipients of health care and are thus an equally critical component of staffing needs.

Finally, Grievants urge that the difference in PG rankings between a non-nurse surveyor (HFS) and a nurse surveyor (N3 or N4) is not "permissible" under Personnel's Regs. In their view, there was no showing that any difficulties existed with respect to the recruitment of nurses to perform surveying work so as to justify or necessitate a higher PG for nurses who are hired to perform survey work. Finally, Grievants urge that it was an abuse of discretion on HHR's and Personnel's part to permit one group of surveyors to keep job titles consistent with their education and not their duties, while requiring another group of

surveyors to have job titles strictly related to their job duties and placed at a lower PG.

Among other things, HHR strongly argues that Grievants failed to prove their case. Notably, HHR, in its level four brief, proposed a great many findings of fact, many based on "evidence" or "testimony" presented by Mr. Basford or Ms. Kramer,7 and almost an equal number of conclusions of law. For example, HHR argues that OHFLAC's nurse surveyors and HFSs are assigned to different pay grades based upon different duties performed, different education, experience and knowledge base required, and recruitment and retention concerns. However, many of HHR's proposed findings of fact and conclusions of law were based on unsupported assertions and facts not in evidence.

Discussion

The Grievance Board has jurisdiction to determine whether a classification should have been created that would more closely fit the duties and responsibilities of a grievant. Nida v. W.Va. Dept. of Health and Human Resources/Personnel, Docket No. 93-HHR-240 (Aug. 20, 1993); Pridemore v. W.Va. Bureau of Empl. Programs/Personnel, Docket No. 92-BEP-435 (Aug. 17, 1993). The standard under which such a case should be decided is whether Personnel abused its broad discretion in not creating an addi tional classification. Id. When a worker challenges the pay grade and salary ranking of his job class and/or alleges that his job class should include a series of one or more progres sively higher positions (career ladder), he or she bears the burden of proof that laws, rules or regulations have been

---

7Neither Mr. Basford nor Ms. Kramer, representing Personnel

and HHR, respectively, were ever sworn in to actually offer testimony.

violated, misapplied or misinterpreted, or that an abuse of discretion has occurred with respect to those issues. Frame v. W.Va. Dept. of Health and Human Resources/Personnel, Docket No. 94-HHR-140 (Nov. 29, 1994); Thompson v. W.Va. Dept. of Health and Human Resources/Personnel, Docket No. 94-HHR-051 (Nov. 23, 1994).

Issues raised in this case are whether the HFS class is properly ranked at PG 14, whether the HFS should be a stand-alone classification without a "career-ladder" series, and whether justification exists for the hiring of nurse surveyors as N3s or N4s instead of hiring them as HFSs. Basically, HHR argues that Grievants failed to prove by a preponderance of the evidence that Personnel erred in devising a classification scheme for employees who perform surveying duties within OHFLAC, a system in which some workers, by virtue of their job class, are placed in higher pay grades. After a thorough examination of the evidence in this case, as well as an intensive assessment of the parties' respective positions, the undersigned must conclude that Grievants have demonstrated a violation or misap plication of W.Va. Code 29-6-10(1) as well as Personnel's Regs. Some rationalization was offered that the classification scheme within OHFLAC is proper because one goal of reclassifica tion was to reduce the number of classified positions. In fact, Mr. Basford, as Personnel's representative, remarked about this matter at the level three hearing. While this might serve as a starting point to justify the creation of a lone HFS position, no rationale at all was given for the placement of the HFS title at PG 14, one PG below that of a N3 and two PGs below that of a

N4. Instead, the respondents' focus at hearing was decidedly an attempt to justify the fact that nurse-trained persons are hired for surveying work and are classified as nurses in pay grades which are higher than the pay grade established for an HFS. However, whether all of the respondents' representations in this regard have been adequately supported is questionable, given the lack of specificity and documentation on the respondents' part. See Relihan v. Greenbrier County Bd. of Educ., Docket No. 90-13-189 (Aug. 27, 1990).8

For example, even assuming for argument's sake that there are legitimate market-based concerns regarding the recruitment of nurses for state employment as Mr. Basford asserted, HHR did not present one scintilla of evidence that it would have any difficulty in hiring HFSs with BS nursing degrees and the requisite experience. There was no showing by either Personnel or HHR that OHFLAC had ever experienced any difficulty in recruiting nurses to perform survey work. Moreover, if recruit ing difficulties for nurse surveyors would occur within OHFLAC due to market forces, prospective nurse-trained surveyors could be offered higher wages for recruitment purposes. Section 5.04(b) of Personnel's Regs provides that, while the "entry

---

8In Relihan, an instructor for a practical nursing program claimed her employer's operation of the nursing program violated the State's manual of accreditation. The the administrative law judge rejected the grievant's claims, in part, because the grievant failed to place into evidence the accreditation manual or to even cite the specific provision of the manual which was allegedly being violated.

salary for any employee shall be at the minimum salary for the class . . . [t]he director may authorize appointment at a rate above the mid-point where the appointing authority can substan tiate severe or unusual recruiting difficulties for the job class."

There are other illogical outcomes with respect to the reclassification scheme. Personnel has consistently insisted that it classifies positions, not people. See Auvil v. W.Va. Dept. of Health & Human Resources, Docket No. 94-HHR-613 (Feb. 23, 1995); Pridemore v. W.Va. Bureau of Employment Programs, Docket No. 92-BEP-435 (Aug. 17, 1993). Thus, the fact that OHFLAC's nurse surveyors have nursing degrees, one of the many alternative degree requirements for employment as an HFS, does not justify their being hired as surveyors without the HFS classification. Additionally, the "predominate duty" rule is also utilized in determining whether workers are properly classified. Nurse surveyors do not function as traditional practicing nurses, and, more importantly, do not perform the patient-care/administrative nursing duties set forth in the CSs for N3 and N4. Rather, the duties that nurse surveyors perform are found listed in the CS for an HFS.

Moreover, if workers classified as nurses can perform all aspects of survey work, as some of OHFLAC's nurses contend, then there is no need at all to carry the HFS title and classifica tion. Obviously, this is not the case in that the HFS title exists, and OHFLAC hires both HFSs and N3s/N4s. Grievants are understandably disgruntled because HHR can hire a classified nurse as a surveyor with an in-house job description and job duties which are essentially the same as those of a non-nurse surveyor or HFS.

No doubt, such an event is particularly troubling when the HFS specification states that a minimum educational requirement to become an HFS is a four-year college degree in various disciplines, including nursing and other health-care-related fields such as hospital administration, a discipline which generally requires a master's level program, not a baccalaureate program.9 This inclusion of the four-year nursing degree as a qualifier for obtaining a position as an HFS is critical.

Literally, this means that a person with a four-year nursing degree who desires surveying work rather than "traditional" nursing work, and who applies for such a surveying position, must be hired at the salary level of the HFS class and forego the higher salary levels of the nursing class. Again, under the current classification scheme for nurse and non-nurse surveyors within OHFLAC, this is not what actually occurs.

Finally, Personnel's determination that the HFS should be a stand-alone classification and position appears erroneous. It hardly seems likely that a newly-hired HFS would have the expertise or experience to lead a survey team, prepare essential reports and recommendations or complete other work which is

---

9Some surveyors now classified as an HFS had obtained their master's degree in a relevant field prior to the reclassification project. Like the present HFS title, not one of the four titles in the nursing series, N1 through N4, requires a master's degree (obviously in nursing for nurses). crucial to accomplishing OHFLAC's mission. The evidence clearly established that survey assignments are made on the basis of each surveyor's expertise in the discipline involved and that

leadership roles are assigned on the basis of the surveyor's relative experience, not whether the surveyor has been trained as a nurse.

The stand-alone classification scheme for an HFS also makes little sense in that nurses in two higher pay grades are re tained by OHFLAC for surveying work. This suggests that the establishment of a "career ladder" is justified for surveyors within OHFLAC.10 The record established that the assignment of a surveyor generalist, nurse or non-nurse alike, is dependent on on-the-job experience and training. Given that experienced non-nurse surveyors holding master's degrees are often responsi ble for the training and guidance of newly-hired surveyors and are often the leaders of survey teams comprised of nurse and non-nurse surveyors, it is simply inexplicable that HFSs are denied the same career ladder available for nurse surveyors within OHFLAC. A stand-alone HFS title at PG 14 ignores all of these factors.

10The evidence did not reflect that all of OHFLAC's nurse surveyors classified as N4s assumed "leadership" roles. Because a BS-trained nurse can be hired alternatively as an HFS or a N3, the only logical reason for OHFLAC to have a N4, trained substantially the same as a N3, is to reward the incumbent N3's time on the job.

In addition to the factual and legal determinations con tained in the foregoing discussion and analysis, the following formal findings of fact and conclusions of law are appropriate.

Findings of Fact

1. Prior to reclassification, HHR contemplated a position

series for OHFLAC's nurse and non-nurse health facility survey ors along with appropriate pay grades reflecting differences in training and experience.

2. Eventually, Personnel created one job class for non-nurse surveyors, Health Facility Surveyor (HFS), along with an official Class Specification (CS) at pay grade (PG) 14.

3. Generally, nurses occupy one of four positions within a series of four progressively higher paying classification titles, Nurse I, PG 13; Nurse II, PG 14; Nurse III, PG 15; Nurse IV, PG 16 (N1-N4).

4. The CS formulated by Personnel for OHFLAC's HFS personnel describes representative duties commensurate with a surveyor's actual work, work which is generally performed by both nurse and non-nurse personnel in a nearly identical manner.

5. The CS formulated by Personnel for OHFLAC's HFS title contemplates workers who qualify by virtue of a baccalaureate nursing degree or a baccalaureate degree in other relevant fields and disciplines, including hospital administration, generally a master's degree program.

6. In conjunction with the reclassification project, the "Distinguishing Characteristics" section in the N3's CS was modified to state that, "included at this level are specialized positions such as facility surveyors."

7. After the reclassification, nurse surveyors retained their nurse classification, and most were upgraded to either N3 or N4. The record is silent as to why the upgrades occurred.

8. The N4's CS does not contain the modifier "included at this level are specialized positions such as facility surveyors" in its "Distinguishing Characteristics" section.

9. As reflected in their respective CSs, the only notable

differences between the N3 and N4 classifications are that a N4 must qualify for the position by having more time on the job, i.e., experience, and that a N4 shall assume leadership roles.

10. OHFLAC's experienced non-nurse surveyors often assume leadership roles, based on their training and on-the-job experi ence, with respect to training and orienting new workers, including nurse surveyors, and leading survey teams of nurse and non-nurse surveyors.

11. While nurses holding a baccalaureate degree and employed as OHFLAC nurse surveyors have been trained in areas unique to the medical field, non-nurse surveyors within OHFLAC also hold baccalaureate or advanced degrees in distinct disci plines.

12. No documentation, including any pertinent Federal and State regulations or "survey protocols," was made part of the record in conjunction with claims made by HHR and OHFLAC through OHFLAC's nurse surveyors/witnesses that nurses and nurses alone must conduct surveys for Long Term Care Facilities and Home Health Agencies.

13. The N3s and N4s employed by OHFLAC do not spend a predominant portion of their time performing clinical, hands-on nursing duties during the surveying process or at any other time.

14. There is absolutely no evidence of record that OHFLAC ever experienced any difficulty in recruiting and retaining non-practicing nurses for survey work.

15. While the pay grades assigned to the nursing classifi cation to perform traditional nursing care may be driven by market demand, there is no evidence that individuals holding baccalaureate degrees and not wishing to perform clinical,

hands-on nursing duties would decline job opportunities for employment under the HFS title.

Conclusions of Law

1. W.Va. Code 29-6-10(1) specifically requires the Division of Personnel to prepare, maintain and revise the classification plans for positions in the classified service "based upon similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class."

2. A single classification title for Health Facility Surveyor ignores position differences attained by on-the-job experience, including the experienced worker's ability to assume leadership roles and duties for training and team leadership purposes, and, therefore, violates Code 29-6-10(1).

3. Grievants have demonstrated that the establishment of a single classification title at pay grade 14 for Health Facili ty Surveyor workers, while different classes of workers at higher pay grade levels perform nearly identical duties, is an abuse of Personnel's discretion. See Stephenson v. W.Va. Bureau of Employment Programs/Personnel, Docket No. 92-DOP-447 (Aug. 12, 1993).

4. Absent any evidence that the different pay grades assigned to OHFLAC's nurse and non-nurse surveyors is required to attract and retain nurse surveyors, Grievants' allegations that the pay grade differentials between them and nurse survey ors is not justified must stand.

5. Grievants have established that the classification scheme for nurse and non-nurse workers who directly perform health facility surveying is violative of W.Va. Code

29-6-10(1).

6. Interpretations of statutes by bodies charged with their administration should be given great weight unless clearly erroneous. W.Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W.Va. 1993).

7. Personnel's opinions have been found to be clearly erroneous. See Parsons v. W.Va. Bureau of Empl. Programs, 428 S.E.2d 528 (W.Va. 1993); Dillon v. W.Va. Dept. of Health and Human Resources/Personnel, Docket No. 95-HHR-044 (Apr. 12, 1995). In this case, Grievants have established that Personnel abused its discretion under Code 29-6-10 to classify correctly, in relying on erroneous opinions based on incorrect facts, data, and information.

8. Under the circumstances in this case, the establish ment of a "career ladder" for non-nurse surveyors, HFS I, PG 14, and HFS II, PG 15, would comport with the requirements of W.Va. Code 29-6-10(1).

Accordingly, this grievance is GRANTED, but only to the extent that Respondents Health and Human Resources/Office of Health Facility Licensure and Certification and the Division of Personnel must reassess the classification patterns for health facility surveyors and devise classification specifications for those workers in accordance with the dictates of W.Va. Code 29-6-10(1) and consistent with the findings and holdings in this Decision.

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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

NEDRA KOVAL

Administrative Law Judge

Date: June 15, 1995