MILAGROS M. DALA, .

.

Grievant, .

.

v. . Docket No. 94-HHR-059

.

WEST VIRGINIA DEPARTMENT OF .

HEALTH AND HUMAN RESOURCES AND .

DEPARTMENT OF ADMINISTRATION/ .

DIVISION OF PERSONNEL, .

.

Respondents. .

D E C I S I O N

Milagros M. Dala (Grievant), employed by Respondent Department of Health and Human Resources (DHHR) at Lakin Hospital (Lakin), challenges her classification as a "Nutritionist II" by Respondent Division of Personnel (DOP), as well as DHHR's failure to raise her salary commensurate with additional duties assigned. Grievant contends she should be classified as a "Nutritionist III." This grievance was initiated on August 2, 1993. It advanced to Level III where a hearing was held on November 18, 1993. Thereafter, DHHR Deputy Commissioner Garrett E. Moran issued an undated decision denying the grievance at Level III. Grievant appealed to Level IV on February 22, 1994 (See footnote 1), where the West Virginia Departmentof Administration, Division of Personnel, was joined as an essential party by Order dated April 21, 1994. Following a series of continuances, each of which was granted for good cause and without objection, a hearing was conducted in this Board's Charleston office on December 1, 1994. The parties agreed to submit post-hearing arguments. Grievant's submission was received on January 10, 1995. The Respondents elected to waive post-hearing submissions and this matter became mature for decision on January 23, 1995.

Background

The facts in this case are substantially uncontroverted. Grievant has worked as a nutritionist for DHHR for 18 years. She initially worked at Spencer State Hospital (Spencer) as a Nutritionist I and was subsequently promoted to Nutritionist II. Grievant transferred from Spencer to Lakin as a Nutritionist II in 1983. Grievant currently serves as a therapeutic nutritionist as well as administrator of the Dietary Department.

Following her transfer to Lakin over eleven years ago, Grievant began attending care conferences and performing annual patient assessments, duties which she did not perform at Spencer. See J Ex 1. Annual assessments include making recommendations for weight loss or weight gain, as appropriate to each patient. Grievant estimates that she spends a significant portion of her time, approximately 15 hours per week, meeting with patients and conducting interviews in preparation for care conferences. Thistask also involves making progress notes on each patient at Lakin, a 136-bed long-term care hospital.

Grievant's current duties also include responsibility for keeping records and documentation in the Dietary Department, including policy and procedure manuals, as required to maintain hospital certification. See J Ex 1. She supervises the tray service, which involves delivery of meals to patients in their rooms, and assists with this task when the food service area is short-staffed. She prepares work schedules for the dietary department and supervises the food service workers during the absence of the Food Service Supervisor. (See footnote 2) **Grievant is also responsible for preparing menus suitable for each diet a physician prescribes. She has responsibility for health and sanitation in the food service area.**

Grievant stated that her work is reviewed on an annual basis in the course of detailed inspections conducted by outside personnel who evaluate all aspects of Lakin's operation for formal recertification. Grievant noted that such certification is essential for continued hospital accreditation and reimbursement from federal sources. Grievant indicated that she works at least forty hours per week, sometimes more, and often takes work home to complete all assigned tasks.

After statewide reclassification was completed, DOP revised the pay scale for Nutritionist II from pay grade 11 to pay grade 12 andNutritionist III from pay grade 12 to pay grade 14. Pay grade 11 has a salary range from $19,674 to $32,184, while pay grade 12 has a salary range from $21,156 to $34,440 and pay grade 14 has a salary range from $24,240 to $39,432.

Mr. Lowell Basford, Deputy Director of Personnel for Classification and Compensation, testified that Grievant does not perform duties at the level prescribed by the "Nature of Work" section of the classification specification for Nutritionist III. He noted that Grievant has responsibility for a dietary department in a state facility as contemplated by the Nutritionist II classification specification. He stated that a Nutritionist II is expected to perform both clinical and administrative functions.

Mr. Basford further observed that the clinical aspects of Grievant's duties were the most demanding and comprised the predominant portion of the work she performs. He credited Grievant with performing clinical work as a nutritionist at the advanced level, consistent with the Nutritionist II classification specification. Mr. Basford represented that there was no basis for increasing Grievant's current pay and made reference to the West Virginia Supreme Court of Appeals' recent Largent decision. (See footnote 3)

Classification Specifications at Issue

The relevant portions of the classification specifications for the Nutritionist II and Nutritionist III positions at issue in this case are reproduced herein as follows:

NUTRITIONIST II

Nature of Work

Under general direction, performs work at the advanced performance level by planning, organizing and directing a public health nutrition program in a single county or small local health department, the dietary program in a state facility, or conducts monitoring surveys of health care facilities. May supervise and/or train other nutritionists or food service staff at a state facility. Performs related work as required.

Distinguishing Characteristics

This is advanced level work in public health nutrition, responsible for planning, implementing and evaluating nutrition programs and services at the local level or in a single or small local health department or facility. As part of a survey team, conducts on-site inspections of health care facilities to monitor compliance with applicable state and federal regulations.

Examples of Work

Administers the Women, Infants and Children (WIC) program at the local level, which includes directing and supervising nutrition education programs, certification, monitoring, fiscal reporting and food delivery.

Directs and coordinates the dietary department and canteen operations at a state facility, which includes overseeing storage, preparation of food, equipment and supplies.

Conducts needs assessment of nutrition and diet-related health problems and resources, and utilizes the data to develop an operational plan for nutrition service delivery.

Conducts staff in-services and training.

Conducts in-services, presentations, and provides consultation on nutrition topics to various groups and organizations upon request.

Oversees the provision of contractual nutrition services.

Counsels medically high-risk clients in the prenatal and pediatric clinics, or in a state facility.

Develops and approves menus for regular and therapeutic diets for patients in a state facility.

As part of a survey team, conducts on-site surveys of health care facilities to monitor compliance with applicable state and federal regulations, and prepares written reports of fundings. (sic)

Conducts on-site surveys of hospitals, county health depart ments, primary care centers, private physicians and other agencies having contractual agreements with the Maternal and Child Health Division of the agency, and prepares written reports of findings.

NUTRITIONIST III

Nature of Work

Under administrative direction, performs complex administrative and supervisory work planning, organizing and directing a public health nutrition program in a multi-county health

department or a large geographic district, or manages a nutrition program in a specialty area at the state level. Performs related work as required.

Distinguishing Characteristics

At the local level, this is complex administrative work responsible for planning, organizing and directing nutrition programs and services and training and supervising a large staff of professionals and clericals. At the state level, may serve as an assistant to the state nutrition/WIC program director and/or perform such duties as coordinating the activities of the central office and field staff, identifying nutritional needs, developing, coordinating and implementing statewide generalized and specialized nutrition programs, and coordinating statewide training and continuing education programs.

Examples of Work

Administers the Women, Infants and Children (WIC) program at the local level, which includes directing and supervising nutrition education programs, certification, monitoring, fiscal reporting and food delivery.

Conducts needs assessment of nutrition and diet-related health problems and resources, and utilizes the data to develop an operational plan for nutrition service delivery.

Conducts staff in-services and training.

Conducts in-services, presentations and provides consultation on nutrition topics to various groups and organizations upon request.

Oversees the provision of contractual nutrition services.

Counsels medically high-risk clients in the prenatal and pediatric clinics, or in a state facility.

Supervises professional and clerical staff.

Utilizing federal regulations, develops, writes and implements policies and procedures for program administration.

Assesses statewide nutrition staff training needs and plans, and provides for continuing education opportunities.

Reviews, monitors and approves local nutrition education plans.

Produces a statewide newsletter for WIC program participants.

Previews, prepares and compiles educational materials for statewide distribution.

Reviews and monitors local agencies for compliance with state and federal regulations.

Prepares statewide public information releases, designs brochures and develops audio-visual presentations.

Plans, organizes and develops statewide outreach activities to increase awareness of the WIC program.

DISCUSSION

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 the one under which she is currently 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 the 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 Serv., Docket No. 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 clearlyerroneous. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993).

Under the foregoing legal analysis, the West Virginia Supreme Court of Appeals' holding in Blankenship presents employees challenging their current classification with a substantial obstacle to overcome in attempting to establish that they are currently misclassified. In the

instant matter, Grievant's evidence falls short of demonstrating that DOP's determination that she is performing the duties of a Nutritionist II is "clearly wrong." Although Grievant performs some functions normally done by a Nutritionist III, these functions do not comprise a predominant portion of her assigned duties. Thus, Grievant's performance of certain duties outside her current classification as a Nutritionist II does not render her misclassified. See Darby v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-356/357 (Jan. 18, 1994); W. Va. Div. of Personnel Administrative Rules, Series I (Amended) § 4.04(d) (1993).

Moreover, Grievant's work in a hospital environment does not fit with the "Nature of Work" required in the Nutritionist III class specification calling for "complex administrative and supervisory work" in a "multi-county health department or a large geographic district" or a statewide specialty nutrition program. Likewise, Grievant's work as a nutritionist at Lakin does not qualify as managing "a nutrition program in a specialty area at the state level" as required in the "Nature of Work" portion of the class specification.

While Grievant may perform certain tasks which fall within the somewhat overlapping Nutritionist III classification, her predominant duties are included in the Nutritionist II class specification, and these duties provide the controlling basis for classifying her position in that class. See Broaddus v. W. Va. Div. of Human Services, Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990). Thus, although Grievant established that she performs her assigned duties in a proficient manner and her diligence and initiative allow her to make a significant contribution to the effective operation of an important function at Lakin, these factors are not controlling in determining her proper classification, because positions, and not persons are classified. See generally, W. Va. Div. of Personnel Administrative Rules, Series I (Amended) § 4.01, et seq. (1993).

Grievant also complains that she is not being equitably compensated for the work she performs given her tenure and experience. The West Virginia Supreme Court of Appeals recently noted in Largent v. W. Va. Div. of Health, 452 S.E.2d 42 (W. Va. 1994), that state agencies have "a certain degree of flexibility in setting employee compensation within a classification." Id. at 48. Grievant's complaint that she has received no pay raises, other than across-the-board raises, since being promoted to Nutritionist II over eleven years ago, repeats a concern expressed by many other state employees. However, Grievant has not

demonstrated that her employer's failure to raise her salary is contrary to any law, rule or regulation, or that she has been treated in a manner significantly different from any other similarly situated DHHR employee. See Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995)

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

FINDINGS OF FACT

1. Grievant is employed as a nutritionist at Lakin Hospital (Lakin), a 136-bed long-term care facility operated by the Department of Health and Human Resources (DHHR).

2. Grievant is presently classified by the Division of Personnel as a Nutritionist II.

3. Grievant began working at Spencer State Hospital as a Nutritionist I. She was subsequently promoted to Nutritionist II and transferred to Lakin in 1983.

4. Since transferring to Lakin, Grievant has been assigned additional duties including attending patient care conferences and conducting annual nutritional assessments for all patients.

5. Grievant has both clinical and administrative duties, supervising all aspects of the Dietary Department at Lakin. She directly supervises a Food Service Supervisor who supervises six Cooks and nine Food Service Workers. See J Ex 1.

6. Grievant spends the majority of her time performing clinical duties, including preparing for and participating in care conferences, developing menus and performing nutritional assessments. See J Ex 1.

7. Other than across-the-board pay raises given to all state employees, Grievant has not received a salary increase since transferring to Lakin.

CONCLUSIONS OF LAW

1. Grievant has not proven by a preponderance of the evidence that the classification of Nutritionist III constitutes the "best fit" for the duties she performs. See Simmons v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-433 (Mar. 28, 1991).

2. Although Grievant is performing some duties that are outside her current classification

as a Nutritionist II, this does not render her misclassified. Dooley v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-498 (Mar. 19, 1991). See Div. of Personnel Administrative Rules, Series I (Amended), §4.04(d) (1993); Broaddus v. W. Va. Div. of Human Services, Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990).

3. Personnel's interpretation of the classification specifications for the positions of Nutritionist II and III, as they apply to the duties being performed by Grievant, are not clearly erroneous and, therefore, should be accorded great weight. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993).

4. Grievant's job duties, as demonstrated by a preponderance of the evidence, best fit within the classification specification for Nutritionist II.

5. Grievant did not demonstrate that her current salary was established in violation of any law, rule or regulation or that she has been treated differently from any similarly situated DHHRemployee. See Thompson v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-051 (Nov. 23, 1994); Rumbaugh v. W. Va. Dept. of Transp., Docket No. 94-DOH-034 (July 25, 1994).

Accordingly, the grievance is DENIED.

Any party 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: March 29, 1995

Footnote: 1**The Respondent did not raise any issue in regard to the timeliness of Grievant's appeal to Level IV.**

Footnote: 2**Grievant directly supervises only the Food Service Supervisor. There are no other nutritionists or clerical personnel under her supervision.**

Footnote: 3**Largent v. W. Va. Div. of Health, 452 S.E.2d 42 (W. Va. 1994).**