

MICHAEL RITCHIE and

VIOLET HARDWAY, et al.,

Grievants,

v.

DOCKET NO. 95-HHR-301/307

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants Michael Ritchie, Violet Hardway and Anna Glover filed separate grievances on or about October 24, 1994, alleging they were being worked out of classification. Following adverse decisions at the lower levels, Grievants appealed to level four on July 13, 1995, where their grievances were consolidated by Order dated July 31, 1995. After several continuances for good cause, hearing was held on May 2, 1996, and this case became mature for decision on June 14, 1996, the deadline for the parties' proposed findings of fact and conclusions of law.

Grievants are currently classified as Social Service Worker II's (SSW II) and allege they have been responsible for Adult Protective Service (APS) work in Gilmer and Calhoun Counties. Mr. Ritchie asserts he performed APS work since January 1, 1989, Ms. Hardway since September 9, 1985, and Ms. Glover since November 25, 1986. Grievants Ritchie and Hardway seek to be reclassified either as Protective Service Workers (PSW) or Social Service Worker III's (SSW III), with back pay for the relevant period. Grievant Glover was classified as a Social Service Worker I (SSW I) when she originally filed her grievance, but was reallocated to a SS II classification in August 1995, by order of the level three hearing examiner, Sue Sergi. She was awarded back pay from October 16, 1994, or ten days prior to her filing her grievance, to June 30, 1995, the date of the level three

decision. Ms. Glover is content with that classification, but seeks additional back pay from November 25, 1986, through October 15, 1994.

The level three grievance evaluator limited Grievant Glover's back pay to ten days prior to her filing her grievance in accordance with Grievance Board precedent. However, there is no indication anywhere in the record that a timeliness issue was raised by Respondent at the lower levels. Grievance Board precedent holds that a backpay award in a misclassification case will only be limited when the employer raises a timeliness defense to time bar the claim to ten days preceding the filing of the grievance. Hatfield v. W. Va. Alcohol Beverage Control Comm'n., Docket No. 91-ABCC-052/169 (Sept. 27, 1991). See also, Easterly v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-053 (July 25, 1996). Respondent also did not raise a timeliness defense at level four. However, Respondent could have believed in good faith that the issue of timeliness was raised at the lower level by the grievance evaluator, and Respondent should not be penalized in this case for its reliance on that decision. However, Respondent should be aware that in the future, it must raise the timeliness defense if it wishes to limit a successful misclassification grievant's backpay award to ten days preceding the filing of the grievance.

The pertinent sections of the classification specifications at issue are repeated below.

SOCIAL SERVICE WORKER II

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

Distinguishing Characteristics: All three levels of Social Service Worker provide professional social services to the public. The Social Service Worker II provides these services in one or more of the following areas: nursing home placement, adult family care, pre-institutionalization, admission and aftercare, generic social services, homeless, reception social work, or other services at this level.

SOCIAL SERVICE WORKER III

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

Distinguishing Characteristics: All three levels of Social Service Worker provide professional social services to the public. The Social Service Worker III provides these services in one or more of the following areas: foster care, emergency shelter care, youth services, community juvenile delinquency, single adolescent parent, adoption, Hartley program, Medley program, Medical Waiver Project, licensing specialist or other services at this level. This class may also be used for positions in certain geographic areas performing professional social work in a variety of program areas such as day care, generic social services, foster care and protective services, and differs from the generic Social Service Worker II in that the positions involve a significant, but not predominant, amount of protective services work.

PROTECTIVE SERVICE WORKER

Nature of Work: Under limited supervision, performs advanced and complex social casework in a specialized area. Work is characterized by cases involving abuse/neglect/exploitation of children or adults. The nature of the situations require expertise and judgement to deal with problems that are potentially dangerous to the client and the worker. Work requires the use of personal automobile for local travel. Employee is subject to being on-call during non-business hours. Performs related work as required.

The material facts of this grievance are not in dispute and are related below.

Findings of Fact

1. Michael Ritchie, Violet Hardway and Anna Glover are classified as SSW IIs. Ms. Glover was classified as an SSW I until August 1995. Mr. Ritchie and Ms. Hardway work in Calhoun County and Ms. Glover works in Gilmer County. Ms. Glover was the only adult services worker in Gilmer County during the period she seeks reclassification, November 25, 1986, through October 15, 1994.

2. Earl Nicholson was the area administrator for Calhoun and Gilmer Counties from approximately 1972 to 1986. During that time, Mr. Nicholson believed that workers could be worked out of classification up to 50% of the time without requiring them to be promoted or reclassified. He remembers the Grievants performing adult protective services during the time he was the area administrator, but did not testify how much of their time was spent performing those services. LIII, p. 5.

3. Ms. Mildred Burke has supervised Grievants from 1993 to the present. She testified that the Grievants performed APS work under her supervision. She stopped assigning referrals to them in January or February 1995. LIII, pp. 31-32.

4. The difference between a SSW II and SSW III is that the SSW III spends a significant amount of time performing protective service work.

5. A significant amount of time could be anywhere from 25-49%.

6. The adult protective service work performed by Grievant Ritchie did not constitute a predominant or significant amount of his time. LIII, p. 20.

7. The adult protective service work performed by Grievant Hardway did not constitute a predominant or significant amount of her time.

8. Grievant Glover spent approximately 40%, or a significant portion, of her time performing adult protective service work.

9. Mr. James Morford was the immediate supervisor of Grievants from 1986 to 1993. Mr. Morford signed and agreed with the position description forms filled out by the Grievants in 1990 in accordance with the state reclassification project. Mr. Morford believed he was able to work employees out of classification as long as it was not more than 50% of their time. The need for adult protective services in Calhoun and Gilmer Counties has never been a full-time assignment and there has not been a need for a full-time adult protective service worker in

those counties. Recently an individual was hired to perform adult protective service work in those counties, but that individual will also be performing other adult services work as well. LIII, p. 29. Mr. Morford testified that none of the Grievants performed adult protective service work a predominant amount of their time.

Discussion

In order for Grievants to prevail upon a claim of misclassification, they must prove by a preponderance of the evidence that their duties for the relevant period more closely matched another cited Personnel classification specification than that under which they are 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. Dept. 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 Grievants' current classification constitutes the "best fit" for their 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. Broadus v. W. Va. Div. of Human Services, Docket Nos. 89-DHS- 606, 607, 609 (Aug. 31, 1990).

Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. W. Va. Admin. Rule §4.04(a); Coates v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-041 (Aug. 29, 1994). Even though a job description does not include all the actual tasks performed by a Grievant, that does not make the job classification invalid. W. Va. Admin. Rule at §4.04(d). Finally, Personnel's interpretation and explanation of the classification specifications at issue, if determined to be ambiguous, should be given great weight unless clearly erroneous. See, W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993).

In the instant case, there is no dispute that Grievants performed APS work during the

relevant time period, and that those duties are not included within the classification specification of an SSW II. The only issue to be decided is whether Grievants performed those duties a predominant amount of their time, thus rendering them misclassified.

Mr. Lowell Basford, Assistant Director of Classification and Compensation, Division of Personnel, testified that predominant duties are those which take up most of an employee's time, 50% of greater, as described in their position description forms. Grievants have not shown that they performed those duties a predominant amount of their time. Mr. Ritchie testified that APS work did not constitute a predominant amount of his time. Ms. Hardway indicated on her position description form that she spent 20% of her time doing APS work. Ms. Glover's position description form indicates she spent 40% of her time performing APS work. She was the only adult service worker in Gilmer County, so it is reasonable to assume that she was responsible for any APS work in that county. Mr. Morford testified at level four that Ms. Glover performed more APS work than either Mr. Ritchie or Ms. Hardway. Because the predominant duties of the position are class controlling, the fact Grievants performed these tasks, not specifically identified in their current classification, a small portion of their time, did not invalidate their classification. Hager v. Dept. of Health and Human Resources, Docket No. 95-HHR-241 (Sept. 29, 1995). Thus, none of the Grievants have proven they were performing APS work a predominant amount of their time, and have not demonstrated Personnel's determination that the classification of SSW II was "clearly wrong" versus the classification of PSW. Hager, supra.

However, Mr. Basford also testified that the difference between a SSW II and SSW III was that the SSW III spent a significant amount of time performing protective service work. Mr. Basford indicated that significant amount of time could be anywhere from 25- 49%. Clearly, Ms. Glover spent a significant amount of her time performing APS work during the relevant period, and thus was not only misclassified as a SSW I for the relevant period, but also would have been misclassified as an SSW II. Grievants Ritchie and Hardway were not performing APS work a predominant or significant amount of their time.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. Any relief in a misclassification case is limited to prospective relief and to back relief from and after ten days preceding the filing of the grievance, when the employer has raised a timeliness defense. Easterly v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-053. See also, Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399 (W. Va. 1995); Hatfield v. W. Va. Alcohol Beverage Control Comm'n., Docket No. 91-ABCC-052/169 (Sept. 27, 1991).
2. The predominant duties of the position in question are class controlling. Hager v. Dept. of Health and Human Resources, Docket No. 95-HHR-241 (Sept. 29, 1995).
3. Personnel's interpretation of the class specifications for the position in question, as they apply to the duties Grievants performed, 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. Although Grievants Ritchie and Hardway did perform some APS duties outside their current classification as SSW II's, they did not spend a predominant, or even significant amount of their time on this work, and thus it did not render them misclassified.
5. Grievant Glover was performing APS work a significant amount of her time during the relevant period and has proven she was misclassified as a SSW I and an SSW II.
6. Grievant Glover has not presented any evidence showing she was misled, coerced, or deterred from filing a grievance over her classification at some earlier point in her career.

Accordingly, this grievance is DENIED in part and GRANTED in part. Respondent is hereby ORDERED to compensate Grievant Glover for the difference, if any, in salary between a SSW I and a SSW III, for the period October 16, 1994 through June 30, 1995, providing Respondent has not already compensated Grievant Glover in accordance with the level three grievance evaluator's decision. If Respondent has compensated Grievant Glover in accordance with that directive, then it is hereby ORDERED to compensate Grievant Glover for the difference, if any, in salary between a SSW II and a SSW III, for the period October 16, 1994 through June 30, 1995.

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.

MARY JO SWARTZ

Administrative Law Judge

Dated: August 28, 1996