LYNDA R. TRAVIS, et al.,

v. Docket No. 95-HHR-359

WEST VIRGINIA DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/WEST VIRGINIA DIVISION OF PERSONNEL

DECISION

The grievants (See footnote 1) are employed by the West Virginia Department of Health and Human Resources (HHR) as Investigator IIs in the Investigations and Fraud Management Unit of its Office of the Inspector General (OIG). They filed grievances at Level I in August 1993, (See footnote 2) contending that their positions were misclassified and misnamed; they seek the creation of a new, higher-paid "Special Agent" or "Criminal Investigator" classification.

Background

Much of the factual background of the case is not in dispute. In 1992, the West Virginia Division of Personnel (Personnel), per its authority under W.Va. Code §29-6-10, (See footnote 3) began a statewide reclassification of most, if not all, "civil service" (See footnote 4) positions. One of the purposes of the plan was to redefine positions in order to acknowledge and conform to changes in job functions which had occurred since the last such reclassification. Since another goal was to reduce the number of overall classifications used by state agencies, new job descriptions were designed to broaden the scope of the tasks, and perhaps authority, assigned to positions in a particular series or "class" of positions. (See footnote 5) Typically, a series withpositions designated I, II, III and IV, would be changed to a I, II and III configuration under the plan.

To some extent, a reconfiguration of a series afforded an affected agency the opportunity to change and/or realign duties to adapt generally to shifts in budgets, staff levels, or agency philosophy and focus. To determine what duties were currently assigned to a position, Personnel relied heavily on detailed written accounts of those duties completed by the incumbent employees and their immediate supervisors.

Personnel's plan also reconfigured and reduced the number of salary levels in the state's pay structure. The overall workforce was not reduced; employees were merely assigned the same or new

titles within their series and, in some cases, to higher pay levels, on the basis of which of the redefined classifications constituted the “best fit” for the duties they were then performing. The plan provided an “informal” grievance procedure for employees who took issue with the placement of their positions in particular classifications and/or pay levels.

The regulations by which Personnel initiated the reclassification also provided that officials in an affected agency would be consulted as its positions were redefined and placed in new pay grades. The regulations specifically provided that an agency's “appointing authority” was required to “sign-off” before the reclassification of positions was implemented.

When establishing pay levels for positions in the classified service, it has been Personnel's practice to refer to the Southeastern Salary Conference (SESC), a compilationof the salaries for various positions used by state governments in the southeastern United States. Personnel also considers an agency's recruitment problems, and the extent to which its budget will permit it to pay an average of the salaries listed in SESC for particular positions. It appears that most agencies attempted to increase the entry-level salaries of a great many of their positions under the plan in order to better compete with the private sector for new employees.

Lowell Basford, Personnel's Assistant Director of Compensation and Classification, consulted with HHR officials as the reclassification plan for HHR positions was developed. The grievants and certain supervisors and/or directors within OIG disagreed with Personnel's proposal to create a single Investigator classification assigned to pay grade 10 for all OIG employees with investigative duties. Personnel ultimately rejected their contention that the new job specifications for Investigator were too broad to accurately describe the grievants' duties.

Then-HHR Commissioner Ruth Panepinto, the agency's appointing authority (See footnote 6) signed off on Personnel's plan in December 1992. On or about December 15, 1992, all HHREmployees were notified of their new classifications and the pay grade to which their positions were assigned. The grievants were notified that they had been placed in the Investigator classification at pay grade 10.

Subsequently, certain HHR employees with “front-end” or preliminary investigative duties challenged their placement in the Eligibility Specialist (ES) classification. Personnel reviewed their complaint and determined that the ES job specifications did not accurately describe their duties. With HHR's approval, Personnel created an Investigator I classification assigned to pay grade 9 and

notified the ES workers of their placement therein. The Investigator classification was retitled Investigator II; the job specifications and pay grade for the position remained the same.

The parties do not dispute that the grievants, unlike Investigator IIs in OIG's Medicaid Fraud Unit, primarily perform criminal investigations. They work closely with county prosecuting attorneys, and local and federal law enforcement agencies on cases involving violations of the numerous state and federal regulations and statutes associated with HHR programs. On occasion, they are called upon to conduct an investigation into another employee's misconduct; they are frequently required to testify and/or represent the agency's interests in criminal proceedings. Their “in-house” or working title has always been Criminal Investigator.

Argument

The grievants' legal position is straightforward. They contend that the Investigator II job specifications do not accurately reflect their duties, and that the pay grade 10 salarydoes not adequately compensate them for those duties. As noted, they also take issue with the accuracy of their titles. As relief, they seek the creation of a new Special Agent or Criminal Investigator classification assigned to pay grade 13.

HHR and Personnel respond that the job specifications and pay grade for Investigator II accurately describe the grievants' function and properly compensate them for their duties. They claim broad discretion in reclassification matters, and deny that they abused that discretion in any portion of the process by which the grievants obtained their current classification and pay rate. The Respondents stress that the reclassification and pay level assignments of HHR positions were integrally related to the reclassification and assignment of other positions in the statewide plan.

Findings and Conclusions

Typically, an employee bringing a misclassification claim concedes the propriety of the reconfiguration of a series of positions, but disputes his or her placement in a particular classification within the new series. Generally, the central issue in such cases is whether the employee has shown that his duties more closely match another cited personnel classification specification than that under which he is currently assigned. Hayes v. W.Va. Dept. of Natural Resources, Docket No. NR-88-038 (March 28, 1989). Such claims are narrowly drawn, and question a relatively small portion of Personnel's and/or the agency's decision- making during the implementation of a large-scale reclassification plan.

An allegation that Personnel and the agency acted improperly in failing to create a particular classification is a much broader charge. The claim necessarily takes issue withmore comprehensive aspects of the classification plan; in many respects, it is a challenge to the propriety of the underlying philosophy and overall goals of the plan.

Both Personnel and the employer have considerable discretion in classification matters, particularly in the creation of positions. Blake v. W.Va. Dept. of Health and Human Resources, Docket No. 95-HHR-043 (April 30, 1996). The employee must show by a preponderance of the evidence that one or both abused that discretion in not creating the new classification. Id. Since, ordinarily, one of the aims of a reclassification project is the reduction and not the addition of classifications, and, because decisions to eliminate, redefine or create a classification are interrelated and dependent upon a great many factors, both objective and subjective, the employee's burden can be a heavy one. Burke, et al., v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995). Moreover, it is inherently difficult to show that it was arbitrary to omit one particular classification from a plan which could include or exclude hundreds, and perhaps thousands, of classifications.

The grievants' evidence falls well short of substantiating their claims. Essentially, they succeeded only in showing that they and their supervisors disagreed and continue to disagree with Personnel's determination that the job specifications for Investigator II accurately describe their duties and that pay grade 10 is, within the context of the overall pay plan, the proper compensation level for the position. Except for Grievant Travis' testimony and the cross-examination of Mr. Basford, the grievants' case did not address the process by which Personnel developed and implemented the reclassification of HHR positions. Instead, their evidence was almost entirely centered on their supervisors' unsuccessful, post-December 1992 efforts to persuade Personnel to change its view, and the differences between the grievants' duties and those of the Medicaid Fraud Investigator IIs.

Ms. Travis testified generally regarding the duties associated with the grievants' positions and the method by which they determined that pay grade 13 was the appropriate salary level for those duties. Summarized, her testimony on the nature of the grievants' work confirms that their duties are primarily, if not exclusively, confined to criminal investigations, and that their investigations are, in some respects, different from those performed by the Medicaid Fraud Unit Investigator IIs. It is accepted that, in order to carry out their duties, the grievants must have a working knowledge of a great many facets of the criminal justice system. It is clear from Ms. Travis' testimony and the record

as a whole that the grievants are of the firm opinion that criminal investigations are more complex and much more demanding than the investigations performed by the Medicaid Fraud Unit. Ms. Travis consistently characterized the grievants' function as unique.

Ms. Travis further testified that she acquired salary information from other agencies in West Virginia which employed Investigator IIs and officials in certain states participating in the SESC which utilized comparable positions. According to Ms. Travis, an average of the salaries she obtained fell within the range of salaries provided for in pay grade 13 of Personnel's newly-adopted compensation plan.

Mr. Basford confirmed that Personnel and HHR considered salary data from SESC and HHR's budget constraints in establishing pay grade 10 as the proper salary range for the Investigator II position. Significantly, Mr. Basford further testified that this was not an“isolated” decision, and that the assignment of any position to any pay grade is interrelated with, and to some extent dependent upon, the relative pay grade assignments of other classified positions. He noted that HHR Social Service Supervisors and Child Protective Service Workers are also assigned to pay grade 10; he opined that the duties of these positions were as or more demanding than the duties of an Investigator II. Mr. Basford also represented that Investigator IIs employed by other agencies, e.g., Workers' Compensation and Tax and Revenue, also perform criminal investigations.

The specifications for Investigator II are as follows:

Nature of Work

Under general supervision, performs full-performance level work by obtaining evidence of reported fraud or violations of the rules and regulations of a state agency or of state or federal laws. Involves direct public contact. Work requires the use of a personal automobile for travel. Employee is subject to on-call status during non-business hours. May be required to deal with situations which are potentially dangerous. Performs related work as required.

Examples of Work

Conducts field investigations to ascertain facts and obtain evidence on reported violations; obtains statements concerning alleged violations.

Explains the law or other agency regulations to the party in violation to secure voluntary compliance.

Checks business records to determine amount of tax due to the state and collects delinquent accounts.

Initiates prosecution of violators and testifies in court as an expert state witness.

Investigates business and professional establishments for proper licenses and cites violations.

Keeps records and makes oral and/or written reports of all investigations.

Locates witnesses and obtains facts and evidence needed by attorneys in litigation of cases. Conducts legal research and locates the section of the West Virginia Code that covers the complaint under investigation.

Interviews complainants and witnesses using prescribed procedures. Reviews and scrutinizes subpoenaed financial records, documents and records for securities violations.

Performs internal audits to determine misuse of time, funds and/or equipment.

May investigate claims against the state; may prepare reports of evidence for the Grand Jury.

It is apparent that the grievants' chief complaint is that this description is overly broad. As noted, however, one of the aims of the statewide reclassification project was to reduce the number of classifications used by state agencies, and the more broadly worded job descriptions were developed to facilitate that objective. There is no evidence of record which even tends to show that these were not valid goals; it is accepted that they were. This finding alone is virtually dispositive of the grievants' claims.

The factual background of the case is markedly similar to that in Blake, supra. There, certain HHR Quality Control Reviewers, citing a general lack of specificity in their job descriptions, sought the creation of a new, more “complex” classification. Noting that the “Nature of Work” was the most important section of a job description, and that, consistent with Personnel's goal to reduce classifications, it need only portray the predominant duties of a position in general terms, the Administrative Law Judge denied the claim. The undersigned similarly finds that the Nature of Work section of the Investigator II job specifications, particularly the phrase, “Full performance level investigative work,” broadly but accurately describes each and every predominant duty associated with the grievants' jobs. Moreover, to the extent that the job description is susceptible to differing interpretations,Personnel's opinion, i.e., Mr. Basford's explanations of its terms, would be

determinative. See, W.Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W.Va. 1993).

Finally, Personnel's determination that pay grade 10 was the proper pay grade for the Investigator II position must also be accepted. Mr. Basford's testimony reflects that when establishing the pay grade, Personnel was forced to consider, among other things, HHR's budget; as noted, HHR's appointing authority approved of the assignment of the position to pay grade 10. Ms. Travis' testimony establishes that the agency's ability to pay a higher salary was not a part of the grievants' calculations. Further, the scope of her review was more narrow than Personnel's in other respects. Most importantly, it is apparent that Ms. Travis was not making the comprehensive comparison of the complexity, levels of responsibility and overall nature of the duties of all classified positions in pay grade 10 which Personnel was required to do when developing the statewide plan.

In summary, a preponderance of the evidence in the case establishes that Personnel's reclassification of HHR positions, including those in OIG, was in conformance with Code §29-6-10, and that it was developed and implemented in a manner which was neither arbitrary nor capricious. The same conclusion is reached with regard to the assignment of Investigator II to pay grade 10.

Accordingly, the 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 WestVirginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and hsould 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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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: March 24, 1997

Footnote: 1

Lynda Travis, Ellis Brown, Barbara Tankersley, David Linkenhoker, Frances Lantz, Jan L. Kinser, John Poindexter,

Edward Waugh and Jolynn Marra. Grievants Waugh and Marra became parties to the action at the March 18, 1996 Level IV hearing; HHR and Personnel did not oppose their February 26, 1996 motion to join.

Footnote: 2

The grievances first reached Level IV in September 1993; Level III was bypassed per W.Va. Code §29-6A-3(a). The cases were consolidated in October 1993 and, because the pleadings raised classification issues, the West Virginia Division of Personnel was joined as an indispensable party; several hearings were scheduled and continued for cause. Pursuant to the grievants' November 10, 1993 request, the case was remanded to Level III by order dated January 13, 1994. Upon receipt of an adverse Level III decision, the grievants refiled at Level IV on August 11, 1995. It appears that the parties then made several unsuccessful attempts to reach an informal settlement. A Level IV hearing was not convened until March 18, 1996. The parties submitted proposed findings of fact and conclusions of law by May 2, 1996.

Footnote: 3

The statute, in pertinent part, provides,

The [state personnel board] shall have the authority to promulgate, amend or repeal rules, in accordance with chapter twenty-nine-a [29A-1-1 et seq.] of this code, to implement the provisions of this article:

For the preparation, maintenance and revision of a position classification plan for all positions in the classified service and a position classification plan for all positions in the classified-exempt 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.

Footnote: 4

Amendments to W.Va. Code §29-6-2, effective July 1, 1991, recharacterized the civil service system as the "classified service."

Footnote: 5

W.Va. Code §29-6-2 defines a "class or class of positions" as "a group of positions sufficiently similar in duties, training, experience and responsibilities as determined by specifications, that the same qualifications, the same title and the same schedule of compensation and benefits may be equitably applied to each position in the group."

Footnote: 6

W.Va. Code §29-6-2 defines "appointing authority" as "a person or group of persons authorized by an agency to make appointments to positions in the classified or classified- exempt service." There was some dispute at the Level IV hearing over whether Inspector General Danny Van Camp was the appointing authority for the purposes of the reclassification of positions in OIG. Upon review, it seems clear that OIG is a department within HHR, and that Personnel's regulations required Ms. Panepinto's signature. In any event, the grievants did not press the matter, and, since the issue was not

litigated at the lower levels, it is not cognizable at Level IV. See, HHR v. Hess, 432 S.E.2d 27 (W. Va. 1993).