JOANNA SMITH,

Grievant,

v.

DOCKET NO. 94-HHR-1077

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN SERVICES/DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

PROCEDURAL HISTORY

This grievance has a long and protracted procedural history. Grievant filed a grievance at level one on July 22, 1993, alleging she was misclassified as an Audit Clerk II when she was hired on January 31, 1989, through December 16, 1992, and thereafter misclassified as an Office Assistant II from December 16, 1992, through the present. The grievance proceeded through level three, where the Division of Personnel was joined as a party. A level three hearing was held on January 14, 1994, and the grievance was denied by Terry Ridenour, Grievance Evaluator, by decision dated November 9, 1994. Grievant appealed to level four on November 22, 1994, and was given Docket No. 94- HHR-1076. However, she amended her grievance statement to include claims of harassment, favoritism and discrimination, issues which were not addressed at the lower levels. Respondent Department of Health and Human Resources ("HHR") moved to remand the amended portion of the grievance for a level three hearing on those issues. The undersigned granted that motion by Order dated December 16, 1994, and remanded that portion of the grievance alleging harassment, favoritism and discrimination for hearing. On February 17, 1995, Grievant again filed a level four grievance alleging harassment, discrimination and favoritism (hereinafter, the "harassment" grievance), which was given

Docket No. 95-HHR-076. Grievant had received a level two decision denying the grievance from Harry Evans, Director, Division of Accounts Receivable and Payroll, on January 23, 1995, which informed her that she could appeal that decision to level three and request a hearing. Grievant appealed to level three, but did not receive a response within five days, and advanced her appeal to level four. Once again, HHR moved to remand the harassment grievance to level three for a hearing on March 15, 1995. That motion was denied by the undersigned by Order dated March 21, 1995, which also consolidated the misclassification and harassment grievances into Docket No. 94-HHR-1077/95-HHR-076.

Following several continuances, the grievance was reassigned to Administrative Law Judge Albert C. Dunn on September 28, 1995. On November 28, 1995, ALJ Dunn issued an Order remanding the harassment portion of the grievance to level three, upon request of the parties, and the misclassification portion was held in abeyance. Subsequently, the grievance was reassigned back to the undersigned.

A level three hearing was held on the harassment grievance over the course of several days from January through August, 1996, and a decision denying the grievance was issued by Barbara J. Wheeler, Grievance Evaluator, on March 10, 1997. Grievantappealed that decision to level four on March 25, 1997, and that grievance was once again consolidated with the misclassification grievance. Following many continuances for good cause, as well as substitution of counsel, this matter came on for a level four hearing on November 17, 1997. At that time, the parties indicated they wished to address the misclassification issue only and proceeded into settlement discussions. The hearing was continued pending settlement of the misclassification claim. On November 21, 1997, Grievant informed the Grievance Board that she declined the settlement offered by HHR, and requested her grievance be held in abeyance pending her obtaining new counsel. Following several more continuances, this matter finally came on for hearing at level four on May 19, 1998, and August 20, 1998. Following the presentation of evidence on the misclassification grievance, the parties agreed to submit the harassment grievance separately on the record developed below. Both the misclassification and harassment grievances became mature for decision on October 13, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 1) The grievances have been severed for decision purposes into Docket No. 94-HHR-1077 (misclassification) and Docket No. 95-HHR-076 (harassment). This is the misclassification decision.

(See footnote 2)

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts. 1. Grievant is an employee of HHR, Office of Financial Services' Payroll Section. She is currently employed as an Office Assistant II, and has been classified as such since the HHR reclassification project in December of 1992. Prior to the reclassification project, Grievant was classified as an Audit Clerk II.

2. The HHR Payroll Section is divided into two groups: the Health side and the Human Services side. Although the Department of Health and the Department of Human Services merged in 1991, the agency structure effectively remained divided within the Office of Financial Services. The Payroll Section consists of an employee who coordinates benefits for the Health side, an employee who coordinates benefits for the Human Services side (hereinafter benefits coordinators), an employee who completes the payroll for the Health side, an employee who completes the payroll for the Human Services side (hereinafter payroll employees), and the Payroll Manager.

3. Barry Adkins is the Payroll Manager, and has been Grievant's immediate supervisor since 1996. Prior to that time, Grievant's immediate supervisor was Ms. June Ingram, the payroll employee for the Health side. Both Grievant and the other benefits coordinator are classified as Office Assistant IIs, whereas the employees responsible for payroll, June Ingram and Dan Garnett, are classified as Administrative Services Assistant IIs.

4. Grievant acts as the benefits liaison between Public Employees Insurance Agency ("PEIA") and approximately 2700 Human Services employees. Until early 1996, Grievant acted as the benefits coordinator for the Health side. Despite transferring sides within the Office of Financial Services, Grievant's overall job function as the benefits coordinator for HHR have predominantly remained the same since 1989. 5. Grievant's duties consist of the following: (1) remaining current on all PEIA benefit options; (2) orienting Human Services employees to the PEIA system; (3) enrolling Human Services employees in one of several benefit plans offered through PEIA; (4) communicating with specific "clerical" employees in HHR field offices regarding the benefits of field employees; (5) checking employee benefit forms and records for completeness and accuracy; (6) forwarding all insurance benefit forms received from Human Services employees to PEIA; (7) communicating changes and updates to PEIA benefit options to Human Services employees via written

correspondence, telephone, or group presentation; (8) applying programs/charts created by PEIA or herself, through the HHR Data Processing Section, to target discrepancies between payroll and PEIA records; and (9) correcting any errors found in HHR records and transmitting the correct information to PEIA.

6. Grievant does not work under close supervision. Grievant has continually made efforts over the years to establish forms and procedures to improve her job and make it more efficient. Examples of this include Grievant's work with Data Processing employees to make the coding of various information in the insurance reports a more efficient process with greater accuracy, and in another instance, devising a way to quickly calculate the level of benefits which are tax-sheltered versus non-tax-sheltered.

7. Other examples of work typically performed by Grievant include preparing and implementing changes each pay period pertaining to employee participation in PEIA, collecting employee premiums through payroll deduction and direct pay, as well as preparing a premium report which requires reconciliation of agency and program records.

8. Outside contacts are varied and involve entities such as Provident Insurance, Mountaineer Flexible Benefits, the Health Plan of the Ohio Valley, various colleges anduniversities, and other agencies such as the Division of Corrections and Workers' Compensation Division. With regard to the Division of Corrections, Grievant devised a method to more efficiently remove a group of employees from HHR payroll for insurance purposes following a transfer of those employees under the direction of Corrections.

9. Grievant also performs research such as ascertaining the status of backwage settlements for the Public Employees Consolidated Retirement Board and making various types of deductions, such as delayed payroll. Grievant gathers and compiles information for the U.S. Department of Health and Human Services Data Match Project.

10. In 1992, Grievant took on the additional responsibilities of training a co- worker on PEIA regulations and coding insurance/retirement reports. The training was “hands-on” and lasted approximately one year. The co-worker was actually performing the job duties, and Grievant provided information or clarification when asked by that worker. Grievant did not have supervisory authority over that employee.

11. Grievant was hired into the Payroll Division as an Audit Clerk II in 1989. Sometime after

entering that job, Grievant discovered that the job duties she performed did not fit within that classification, and believed a better fit was the Administrative Aide classification.

12. Grievant did not file a grievance at that time over her alleged misclassification, because it was well-known throughout the agency that a reclassification project was underway and would be instituted in 1992.

13. In December 1992, Grievant was reclassified as an Office Assistant II. She appealed that classification through the Division of Personnel, and ultimately filed thisgrievance on July 22, 1993. Grievant believes the best fit for her job duties and responsibilities are found in the Administrative Services Assistant I classification.

PRELIMINARY ISSUE

Respondent HHR filed a motion to dismiss, on the basis of timeliness, the portion of the grievance regarding Grievant's alleged misclassification as an Audit Clerk II in 1989 through December 1992, or in the alternative, to limit her relief, if any, for that time period. In addition, HHR seeks to limit Grievant's back pay award, if any, for the alleged misclassification as an Office Assistant II for the period from December 1992 through the present, to ten days prior to the filing of the grievance on July 23, 1993, also on the basis of timeliness.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH- 445 (July 28, 1997); Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of MasonCounty, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995);

Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code §29_6A-4(a). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

With regard to Grievant's alleged misclassification from 1989 through 1992 as an Audit Clerk II, it is undisputed that Grievant believed at some point several months after her hiring, and well before December 1992, that she was misclassified. Still, she did not file her grievance over that period of misclassification until July 23, 1993. Grievant's excuse for her delay in filing was that the reclassification project was underway in HHR, and she hoped the situation would be corrected through the reclassification. Grievant does not allege, nor was there any evidence presented, that she was in any way deterred from filing a grievance over this period of misclassification by her employer. Thus, the grievance over that period of misclassification was not timely filed. More importantly, it is moot.

Misclassification is a continuing practice, and as such, a grievance may be initiated at any time during the time the misclassification continues, however, “[a]s with a salary dispute, any relief is limited to prospective relief and to back relief from and after [ten] dayspreceding the filing of the grievance.” Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Easterly v. W. Va. Dept. of Health and Human Res., Docket No. 96-HHR-053 (July 25, 1996); Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052/169 (Sept. 27, 1991). W. Va. Code § 29-6A-2. In this instance, even if Grievant's misclassification as an Audit Clerk was deemed to be a continuing violation tolling the time limitation for filing a grievance, Grievant is not entitled to any back wages for that period of time, because that period of misclassification ended long before ten days preceding the filing of this grievance. Thus, as there is no relief to be granted on that portion of the misclassification grievance, it is deemed to be moot, and any decision on this issue would be merely advisory. This Grievance Board will not issue advisory opinions. See Stollings v. Div. of Envtl. Protection, Docket No. 97-DEP-411 (June 8, 1998); Owens v. Lincoln County Bd. of

Educ., Docket No. 97-22-121 (Feb. 11, 1998).

With regard to Respondent's motion to limit Grievant's relief, if any, for the period December 1992 through the present, again, Grievant believed she was misclassified on December 16, 1992, but did not file this grievance until July 23, 1993. Therefore, she is limited to any back pay award for that period to ten days preceding the filing of the grievance until the present. See Martin, supra.

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 match another cited Personnel classification specification than that 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. 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 Grievant's current classification constitutes the “best fit” for her required duties. Simmons v. W. Va. Dept. of Health and Human Res., 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 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 Res., 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, § 4.04(d). Finally, Personnel's interpretation and explanation of the classification specifications at issue, if said language is 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).

The classification specifications at issue in this grievance are the Office Assistant II and Administrative Services Assistant, from December 16, 1992 to May 1994. In May 1994, the Administrative Services Assistant classification was divided into three groups. The Administrative Services Assistant I position is the classification specification at issue from May 1994 to the present. In addition, the Office Assistant III classification specification is relevant to this grievance as a possible alternative classification. Relevant portions of said classification specifications are set forth below.

OFFICE ASSISTANT II

Nature of Work: Under general supervision, performs full-performance level work in multiple-step clerical tasks calling for interpretation and application of office procedures, rules and regulations. Performs related work as required.

Distinguishing Characteristics: Performs tasks requiring interpretation and adaptation of office procedures as the predominant portion of the job. Tasks may include posting information to logs or ledgers, and checking for completeness, typing a variety of documents, and calculating benefits. May use a standard set of commands, screens, or menus to enter, access and update or manipulate data.

At this level, the predominant tasks require the understanding of the broader scope of the work function, and requires an ability to apply job knowledge or a specific skill to a variety of related tasks requiring multiple steps or decisions. Day-to-day tasks are routine, but initiative and established procedures are used to solve unusual problems. The steps of each task allow the employee to operate with a latitude of independence. Work is reviewed by the supervisor in process, randomly or upon completion. Contacts are usually informational and intergovernmental.

Examples of Work

> Posts information such as payroll, materials used or equipment rental to a log or ledger; may be required to check for completeness; performs basic arithmetic calculations (addition, subtraction, division or multiplication); corrects errors if the answer is readily available or easily determined.
>
> Maintains, processes, sorts and files documents numerically,

alphabetically, or according to other predetermined classification criteria; reviews files for data and collects information or statistics such as materials used or attendance information.

Answers telephone, screens calls, takes messages and complaints; gives general information to callers when possible, and specific information whenever possible.

Receives, sorts and distributes incoming and outgoing mail.

Operates office equipment such as adding machine, calculator, copying machine or other machines requiring no special previous training.

Types a variety of documents from verbal instruction, written or voice recorded dictation.

Collects, receipts, counts and deposits money.

Calculates benefits, etc., using basic mathematics such as addition, subtraction, multiplication, division and percentages.

Posts records of transactions, attendance, etc., and writes reports.

May compile records and reports for supervisor.

May operate a VDT using a set of standard commands, screens, menus and help instructions to enter, access and update or manipulate data in the performance of a variety of clerical duties; may run reports from the database.

OFFICE ASSISTANT III

Nature of Work: Under general supervision, performs advanced level, responsible and complex clerical tasks of a complicated nature involving interpretation and application of policies and practices. Interprets office procedures, rules and regulations. May function as a lead worker for clerical positions. Performs related work as required.

Distinguishing Characteristics: Performs tasks requiring interpretation and adaptation of office procedures, policies, and practices. A significant characteristic of this level is a job-inherent latitude of action to communicate agency policy to a wide variety of people, ranging from board members, federal auditors, officials, to the general public.

Examples of Work

Analyzes and audits invoices, bills, orders, forms, reports and documents for accuracy and initiates correction of errors.

Maintains, processes, sorts and files documents numerically, alphabetically, or according to other predetermined classification criteria; researches files for data and gathers information or statistics such as materials used or payroll information.

Types a variety of documents from verbal instruction, written or voice recorded dictation.

Prepares and processes a variety of personnel information and payroll documentation.

Plans, organizes, assigns and checks work of lower level clerical employees.

Trains new employees in proper work methods and procedures.

Answers telephone, screens calls, takes messages and complaints and gives information to the caller regarding the services and procedures of the organizational unit.

Receives, sorts and distributes incoming and outgoing mail.

Operates office equipment such as electrical calculator, copying machine or other machines.

Posts records of transactions, attendance, etc., and writes reports.

Files records and reports.

May operate a VDT using a set of standard commands, screens, menus and help instructions to enter, access and update or manipulate data in the performance of a variety of clerical duties; may run reports from the database and analyze data for management.

ADMINISTRATIVE SERVICES ASSISTANT (See footnote 3)

Nature of Work

Under general direction, performs work at the full-performance level in a major functional area of a division devoted to fiscal or operational management. Incumbent is responsible for assisting and/or developing and carrying out plans to solve operating problems. Working within prescribed guidelines, has considerable latitude to vary methods, approaches, and tools necessary to achieve desired outcome. Monitors the success of the solution; makes modifications to improve services. Work is usually multi- faceted and contacts may include both inter-governmental and private-sector. Performs related work as required.

Distinguishing Characteristics

Positions in this classification typically perform technical work in administrative services such as accounting, budgeting, project monitoring and reporting, personnel, and procurement and property. The duties include report-writing or compiling data to document accountability in the area of assignment. Many assignments are on-going, but special studies for management are a recurring part of the job.

Examples of Work

Confers with inter- and intra-agency personnel to transact business; gather information, or discuss information; may be in a position with public or federal government contact.

Conducts performance surveys and reviews agency methods of operation; devises flowcharts and graphs; may conduct cost analysis studies.

Gathers and compiles information for state records; writes reports, balances tally sheets, and monitors inventories, purchases, and sales.

Updates records and contacts employees to gather information; represents the agency in the area of assignment in in-house meetings.

Maintains files of information in hard copy files or electronic format; runs reports for regular or intermittent review.

Assists in determining the need for changes in procedures, guidelines and formats; devises a solution; monitors the success of solutions by devising qualitative measures to document the improvement of the services.

Assists in the writing of manuals in the area of assignment; clarifies the wording and describes new procedures accurately.

May review the work of clerical staff for accuracy and adherence to rules and regulations.

ADMINISTRATIVE SERVICES ASSISTANT I

Nature of Work: Under general supervision, performs administrative work in providing support services such as fiscal, personnel, payroll or procurement in a small division or equivalent organization level. May function in an assist role or in a specialized capacity in a large agency or department. Develops or assists in developing and implements plans/procedures for resolving operational problems and in improving administrative services. Work is typically varied and includes inter- and intra- governmental and public contact. Performs related work as required.

Distinguishing Characteristics: Positions in this class are distinguished from the Administrative Services Assistant II by the size of the unit served and by the independence of action granted. Positions in a small agency or division may be responsible for a significant administrative component; other positions assist an administrative supervisor in a large state agency. Authority to vary work

methods or policy applications or to commit the agency to alternative course of action is limited.

Examples of Work

Confers with inter- and intra-agency personnel to transact business, gather information, or discuss information; may be in a position with public or federal government contact.

Gathers and compiles information for state records; writes reports, balances tally sheets, and monitors inventories, purchases, and sales.

Updates records and contacts employees to gather information; represents the supervisor or unit in the area of assignment at in-house meetings.

Maintains files of information in hard copy files or electronic format; runs reports for regular or intermittent review.

Assists in determining the need for changes in procedures, guidelines and formats; devises a solution; monitors the success of solutions by devising quantitative/qualitative measures to document the improvement of services.

Assists in the writing of manuals in the area of assignment; clarifies the wording and describes new procedures accurately.

Grievant argues she should be reclassified as an Administrative Services Assistant because her work is administrative, rather than clerical. Specifically, she contends she is performing administrative functions by requesting the Data Processing Unit to compose forms and/or programs to help consolidate employee paperwork for various PEIA reports. Grievant's reports are drafted and used by her, and make the duties involved in coordinating benefits less cumbersome and more efficient.

The predominant distinguishing characteristic between the Office Assistant series and the Administrative Services Assistant series is the distinction between the performance of clerical versus administrative tasks. The Office Assistant II and III classification specifications both speak to full-

performance and advanced level clerical tasks, while the Administrative Services Assistant I classification specification defines the duties of that series as administrative technical work.

In explaining the distinction between “clerical” and “administrative” for classification purposes, Mr. Lowell Basford, Director of Compensation and Classification, Division of Personnel, indicated that clerical work is process driven in a structured and regulated way, whereas administrative work is less structured with a greater variety of outcomes. Mr. Basford testified that Grievant performs clerical type work because her responsibilities consist primarily of obtaining fixed criteria from PEIA, and applying that criteria to incoming employee insurance requests. Grievant is part of a multi-step process in which she receives insurance information from an employee, and follows the proper PEIA regulations in order to get the benefits started, changed, or terminated. She is responsible for enrolling, maintaining, or terminating employee insurance benefits based upon standards provided by PEIA.

Mr. Basford explained that Grievant is limited in her decision making because boundaries and regulations are set by PEIA. Grievant does not have latitude to vary methods, approaches, or the forms used to report employee insurance information toPEIA. Further, Grievant's work is consistently driven by an employee being hired, fired, retired, or taking extended family or medical leave. To a great degree, her work is routine.

Mr. Basford testified that Personnel has reviewed Grievant's position for classification purposes approximately four times. Based upon the nature of her work and the responsibilities involved in coordinating insurance benefits, Mr. Basford opined that Grievant's “best fit” for classification purposes was within the Office Assistant series. Evidence was presented, without objection by Grievant's counsel, that Personnel offered to reclassify Grievant as an Office Assistant III due to the advanced level of terminology and insurance rules which had to be understood in her position. That offer was rejected by Grievant.

Grievant argues that she performs administrative work similar to that of two payroll employees who are classified as Administrative Services Assistant IIs. Tammy Sebok, who formerly worked with Grievant in the Payroll Division, testified that the benefits coordinator and payroll employees' jobs are “predominantly similar”. Lynn Dotson, a former payroll employee who also used to work with Grievant, testified that the payroll employees and benefits coordinator positions are similar jobs. However, neither of the payroll employees, June Ingram or Dan Garnett were called to testify, and no

evidence was presented as to what their job duties and responsibilities actually consist of on a day-to-day basis. Merely stating that she performs similar work to others without providing any evidence of what those others actually do is not sufficient to establish by a preponderance of the evidence that Grievant is misclassified.

In addition, the evidence established that June Ingram had supervisory duties over Grievant until very recently, including responsibility for Grievant's performanceevaluations. Grievant does not have any supervisory duties in the Payroll Division. In fact, it appears that the difference between the payroll employees and the benefits coordinator positions is hierarchical within the Payroll Division, thus explaining the different classification specifications.

It is possible that if June Ingram or Dan Garnett no longer have supervisory duties, they may currently be misclassified themselves. However, that does not make Grievant misclassified. Indeed, it is possible that Ms. Ingram and Mr. Garnett are now misclassified. Where a grievant compares herself to others who are enjoying a higher classification and performing the same work that she performs, but the others are misclassified, the remedy is not to similarly misclassify the grievant. Akers v. W. Va. Dept. of Tax and Revenue, 460 S.E.2d 702 (1995); Kunzler v. Dept. of Health and Human Resources, Docket No. 97-HHR-287 (Jan. 8, 1998).

While the Office Assistant and Administrative Services classification specifications do contain some overlap in duties and responsibilities, thus making this a close call, there is no evidence to demonstrate that Personnel's classification of Grievant's position in the Office Assistant classification is clearly wrong or arbitrary or capricious. However, it does appear, as Mr. Basford and HHR conceded, that Grievant's duties reflect a more advanced knowledge of rules, regulations and procedures, and she does not work under any direct supervision. Thus, I conclude that the Office Assistant III classification specification is the best fit for Grievant's position of benefits coordinator for the Human Services side of HHR.

CONCLUSIONS OF LAW

1. 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 match another cited Personnel classification specification than that under which she is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).

2. 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).

3. The key to the analysis is to ascertain whether Grievant's current classification constitutes the “best fit” for her required duties. Simmons v. W. Va. Dept. of Health and Human Res., 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 Services, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

4. 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 Res., Docket No. 94-HHR-041 (Aug. 29, 1994). Even though a job description does not include all the actual tasksperformed by a grievant, that does not make the job classification invalid. W. Va. Admin. Rule, § 4.04(d).

5. Personnel's interpretation and explanation of the classification specifications at issue, if said language is 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).

6. Where a grievant compares herself to others who are enjoying a higher classification and performing the same work that she performs, but the others are misclassified, the remedy is not to similarly misclassify the grievant. Akers v. W. Va. Dept. of Tax and Revenue, 460 S.E.2d 702 (1995); Kunzler v. Dept. of Health and Human Resources, Docket No. 97-HHR-287 (Jan. 8, 1998).

7. Grievant has failed to prove by a preponderance of the evidence that the best fit for her duties and responsibilities lies within the Administrative Services Assistant I classification specification.

8. Grievant has proven by a preponderance of the evidence that the best fit for her duties and responsibilities lies within the Office Assistant III classification specification.

Accordingly, this grievance is **GRANTED** and HHR and Personnel are hereby **ORDERED** to reclassify Grievant to the Office Assistant III classification, and compensate her in the form of back pay and benefits, if any, to which she is entitled from ten (10) days preceding the filing of this

grievance to the present.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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: November 9, 1998

ATTACHMENT A

SUMMARY OF EVIDENCE (MISCLASSIFICATION)

Level Three Grievant's Exhibits

Ex. 1 -

Job Specification: Administrative Services Assistant.

Ex. 2 -

Packet of employee benefits enrollment forms.

Ex. 3 -

Example of a reminder notice.

Ex. 4 -

Packet of forms Grievant receives from others (WV-11, etc.).

Ex. 5 -

Sample Federal reporting from (IRS/SSA/HCFA).

Ex. 6 -

Examples of contacts with others.

Ex. 7 -

P.E.I.A. Supply Order form.

Ex. 8 -

Memorandum from David P. Lambert, Director, to Insurance Coordinators, dated November 24, 1993.

Ex. 9 -

PEIA Employer Survey.

Ex. 10 -

Memorandum from Barry to Dan dated January 31, 1991.

Ex. 11 -

Packet of sample letters to employees concerning leave status.

Ex. 12 -

Manila folder containing samples of employee benefit related literature.

Ex. 13 -

Packet of monthly insurance report forms.

Ex. 14 -

Packet containing sample correspondence to Insurance Coordinators from the PEIA.

Ex. 15 -

Job Specification: Office Assistant II.

Level Three HHR Exhibits

None

Level Three Personnel Exhibits

None

Level Four Grievant's Exhibits

Ex. 1 -

Job Specification: Office Assistant II (eff. 12/1/91).

Ex. 2 -

Job Specification: Administrative Services Assistant I (eff. 5/11/94).

Ex. 3 -

Job Specification: Administrative Services Assistant (eff. 12/1/91).

Ex. 4 -

Performance Evaluation Form for Joanna Smith from Jan. 1, 1996 to Dec. 31, 1996.

Ex. 5 -

Performance Evaluation Form for Joanna Smith from Oct. 1,1992 to Sept. 30 1993.

Ex. 6 -

Performance Evaluation Form for Joanna Smith from January 1, 1994 to December 31, 1994.

Ex. 7 -

October 21, 1992 memorandum from Barry Adkins to Harry Evans.

Ex. 8 -

New Employee Development Presentation Agenda, 1997.

Ex. 9 -

New Employee Development Presentation Agenda, 1998.Ex. 10 -
Rate Chart for insurance plans.

Ex. 11 -

PEIA Premium Comparison Exception Report.

Ex. 12 -

Data Processing Request Form.

Ex. 13 -

Adjustments to Retirement Form.

Ex. 14 -

Sample form.

Ex. 15 -

Sample form.

Ex. 16 -

March 24, 1998 memorandum from Grievant to Personnel/Payroll Clerks.

Ex. 17 -

April 17, 1998 memorandum from Grievant to Personnel/Payroll Clerks.

Ex. 18 -

October 30,1997 memorandum from Grievant to Barbara Beane, Eligibility Unit Supervisor.

Ex. 19 -

August 18, 1992 memorandum from Grievant to Ms. Sharon Latorre.

Ex. 20 -

December 16, 1996 letter from Hilda McGrew, Retirement Advisor, to Grievant.

Ex. 21 -

June 19, 1992 letter from Susan K. Ball, Director of Marketing, to Grievant.

Ex. 22 -

Sample of Worker's Compensation Fund letter of eligibility.

Ex. 23 -

February 9, 1995 memorandum from Charles W. Bailey, Jr., State Registrar, to Shawna M. Pennington.

Ex. 24 -

June 28, 1996 memorandum from Division of Surveillance and Disease Control to Grievant.

Ex. 25 -

December 12, 1997 memorandum from Terry Hoover, Manager, to Payroll Administrators.

Ex. 26 -

April 27, 1998 letter from Lucy C. Eates to Grievant.

Ex. 27 -

November 16, 1995 letter from Jeanne L. Roberts, Director, to Ms. Jane N. Alatorre.

Ex. 28 -

Description of Work portion of position description form completed by Grievant.

Level Four HHR Exhibits

Ex. 1 -

Job Specification: Audit Clerk III (eff. 7/1/79).

Ex. 2 -

Job Specification: Administrative Aide (eff. 7//79).

Ex. 3 -

West Virginia Administrative Rule, Section 4. Classification Plans.

Level Four Personnel Exhibits

Ex. 1 -

Appeal of Reclassification Decision of Joanna Smith, dated January 8, 1993.

Testimony

Grievant testified in her own behalf and presented the testimony of Tammy Sebok and Lynn Dotson. HHR presented the testimony of Lowell D. Basford.

Footnote: 1

Grievant was represented by Dale Green, Esq., Christopher G. Moffatt, Esq., and finally George P. Surmaitis, Esq. HHR was represented by Michelle Mensore, Esq., and Meredith Harron, Esq, Assistant Attorneys General. The Division of Personnel was represented by Mr. Lowell D. Basford.

Footnote: 2

A Summary of Evidence is attached as Attachment A.

Footnote: 3

As noted earlier, this classification specification was fragmented in 1994 into three separate classifications within the Administrative Services Assistant series. Grievant alleges the best fit for her job duties after the fragmentation lie within the Administrative Services Assistant I classification specification.