THOMAS L. RITCHIE, JR.,

Grievant,

v. DOCKET NO. 98-CORR-105

WEST VIRGINIA DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER

Respondents.

DECISION

Grievant, Thomas L. Ritchie, filed this grievance against Respondents, West Virginia Division of Corrections (Corrections)and the Huttonsville Correctional Center (Huttonsville). The West Virginia Division of Personnel (DOP) was made a part of the grievance at Level III since the grievance primarily involved compensation and classification issues. The Grievant alleges discrimination and favoritism due to his belief he is currently misclassified as an Accounting Assistant II/Trustee Clerk. (See footnote 1) Grievant submits he actually performs the same duties as an Accounting Assistant III, now known as an Accounting Technician III, at another correctional facility, the Mount Olive Correctional Complex (Mt. Olive). An Accounting Technician III is a pay grade 7. This is a higher pay level than Grievant's current position as a Trustee Clerk, which is a pay grade 5. As relief, Grievant seeks promotion to Accounting Technician III and any requisite increase in salary. Grievant was denied relief at the lower levels of the grievance procedure. At Level IV, an evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on July 14, 1998. Upon notification the parties were not submitting post-hearing briefs, the case became mature for decision on July 27, 1998.

DISCUSSION

Grievant's primary contention is that he is currently misclassified. In order for Grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match another cited Personnel classification specification than the one to which he is currently assigned. See generally, Hayes v. W. Va. Dept of Natural Resources, Docket No. NR-88-038 (Mar.28, 1989).

In order to decide whether or not Grievant is misclassified, we must determine whether Grievant's current classification constitutes the "best fit" for his required duties. Propst v. W. Va. Dept. of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 93-HHR-371 (Dec. 3, 1993); Simmons v. W. Va. Dept. of Health and Human Resources/W. Va. 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 Services, Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990). Additionally, class specifications are descriptive only and are not meant to be restrictive. The mention of one quality or requirement does not exclude others. W. Va. Div. of Personnel Rules § 4.04(a). Even though a job description does not include all the actual tasks performed bya grievant it does not make that job classification invalid. Id. at § 4.04(d). Finally, Personnel's interpretation and explanation of the classification specifications should be given great weight unless clearly erroneous. W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

A review of the evidence does indicate both classifications have some basic similarities. Both classifications require the employee to perform basic accounting duties and maintain accurate financial records of all inmate monies. Respondents do not dispute this contention.

Respondents submit, however, that, despite some similarities, there are a few major differences between a Trustee Clerk and an Accounting Technician III. Primarily, as testified to by Mr. Lowell Basford, Assistant Director of Classification for the DOP, the Accounting Technician III classification is intended to be a supervisory position and is what the DOP calls a “lead worker.” Supervision duties are not a part of the Trustee Clerk position.

More specifically, a review of the Accounting Technician III Job Specification, the position which Grievant seeks, does indicate an individual in this classification performs “full-performance accounting support duties" (Accounting Technician III Job Specifications, "Nature of Work") and the responsibilities “include training and reviewing work of subordinate staff" (Accounting Technician III Job Specifications, "Distinguishing Characteristics"). The Trustee Clerk position, while having some

duties in common with the Accounting Technician III job, clearly does not require any supervisory duties and is not a lead worker position.

While it does appear Grievant is a hard worker and may perform some dutiesoutside of his job description, employees can perform duties outside their job description and still be properly classified. Dooley v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-498 (Mar. 19, 1991). Class specifications are to characterize the type of work to be performed, not to identify every task of the position. Again, class specifications are descriptive, not exhaustive, and are to give a "flavor" of the difficulties, complexities, and duties of the position. Hager v. Health and Human Resources, Docket No. 95-HHR-241 (Sept. 29, 1995).

Although Grievant has trained a backup who does his work on days he is not present, he does not supervise this individual and does not perform the duties normally required by the Division of Personnel to be labeled as a lead worker or supervisor, such as, review of work, completing evaluations and being completely in charge of their assignments. Grievant has not identified anyone directly supervised by him. It is clear from the evidence presented that Grievant does not perform any of the “lead worker” supervisory functions inherent in the Accounting Technician III position and, therefore, is not misclassified as a Trustee Clerk. The undersigned Administrative Law Judge finds that Grievant's current classification as a Trustee Clerk constitutes the "best fit" for his required duties. See Simmons,supra.

Grievant has not met his burden of proof and has not demonstrated that Personnel's determination that the predominant portion of his duties were within the Trustee Clerk classification was "clearly wrong." Francis/Sayre v. Dept. of Health and Human Resources/Office of Social Servs. And Div. of Personnel, Docket No. 95-HHR-077 (July 28, 1995).

Grievant's second issue is that if he is not misclassified, he is a victim ofdiscrimination and/or favoritism. A prima facie showing of either discrimination (See footnote 2) or favoritism (See footnote 3) , under W. Va. Code §29-6A-2(d)&(h), consists of a grievant establishing:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other

employee(s) and were not agreed to by the grievant in writing.

Hindman v. W.Va. Div. of Corrections, Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W.Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W.Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

If a grievant successfully proves a prima facie case, a presumption of discrimination exists, which respondent can rebut by articulating a legitimate reason for its action. (See footnote 4) However, a grievant may still prevail if he can demonstrate the reason proffered by arespondent was pretextual. Singleton v. W.Va. Dept. of Health and Human Resources, Docket No. 95-HHR-490 (May 24, 1996).

Grievant contends that he is being discriminated against because he performs the exact same duties as, and is therefore similarly situated to, the Accounting Technician III at Mt. Olive. The record, however, fails to contain sufficient and reliable evidence to make a true comparison between Grievant and the Accounting Technician III at Mt. Olive. Such a comparison is necessary to ascertain whether or not the two are similarly situated. Neither the aforementioned Mt. Olive employee, nor anyone else from Mt. Olive, was available to testify as to her exact duties. Further, although Grievant contends the Mt. Olive employee currently has no subordinates to supervise, there is no indication this is a permanent situation. The Mt. Olive employee also handles more accounts, albeit only slightly more, and is based in a maximum security facility. Grievant is employed at a medium security facility. Grievant failed to prove by a preponderance of the evidence that he is similarly situated to this individual, or any other Accounting Technician III.

Finally, even if the Grievant was able to prove the Mt. Olive employee actually performs the same duties as he does, and the Mt. Olive person is, in fact, misclassified, the Grievance Board has held that such a mistake does not constitute discrimination. Ritchie v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). The Grievance Board has consistently refused to grant the type of relief Grievant seeks because of a mistake or a violation of a policy, because such actions constitute ultra vires acts, and because two wrongs do not make a right. See Guthrie v. W.Va. Dept. of Health and Human Resources, Docket No. 95-HHR-277 (Jan. 31, 1996); Earnest andHatfield v.

Southern W.Va. Community College, Docket Nos. 91-BOD-352/290 (Sept. 30, 1992), rev'd, Circuit Court of Kanawha County, Civil Action No. 92-AA-296 (Apr. 23, 1993); Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec 18, 1989). See also Roberts v. W.Va. Dept. of Transp., Docket No. 96-DOH-017 (May 2, 1996), aff'd, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (May 25, 1997); Gilliam v. W.Va. Dept. of Transp., Docket No. 96-DOH-511 (Apr. 24, 1997).

The remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that he performs, is not to similarly misclassify the grievant. Akers v. W. Va. Dept. of Tax and Revenue, 194 W. Va. 956, 460 S.E.2d 702 (1995). Grievant asserts that because another position with supervisory duties apparently does not, at present, have subordinates requiring supervision, he should likewise be elevated to the Accounting Technician III class, even though he does not perform the higher duties. That remedy is clearly not available to him.

After reviewing the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact.

FINDINGS OF FACT

1. Grievant is currently employed by the West Virginia Division of Corrections as a Trustee Clerk (Accounting Assistant II).

2. On Tuesday, September 23, 1997, Grievant became aware of an Accounting Assistant III, now Accounting Technician III, position posted at Mt. Olive. Grievant did not apply for the posted position at Mt. Olive. 3. Grievant currently performs many of the same basic duties as the Accounting Technician III at Mt. Olive. 4. The Job Description for an Accounting Technician III is a “lead worker” position and includes supervisory responsibilities.

5. Although Grievant has trained a backup who does his work on days he is not present, he does not supervise this individual and does not perform supervisory duties, such as: review of work, completing evaluations and being completely in charge of their assignments. Grievant did not identify anyone he directly supervised on his PDF or in his testimony.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. In order for Grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match another cited Personnel classification specification than the one to which he is currently assigned. See generally, Hayes v. W. Va. Dept of Natural Resources, Docket No. NR-88-038 (Mar.28, 1989).

2. Personnel's interpretation of the class specifications for the position in question, as they apply to the duties Grievant performs, are not clearly erroneous and, therefore, should be accorded great weight. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993). Francis/Sayre v. Dept. of Health and Human Resources/Office of Social Servs. And Div. of Personnel, Docket No. 95-HHR-077 (July 28, 1995). 3. The key to the analysis is to ascertain whether Grievant's current classification constitutes the "best fit" for his required duties. Propst v. W. Va. Dept. of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 93-HHR-371 (Dec. 3, 1993); Simmons v. W. Va. Dept. of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991).

4. Although Grievant may perform some duties outside his current classification as a Trustee Clerk, this does not render him misclassified. Dooley v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-498 (Mar. 19, 1991).

4. A review of the evidence demonstrates Grievant has not met his burden of proving the Accounting Technician III position constitutes the "best fit" for his required duties.

5. A prima facie showing of discrimination or favoritism consists of a grievant establishing: (a) that he is similarly situated, in a pertinent way, to one or more other employee(s); (b) that he has, to his detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing. Hindman v. W.Va. Div. of Corrections, Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

8. Grievant failed to prove by a preponderance of the evidence a case of discrimination or favoritism.

9. The remedy, in a situation involving a grievant's claim that others are enjoying ahigher classification and performing the same work that he performs, is not to similarly misclassify the grievant. Akers v. W. Va. Dept. of Tax and Revenue, 194 W. Va. 956, 460 S.E.2d 702 (1995).

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this DECISION to the Circuit 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.

Dated: November 30, 1998 _____ RANDY K. MILLER

ADMINISTRATIVE LAW JUDGE

Footnote: 1

The official title of Grievant's current position is Accounting Assistant II, but is more commonly referred to by the working title of Trustee Clerk.

Footnote: 2

W. Va. Code §29-6A-2(d) provides:

> *"Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.*

Footnote: 3

W. Va. Code §29-6A-2(h) provides:

> *"Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.*

Footnote: 4

While the burden of production may shift, the overall burden of proof never does. See, Texas Dept. of Comm. Aff. v.

Burdine, 450 U.S. 248 (1981).