DINA KUNZLER,

Grievant,

v v.

DOCKET NO. 97-HHR-287

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

HUNTINGTON STATE HOSPITAL, and

DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant Dina Kunzler alleges that she is misclassified as an Inspector II, and requests reclassification to Inspector III. As relief, she requests reclassification and compensation, including back pay, from July 16, 1996, when her job duties changed to include supervision of security guards and switchboard operators. The grievance was filed December 10, 1996; was waived at Levels I and II; and was denied at Level III. (See footnote 1) A hearing was held at Level IV on September 30, 1997, at which time the matter became mature for decision. For reasons explained below, the grievance is granted.

FINDINGS OF FACT

1 1.

Grievant is employed with the Department of Health and Human Resources' Huntington State Hospital, as an Inspector II, at pay grade nine. She works in the Environmental Services/Safety and Security Unit. Grievant has a Bachelor's degree in Safety Technology and a Master's Degree in Occupational Safety and Health.

2 2.

Grievant was initially hired at Huntington State Hospital in July of 1995 as a ninety-day temporary employee, with the working title of Safety Director. She became permanently employed in December of 1995, as an Inspector II with the same working title.

3 3.

On July 16, 1996, Grievant began supervising security guards and telephone operators on a 24-hour-per-day basis, seven days per week. Grievant assigns work, approves or disapproves leave requests, evaluates performance, and addresses personnel issues for these subordinates. She interviews potential employees and recommends persons for hire. She reviews security reports, issues work orders, and takes disciplinary actions. The persons Grievant supervisesare in pay grade eight. (L III, Tr. pp. 3, 4-5, 13.)

4 4.

At least two position descriptions (PDs) have been submitted for Grievant's position. The PD signed on October 9, 1996 reflects that Grievant spent 40% of her time supervising security guards and switchboard operators, and 60% on safety- and inspection-related duties. (L III, Gr. Ex. 2.) The PD signed on May 16, 1997, reflects that Grievant's time was equally split between her supervisory duties and her safety- and inspection-related duties. (L III, Gr. Ex. 1.) Although the two PDs are differently worded in some respects, they generally agree in describing Grievant's duties.

5 5.

Grievant is directly responsible for compliance with safety requirements, such as those imposed by the Joint Commission on the Accreditation of Hospital Organizations (JCAHO) and OSHA, (See footnote 2) including maintaining and distributing Material Safety Data Sheets and reviewing injury reports (9-13% of her time); developing, implementing and assessing safety training programs (6.5-8.5%); ensuring compliance with applicable safety codes through preventive maintenance programs; developing and implementing disaster plans and policies, hazardous materials handling programs, and risk-assessment programs; and addressing emergency situations (6-13.5%); supervising monthly safety inspections and testing of fire alarm systems and fire extinguishers, conducting and evaluating fire drills (8-16.5%); acting as liaison with various inspections entities, such as the state Fire Marshall and an engineering firm (2.5-5.5%); attending required supervisory meetings and training (1-4%); attending Infection Control Committee meetings and chairing the Safety Committee (5.5-8.5%); supervising security guards and switchboard operators (40-50%); and acting as Director of Environmental Services in her supervisor's (Sue Selbee's) absence (2%). (See footnote 3)

6 6.

The Safety Director at Sharpe Hospital, William Andrew (Rocky) Kimble, is classified as Inspector III. Mr. Kimble has a Master's degree in Public Safety. He spends 35% of his timehandling maintenance contracts. In that role, he acts as overseer and liaison with contractors repairing or otherwise working on heating, air conditioning or similar systems. Mr. Kimble's work with maintenance contracts is not within the Inspector III classification. Mr. Kimble administers plans for compliance with various safety-related requirements, but performs only a minimal amount of actual inspection on his own. He does not have any supervisory responsibilities. (L III, Tr. p. 10.)

7 7.

Mr. Kimble and Grievant fulfill similar functions at their respective hospitals, with the primary exception that, while he deals with maintenance contracts, Grievant deals with security guards and switchboard operators.

8 8.

Mr. Kimble's PD, signed July 16, 1997, shows that he reports to the hospital's Assistant Administrator.

9 9.

Mr. Kimble's job duties, as described on his PD, include: developing and implementing plans and procedures for JCAHO and OSHA compliance (23%); gathering data for improving plans and procedures (5%); reviewing legal requirements and facility compliance (4%); conducting fire drills and inspections (3%); developing, conducting and assessing training required by JCAHO and OSHA (10%); acting as liaison with inspection entities such as the State Fire Marshall, EPA, and maintenance contractors (10%); preparing reports for, attending and following up on actions for safety-related committees, such as Infection Control and Safety/Risk Management (6%); participating in Wellness Committee activities (3%); maintenance contract responsibilities (35%) and attending required administrative meetings and in-service training (1%). (L IV, Gr. Ex. A.)

10 10.

Grievant's predecessor in supervising security and switchboard staff, and Grievant's current supervisor, is Sue Selbee. Her working title when she supervised security and switchboard staff was Environmental Resources Director. Her classification title was Supervisor I. She held the position from 1979 to 1994. Ms. Selbee is currently the Director of Environmental Services at the hospital. (L III, Tr. pp. 6-7.) The position has changed since Ms. Selbee supervised the security and switchboard and safety functions, in that there are more regulations and requirements imposed by federal and state law, and more oversight byregulatory agencies such as EPA (See footnote 4) and OSHA. (L III, Tr. pp. 9-10.)

11 11.

The JCAHO, which accredits hospitals such as Huntington State and Sharpe, requires that hospitals meet certain criteria, including that hospitals of their size have a full-time safety director.

12 12.

Persons in the Supervisor I class title typically have responsibility for supervising clerical support and labor personnel. They may also perform the same or similar work as their subordinates.

13 13.

Inspector III positions have supervisory responsibilities over other Inspectors, not just clerical staff or security guards. That class title is used primarily by the West Virginia Department of Labor, in its Occupational Safety and Health program, where an Inspector III typically supervises a team of inspectors. (L III, Tr. pp. 13-14.)

14 14.

Grievant's supervisors, Ms. Selbee and Mr. Byrne, believe that her job duties exceed

those defined in the Inspector II class specification. Because of similarities between Grievant's and Mr. Kimble's positions, and the fact that Grievant supervises others, they believe the Inspector III class title is appropriate for Grievant's position.

DISCUSSION

In order to prevail on a claim of misclassification, a grievant must prove by a preponderance of the evidence that his or her duties more closely match another cited class specification than that under which he or she is currently assigned. Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). In this case, Grievant asserts that her duties more closely match the Inspector III class specification, although all parties acknowledge that there is no existing class specification that directly addresses hospital Safety Director positions such as Grievant's.

Class specifications are read in "pyramid fashion" from top to bottom, with the different sections considered as going from the more general and more critical to the more specific and less critical as one reads down the length of the document. Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991). Thus, the "Nature of Work" section of a position specification is its most general and most critical section. Atchinson v. W. Va. Dept. of Health, Docket No. 90-H-444 (Apr.22, 1991). This prioritization scheme must be considered in ascertaining whether the current classification constitutes the "best fit" for Grievant's required duties. See Propst v. W. Va. Dept. of Health and Human Resources, Docket No. 93-HHR-371 (Dec. 3, 1993).

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); See Oates 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, §4.04(d). There need not be a "perfect fit", only the "best fit." 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, and -609 (Aug. 31, 1990).

Pertinent parts of the class specifications at issue in this case, those of Inspector II (Grievant's current class title) and Inspector III (which she has identified as more closely matching her job duties), with emphasis added at important points, are reproduced here for comparison purposes.

INSPECTOR II

Nature of Work

Under general supervision performs work at the **full-performance level** by **conducting inspections** to determine compliance with various state and federal regulatory laws and regulations. Work is performed according to prescribed procedures, and involves direct contact with employees, public officials, civic and labor groups and the public. Involves traveling throughout the state and working irregular hours. Performs related work as required.

Distinguishing Characteristics

The Inspector II is distinguished from the Inspector I by the complexity of inspection duties and the level of independence with which the duties are performed. **This class is distinguished from the Inspector III by the part [sic] that** although the Inspector II may oversee support staff in relation to the completion of his/her own work, and train new employees, **this class does not function in a lead or supervisory capacity.**

Examples of Work

Conducts routine, complex, and special inspections.

Trains and instructs new employees in the techniques and procedures used in performing inspections, handling investigations, surveys, or complaints.

Takes action indicated by results of inspections, tests and investigations.

May check and evaluate the work and reports of subordinates in relation to the completion of specific assignments.

Makes recommendations concerning the proper application of laws, rules and regulations.

Completes and/or assists subordinates in the preparation of detailed inspection reports.

Maintains records pertaining to inspection schedules and results.

Checks for requirements prescribed by law, such as proper licensing, record keeping, security, safety and sanitary conditions.

May inspect and monitor procedures to assure compliance to state and federal agreements and specifications.

INSPECTOR III

Nature of Work

Under general supervision, performs work **at the advanced level** by **conducting inspections** in the enforcement of various state and federal regulatory laws and regulations. Work is performed according to prescribed procedures and involves direct contact with employees, public officials, civic, labor groups, and the public. Involves traveling throughout the state and working irregular hours. **May supervise or act as lead worker.** Performs related work as required.

Distinguishing Characteristics

The Inspector III is distinguished from the Inspector II by the broader scope of administrative oversight and responsibility for planning and operational aspects of the area of inspection. This level functions in a lead worker capacity.

Examples of Work

Conducts complex, special and extraordinary inspections.

Instructs and supervises subordinate inspectors in particular aspects of investigative techniques.

Takes enforcement actions indicated by results of inspections, tests, and investigations.

Makes recommendations concerning the proper application of laws, rules, and regulations, and resolves violations.

Participates in evaluating inspection procedures and advising on policy matters.

Prepares detailed and complex inspection reports and correspondence.

Confers with officials concerning problems related to inspection assignments.

Although not at issue herein, Respondent made frequent reference to the Supervisor I class specification, pertinent parts of which are reproduced, with emphasis added, below:

SUPERVISOR I

Nature of Work:

Under general supervision, performs **full-performance supervisory work** overseeing the activities of clerical support staff, semi-or-fully-skilled trade workers, **or inspectors**. Completes annual performance appraisals, approves sick and annual leave, makes recommendations and is held responsible for the performance of the employees supervised. Work is reviewed by superiors through results produced or through meetings to evaluate output. Performs related work as required.

Distinguishing Characteristics:

Supervisor I is usually a working supervisor who makes work assignments, reviews employees' work, and compiles reports on section activities in addition to **performing tasks similar to their employees**. In some instances, may be a working supervisor **performing related work of a more advanced level than subordinates.**

Examples of Work

Performs duties that are similar or related to the work performed by subordinates.

Makes work assignments to employees; reviews the work of subordinates to ensure accuracy.

Trains employees in proper work methods.

Ensures that equipment, supplies, and materials are available to complete work.

Inspects work areas to ensure that tasks are completed in a timely manner.

Evaluates employees' performance; counsels employees and recommends corrective action.

Answers inquiries from employees; relays information from management.

Updates and compiles reports outlining the unit's activities, including other factors such as amount of work produced, monies spent or collected, or inventory.

Discusses personnel issues with employees; answers grievance issues within mandated time frames in an effort to solve problems.

Grievant argues that Inspector II is distinguished from Inspector III in that the latter has supervisory duties. As she has supervisory duties now, she asserts that she should now be classified as Inspector III. In assessing this argument, the Division of Personnel's interpretation and explanation of the class specifications must 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).

Lowell Basford, the West Virginia Division of Personnel's (DOP) Assistant Director for Classification and Compensation, explained classifying Grievant's position as an Inspector II. He stated that the previous incumbent held a Supervisor I title, but the facility wished to hire someone

with more advanced educational credentials, due to changing requirements and changing emphasis on safety issues. The position was reclassified from Supervisor I to Inspector II because Grievant was to operate in a more technically advanced role.

Mr. Basford further stated that Grievant's dual capacity as a supervisor of lower-level staff and as a technical safety expert justifies the Inspector II title. Because her time is split, with more time in the technical duties, the Inspector II class title reflected the safety knowledge and skills required for the predominant duties of the position. (L III, Tr. p. 13.) He essentially admitted that there is no class specification which truly fits with Grievant's position description. However, he opined that aspecific class specification for hospital safety director positions has not been needed, as his office has not received numerous inquiries and complaints about the issue.

A review of the two class specifications at issue in this case reveals that, indeed, neither of them appear to be perfect “fits” for Grievant's position. Indeed, the Inspector II, Inspector III and Supervisor I specifications all have some aspects in common, and thus some ability to describe Grievant's position, as demonstrated by inclusion of inspectors as subordinates in the Supervisor I specification. However, the "Distinguishing Characteristics" sections provide the key to resolving which of the titles is "the best fit."

The Inspector II specification clearly states that it is distinguished from Inspector III by the fact that the Inspector II class "does not function in a lead or supervisory capacity." Similarly, the Inspector III specification clearly states that it "may supervise" and that it is distinguished from Inspector II "by the broader scope of administrative oversight and responsibility for planning and operational aspects of the area of inspection." The Supervisor I specification is not the best fit for Grievant's supervisory responsibilities, as she does not "perform tasks similar to her employees," to paraphrase the specification. She is not a security guard, nor does she operate the switchboard. It also seems an unwarranted stretch of language to argue that she "performs related work of a more advanced level than her subordinates," as noted in the Supervisor I specification, at least in this situation, where the Inspector class specifications cleanly address the distinctions in supervisory duties.

Moreover, Grievant presented additional evidence regarding application of the Inspector III specification, including a detailed description of one position given the Inspector III title which is quite similar to her position. The Grievance Board will generally not compare position descriptions, as it cannot be assumed that the position with which a grievant compares is itself properly classified.

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, 194 W. Va. 456, 460 S.E.2d 702 (1995). However, in this instance, Mr. Basford argued that Mr. Kimble's position was properly classified as an Inspector III, and attempted to distinguish it from Grievant's position. Thus, it is appropriate to compare the positions here. The position descriptions for Grievant and for Mr. Kimble appear to be nearly interchangeable, as a general proposition. (See Attachment A, a side-by-side summary of the respective job duties of the two positions.) Grievant spends 40-50% of her time in supervisory tasks which are arguably related to her duties as Safety Director at Huntington State, while Mr. Kimble spends 35% of his time working with maintenance contracts which are unrelated to his duties as Safety Director at Sharpe. (See footnote 5) The remainder of their job duties can be classed in similar categories: ensuring their respective facilities comply with applicable safety requirements; developing, implementing and assessing safety training for facility personnel; conducting safety inspections and fire drills; coordinating with regulatory and emergency services agencies; attending safety-related committee meetings; and maintaining a working knowledge of applicable safety requirements. Grievant's supervision of security guards and switchboard operators may even be considered more related to safety issues than Mr. Kimble's contractual oversight duties. While percentages of time spent in each task and the minutia of job duties differ somewhat between Grievant's and Mr. Kimble's positions, I find the differences less than substantial, and the similarities striking.

Mr. Basford asserted that Grievant's 40-50% supervisory duties distinguished her position from that of Mr. Kimble, in that those duties were “lower level” while his 35% maintenance contract duties are “higher.” Mr. Basford explained that Grievant was properly classified as an Inspector II because of her supervisory duties, which he described as “pulling” her classification down towards that of a Supervisor I. In other words, Grievant's hybrid duties result in a position which should be somewhere between a Supervisor I (in pay grade 8) and an Inspector III (in pay grade 11), because she performs some duties of each. Consequently, the Inspector II class (in pay grade 9) is a happy medium. Conversely, Mr. Basford stated that Mr. Kimble's maintenance contract oversight duties “pull” his classification up towards that of Administrative Services Assistant, (See footnote 6) so the Inspector IIIclassification is appropriate for his position. This explanation might have been given deference,

except that Grievant's position has always been that of Inspector II, while she has only undertaken supervisory duties since July 1996. Logic demands that, if the argument is to be believed, the position's class title should have changed to Inspector II when the job duties changed. Obviously, such did not occur, and the argument thus takes on the aura of a post-hoc rationalization.

Mr. Basford did note that the organizational structure is different for each position, as Grievant reports to the Director of Environmental Services while Mr. Kimble reports to the Assistant Administrator. However, the significance of the distinction is lost, as no organizational chart was provided for Sharpe, and no facts were provided by which the facilities can be compared in terms of size, population, or services. Additionally, testimony indicated that there was no practical difference resulting from the formal organizational structure, as Grievant and Mr. Kimble are equally accountable and responsible for their respective programs.

Finally, where there is some disagreement as to the duties and nature of the job involved, the employing agency, rather than DOP, should more influence the decision as to what services an employee is actually performing, as the employer better knows exactly what services are expected from the employee. Parsons v. W. Va. Bureau of Employment Programs, 428 S.E.2d 528, 189 W. Va. 107, 110 (1993). In this instance, the employing hospital and Respondent Department of Health and Human Resources have taken a position in support of Grievant. At the Level IV hearing, those entities confirmed their position that the Inspector II title is not a good fit for Grievant's position, and that Inspector III is a better fit than her current title. The Inspector III title was recommended by these Respondents because there is no better fitting title of which they were aware, and because it is the title given to a very similar position (Mr. Kimble's). The testimony given by representatives of the hospital at all levels of this grievance support Grievant's position, is convincing as to the parallels between Mr. Kimble's position and Grievant's position, and, most importantly, confirms that the Inspector III specification is the best fit for Grievant's job duties.

I find by a preponderance of the evidence that the Inspector III class specification is the best fit for Grievant's job duties. Further, there are marked similarities between Grievant's and Mr. Kimble's positions, and the employing agency persuasively supports Grievant's reclassification. For these reasons, Grievant prevails in this case. Grievant's position must be reclassified as anInspector III position, effective July 16, 1996. (See footnote 7) It is not known whether Grievant is actually entitled to back pay, as no evidence was presented regarding any difference in pay between the Inspector II

and Inspector III classifications, as they pertain to Grievant. However, if there is a pay differential, Grievant is entitled to back pay from that date.

CONCLUSIONS OF LAW

1 1.

In order to prevail on a claim of misclassification, a grievant must prove by a preponderance of the evidence that his or her duties more closely match another cited class specification than that under which he or she is currently assigned. Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).

2 2.

There need not be a "perfect fit", only the "best fit." 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, and -609 (Aug. 31, 1990).

3 3.

Grievant showed that the Inspector III class specification was the best fit for her job duties.

Accordingly, this grievance is **GRANTED**.

Respondents are ordered to reclassify Grievant's position as Inspector III, retroactive to July 16, 1996, and to pay her the difference in the salary she would have received had she been properly classified and the salary she did receive while classified as an Inspector II, if any, from that date.

Any party or the 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 thecivil action number so that the record can be prepared and transmitted to the appropriate court.

Dated: January 8, 1998

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JENNIFER J. MEEKS

Administrative Law Judge

ATTACHMENT A

Inspector III position (Mr. Kimble):

Grievant's position:

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developing and implementing plans and procedures for JCAHO and OSHA compliance (23% of his time);
reviewing legal requirements and facility compliance (4%);
gathering data for improving plans and procedures (5%);
(total of 32%)

developing, conducting and assessing training required by JCAHO and OSHA (10%);

conducting fire drills and inspections (3%);

acting as liaison with inspection entities such as the State Fire Marshall, EPA, and maintenance contractors (10%);

preparing reports for, attending and following up on actions for safety-related committees, such as Infection Control and Safety/Risk Management (6%);

participating in Wellness Committee activities (3%);

maintenance contract responsibilities (35%)

attending required administrative meetings and in-service training (1%).

being directly responsible for compliance with safety requirements, such as those imposed by the JCAHO and OSHA, including maintaining and distributing Material Safety Data Sheets and reviewing injury reports (9-13% of her time);
ensuring compliance with applicable safety codes through preventive maintenance programs;
developing and implementing disaster plans and policies, hazardous materials handling programs, and risk- assessment programs; and addressing emergency situations (6-13.5%)
(total of 15-26.5%)

developing, implementing and assessing safety training programs (6.5-8.5%);

supervising monthly safety inspections and testing of fire alarm systems and fire extinguishers, conducting and evaluating fire drills (8-16.5%);

acting as liaison with various inspections entities, such as the state Fire Marshall and an engineering firm (2.5-5.5%);

attending Infection Control Committee meetings and chairing the Safety Committee (5.5-8.5%);

acting as Director of Environmental Services in Ms. Selbee's absence (2%).

supervising security guards and switchboard operators (40-50%);

attending required supervisory meetings and training (1-4%).

Footnote: 1 *References to the transcript of testimony and to the documents introduced at the Level III hearing on May 19, 1997 are identified as "L III."*

Footnote: 2 *Although not specifically proven, judicial notice can be taken that this acronym stands for the Occupational Safety and Health Administration, and that there are federal and state OSHA programs.*

Footnote: 3 *These percentages are calculated from the 1997 and 1996 PDs, respectively, combining some individual entries into more general categories.*

Footnote: 4 *Presumably the federal Environmental Protection Agency.*

Footnote: 5 *Testimony in the Level IV hearing indicated that Grievant's supervisory duties had again changed in the preceding six months, as budget cuts had resulted in reduction of one entire shift of switchboard operations. However, this change in supervision (to taking only about 20% of Grievant's time) is not considered herein, as, were it to be considered, the percentage change would not affect the outcome.*

Footnote: 6 *No class specification for Administrative Services Assistant was provided.*

Footnote: 7 *While Grievant did not file her grievance at Level I until December 10, 1996, Respondents did not raise the issue of timeliness at Level IV, so no reduction in the relief requested is appropriate. Propst v. W. Va. Dept. of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 93-HHR-351 (Dec. 3, 1993).*