WILLIAM NELSON, et al.,

Grievants,

v. Docket No. 01-BEP-061D

BUREAU OF EMPLOYMENT PROGRAMS/
WORKERS' COMPENSATION DIVISION
and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

On February 26, 2001, Grievants, William Nelson, James Washington, Candra Hinkley, Evelyn Reed, Ruth Workman, Kathy Johnston, Cheryl Pringle, Bonita Meadows, Patricia Allen, Anthony Peters, Karen Allen, Joyce Beard, Andy Jensen, Darlene Cain, and Angela Lilly, filed a default claim against their employer, Respondent, Bureau of Employment Programs/Workers' Compensation Division ("BEP"), alleging a default occurred when the Level III decision was not issued within five days of the February 15, 2001 Level III hearing. On June 25, 2001, an Order was entered by the undersigned granting the default. The Division of Personnel ("Personnel") was joined as a party, and this matter proceeded to hearing on the issue of whether the relief requested was contrary to law or clearly wrong. A Level IV hearing was held on August 17, 2001. Grievants were represented by Grievant Nelson, BEP was represented by William Ballard, Esquire, and Personnel was represented by Robert Williams, Esquire. This matter became mature for decision at the conclusion of the Level IV hearing.

Grievants filed this grievance on October 24, 2000, because they believe they are misclassified as Office Assistant II's and III's. As relief Grievants seek classification as Imaging Operators.

The following Findings of Fact are made based upon the evidence presented at Levels III and IV.

FINDINGS OF FACT

1. Grievants Pringle, Hinkley, Reed, and Cain are employed by BEP as Office Assistant III's ("OA III"), pay grade 7, as they are lead workers. The remaining Grievants are employed by BEP as

Office Assistant II's ("OA II"), pay grade 5.

2. The Imaging Operator classification was created by the State Personnel Board in November 1999, at the request of BEP and the Division of Environmental Protection.

3. BEP employs persons classified as Imaging Operators, pay grade 8, in the indexing unit of its electronic document management section. These individuals are referred to as indexers. Grievants work in the mailroom and scanning unit of BEP's electronic document management section.

4. The mailroom and scanning unit receives mail sent to BEP each day. The mail is opened by Grievants and other employees in the unit, or by temporary workers. Grievants assign each piece of mail to a category according to the document type, group the document categories into what is referred to as a batch, remove staples and creases from documents, repair torn documents, and insert colored paper between batches of documents. Grievants then scan the documents. Grievants observe the scanning process, ensuring that the image is properly scanned.

5. Grievants must be able to recognize over one hundred different types of legal, medical, and other documents in order to separate them and place similar document types together. Grievants reference a list of each document type and sub-type. This is the same list the indexers use. They must make sure they have documents put in the proper order, with document separators where they are supposed to be, when batching.

6. The indexers receive the scanned documents on the computer screen. They review each document to make sure it has been properly batched and scanned. If they find an error in the batching or scanning process, they notify the scanners that the document must be re-scanned. Indexers then determine where the document is to go,whether to the construction group, the entertainment field, or for payment, for example. The indexers have about 300 different choices for labeling the documents. Indexing generally is more detail oriented than batching. Some types of documents require some level of detail in the batching process.

DISCUSSION

Because Grievants are presumed to have prevailed by default, the burden of proof is upon Respondents to prove by clear and convincing evidence that the relief requested by Grievants is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce

evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

W. Va. Code §29-6-10 authorizes Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies which utilize such positions must adhere to that plan in making assignments to their employees. Toney v. W. Va. Dep't of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994).

In a misclassification grievance, the focus is upon the grievant's duties for the relevant period, and whether they more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These 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 the Work" sectionof a classification specification is its most critical section. See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989).

The key to the analysis is to ascertain whether the employee's current classification constitutes the "best fit" for his required duties. Simmons v. W. Va. Dep't of Health and Human Resources, 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 Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Importantly, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. See, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

Respondent argued the relief requested is clearly wrong and contrary to law, because to grant the relief would constitute a gross violation of the Equal Pay for Equal Work Statute, W. Va. Code § 29-6-10(2), and would be contrary to the definition of class, in that the positions held by Grievants are not sufficiently similar to the Imaging Operator classification.

The classification specifications for the classifications at issue are reproduced 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 under standing 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.

Knowledge, Skills and Abilities

Knowledge of office procedures and methods.

Knowledge of business English, spelling and arithmetic.

Ability to operate the common types of office equipment related to the job.

Ability to understand and follow oral and written instructions.

Minimum Qualifications

Training:

Graduation from a standard high school or the equivalent.

Experience:

Two years of full-time or equivalent part-time paid experience in routine office work.

Substitution:

College hours, related business school, or vocational training may be substituted through an established formula for the required experience.

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.

Knowledge, Skills and Abilities

Knowledge of office methods of practices and procedures.
Knowledge of business English, spelling and arithmetic.
Knowledge of program operations and policies with respect to general functions performed.
Ability to maintain or supervise the maintenance of records of some complexity and to prepare reports and tabulations from these records.
Ability to establish and maintain effective working relation ships with other employees and the public.
Ability to understand and effectively carry out complex oral and written directions.

Minimum Qualifications

Training:
Graduation from a standard high school or the equivalent.
Experience:
Four (4) years of full-time or equivalent part time paid experience performing routine office work.
Substitution:
College hours, related business school, or vocational training may be substituted through an established formula for the required experience.

IMAGING OPERATOR

Nature of Work

Under general supervision performs full-performance level work in all aspects of electronic document management production, including electronic imaging, proofing, indexing and lifetime tracking. Interprets and applies agency's policies and practices and demonstrates a complete understanding of business processes specific to, or characteristic of, an agency. Uses independent judgment to assure appropriate identification and routing of business documents. Works with other staff members within

the agency and/or with other state, federal or local government agencies, public and private entities to receive, categorize and/or clarify contents of a document type for processing. Performs operation using computer software utilizing PC's interfacing through Local and Wide Area Networking with mini computers in a multi-platform environment. Participates in training of other document management staff and end-users. Performs related work as required.

Examples of Work

Captures documents through scanning or import of native format; performs quality control functions as required.
Rapidly identifies document image by type and sub-type, evaluates for image quality and data completeness, and determines if exceptions to standard business rules are present.
Establishes and enters the document index (or indexes) for each page and/or document electronically presented for processing.
Ensures documents scanned and/or received electronically meet agency standards, returning unacceptable pages or documents to entry point for re-submission.
Contacts supervisor or technical staff to resolve problems or operational issues.Participates with supervisor, program management, scanning/quality control staff, and technical staff in developing operational procedures; may draft revisions to manuals.
Maintains operation logs and prepares time and activity and statistical reports as requested by management.
Assists program staff, other state or federal agency or external users in accessing documents maintained within the agency's electronic document management system (EDMS).
Participates with supervisor in developing training plans and in the training of end-users where required.

Knowledge, Skills and Abilities

Knowledge of, or ability to learn, the rules, regulations, policies and procedures of the agency.
Knowledge of, or ability to learn, the relevant functional business processes', operations, policies, and business forms, including the relationship among them and to outside entities.
Ability to distinguish small details, recognize their significance, and take appropriate action.

Ability to interact with EDMS, computer database and other computer software.

Ability to analyze situations, problems, and information, and take appropriate action.

Ability to synthesize information and provide interpretation.

Ability to perform work under significant time constraints.

Minimum Requirements

Training:

Graduation from a standard high school or the equivalent.

Experience:

Two years of full-time or equivalent part-time paid experience using PC based software such as word processing, database or spreadsheet or in electronic document management imaging or scanning documents.

Substitution:

Six semester hours of computer science from an accredited college or university or completion of a formal training program in data processing or related field from a business or vocational school may substitute for the experience.

Lowell Basford, Assistant Director of Personnel's Classification and Compensation Section, testified that when Personnel recommended the adoption of the Imaging Operator classification to the State Personnel Board, it envisioned the Imaging Operator performing batching and scanning duties, as well as indexing duties, as that is what the Division of Environmental Protection and the Bureau of Employment Programs proposed. However, he explained that performing batching and scanning duties does not make an employee an Imaging Operator, and pointed out that many employees use scanning equipment. He stated that Personnel considered the second sentence under the Nature of Work Sectionto be the critical element of the classification, and Personnel would not have recommended the adoption of the new classification absent this element. The second sentence reads: “Interprets and applies agency's policies and practices and demonstrates a complete understanding of business processes specific to, or characteristic of, an agency.” He testified that it is those employees who perform indexing duties who must have this understanding of the business processes of the agency in order to perform their duties, and noted that the position description form for Grievants states that Grievants “follow verbal instructions and go through general training to learn

job procedures. Employees use procedures set up and contained in basic manuals prepared by system design vendor CISCORP and equipment manufacturer Bell & Howell." There is no indication that Grievants must have a complete understanding of the business processes of the agency in order to perform their duties. Mr. Basford testified that the controlling and highest level of work would be indexing, and those employees whose predominate duty was indexing were classified as Imaging Operators.

Mr. Basford stated that the difference between the coding performed by Grievants and that performed by BEP employees classified as Imaging Operators is in the choices that must be made by the Imaging Operators, and explained that in order to make the correct choices, the Imaging Operator must have a detailed knowledge of the business functions of the Workers' Compensation Division. He stated Imaging Operators must choose among 300 codes when indexing documents, and they must know about claims, the legal process, employer accounts, and rate making, for example, in order to put the proper code on the document so that it is routed to the correct place. He stated that employees in the scanning unit need to know document types.

Grievants called as a witness a former BEP employee who was an Imaging Operator until September 2000. Her testimony would lead one to believe that the document identification performed by Grievants left her with no indexing work to do; rather,her job was nothing more than data entry. Mr. Basford noted that Personnel performed a desk audit of the two units, which he personally participated in, and this witness' description of the work of the Imaging Operator was not consistent with Personnel's understanding of the function of indexing, nor was it what Personnel actually observed. Likewise, the testimony of Grievants' other witnesses, including one of the Grievants who testified that if Grievants batch documents correctly, it helps the indexers code, did not support a finding that the Imaging Operators do nothing more than data entry.

It is understandable that Grievants would believe they are misclassified. The Imaging Operator classification specification lists the scanning duties performed by Grievants as a duty of the Imaging Operator, and they do identify document types using the same list used by indexers. Whether this is the only list used by indexers is unknown. While Personnel did not provide a good explanation of the difference between the document identification function performed by Grievants and the coding function performed by indexers, it was clear from the testimony that there is a difference in these functions, and the coding function is generally more detail oriented than the document

separation/identification function, although there are some exceptions.

Personnel did demonstrate by clear and convincing evidence that simply performing scanning duties does not make an employee an Imaging Operator, and that duty may also be performed by Office Assistants. Personnel also demonstrated by clear and convincing evidence that the second sentence under the Nature of Work Section of the Imaging Operator classification specification is the critical element of the classification, and an employee classified as an Imaging Operator must have an understanding of the business processes of the agency in order to perform his duties. While the evidence did not clearly demonstrate whether those employees who perform indexing duties for BEP have to have such an understanding in order to perform their duties, and the evidence presented is sufficient to raise a question about this, Personnel demonstrated that Grievants do nothave to have an understanding of the business processes of the agency in order to perform their duties. They only have to be able to identify different document types. It may well be that the indexers are misclassified, although that is not an issue before the undersigned, nor was there sufficient evidence presented on the duties of the indexers for the undersigned to make this determination.

Finally, Grievants compared themselves to another employee in their unit who performs the same duties as Grievants, but is classified as an Imaging Operator. “The remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that she 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).” Myers v. Dep't of Health and Human Resources, Docket No. 00-HHR- 392D (Mar. 30, 2001).

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. Because Respondent defaulted at Level I of the grievance procedure, the Grievants prevail by default unless the remedy requested is contrary to law or clearly wrong. W. Va. Code § 29-6A-3.

2. The burden of proof is upon Respondents to prove by clear and convincing evidence that the relief requested by Grievants is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a

reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

3. In a misclassification grievance, the focus is upon whether the grievant's duties for the relevant period more closely match those of another cited classificationspecification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).

4. The key to the analysis is to ascertain whether the grievant's current classification constitutes the "best fit" for his required duties. Simmons v. W. Va. Dep't of Health and Human Resources, 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 Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Importantly, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. See, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

5. Performing scanning duties does not make an employee an Imaging Operator, and that duty may be performed by Office Assistants.

6. The second sentence under the Nature of Work Section of the Imaging Operator classification specification is the critical element of the classification, and an employee classified as an Imaging Operator must have an understanding of the business processes of the agency in order to perform his duties.

7. Grievants do not have to have an understanding of the business processes of the agency in order to perform their duties.

8. The Imaging Operator classification specification is not a better fit for Grievants' duties than Office Assistant II or III, so granting the requested remedy of reclassification would be contrary to law and clearly wrong. Myers v. W. Va. Dep't of Health and Human Resources, Docket No. 00-HHR-392D (Mar. 30, 2001).

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 20, 2001