BRENDA BAILEY, et al.,

Grievants,

v. **DOCKET NO. 03-HHR-167D**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR CHILDREN AND FAMILIES and

DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants (See footnote 1) initiated separate but materially identical grievances against Respondent the Department of Health and Human Resources (DHHR) on or about March 11, 2003, claiming the transfer of part of the West Virginia Works caseloads from Family Support Specialists (FSSs) to Economic Service Workers (ESWs) resulted in their working out of their classifications. In addition, Grievants claim it is unfair that their pay rates are lower than the FSSs despite the fact that ESWs have higher caseloads. As relief, Grievants seek higher pay by reclassification to FSSs, or the return of the W. Va. Works caseload to the FSSs. The Division of Personnel was joined as an indispensable party at level three. Grievants asserted a default occurred at level three of the grievance process, and Respondents conceded a default had occurred. A level four hearing was conducted onJanuary 7 and April 22, 2004, on the issue of whether the requested relief is contrary to law or clearly wrong.

Grievants, were represented by spokespersons from each county, (See footnote 2) except the Mingo County Grievants, who were represented by counsel, Jane Moran. DHHR was represented by Senior Assistant Attorney General B. Allen Campbell. DOP was represented by Assistant Attorney General Darlene Ratliff-Thomas. This matter became mature for decision on May 24, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievants are employed by DHHR as Economic Service Workers, pay grade 10, assigned to the Bureau for Children and Families in various offices around the state.

2. DHHR Commissioner Fred Boothe issued a directive that stated effective March 1, 2003, ESWs would begin completing reviews and performing general case maintenance on “child only” cases, a task that up until then had been assigned to the FSSs (who are in pay grade 11).

3. “Child only” cases are those where a child receives a cash assistance check but no Personal Responsibility Contract is required because no adult in the household is included in the assistance, and which do not have the usual Temporary Aid to Needy Families (TANF) 60-month limitation.

4. FSSs still do the initial eligibility determination, and when they determine the case is of the child only variety, it is transferred to an ESW for maintenance and annualreview. The annual review is essentially identical to the original eligibility determination performed by the FSS.

5. The number of child only cases assigned to each ESW varied by county. In Kanawha County, the change-over amounted to approximately 42 new cases per ESW, but in Cabell county, the allocation amounted to about 63 cases per ESW.

6. ESWs take applications for and determine eligibility for a wide variety of programs. The “Nature of Work” for the ESW classification is as follows:

> Under general supervision, performs at the full-performance level in taking applications, determining eligibility for and managing a caseload for a variety of economic assistance programs. Responsible for conducting personal interviews with clients, evaluating and verifying personal, financial and social information, determining eligibility for services, maintaining a client caseload, and referring clients to other social service and community service agencies when appropriate. May obtain repayment from clients who have been issued economic assistance erroneously. Transportation must be available as travel is required. Must possess a valid driver's license. Performs related work as required.

7. Examples of ESW work include:

> Interviews client initially to gain overview of client financial resources and social circumstances pertinent to eligibility for services; performs in-depth interview to establish eligibility for specific programs and benefits, such as food stamps and

medical services.

Determines eligibility for economic assistance using eligibility manuals and guidelines.

Contacts banks, employers, medical facilities, physicians, and neighbors as necessary by phone or letter to substantiate client data.

Completes appropriate economic service forms and codes for computer entry thereby authorizing basic services for client; informs client of types of benefits to be received.

Updates each assigned client's case file by scheduling periodic office visits with client. Takes calls from clients and public and sees "walk-ins" requesting information on economic service programs.

Composes brief social summary of client's circumstances and assesses need for social service intervention; directs client to community resources when needs cannot be met through economic services and/or additional assistance is required.

Explains economic service policies, rules and regulations to client in a manner that makes clear the information on application forms and client's obligations and rights as a recipient of benefits.

Computes amount of benefit client will receive using appropriate monetary guidelines and calculator; computes amount of over-payments when they occur and arranges with client for reimbursement.

Pursues collection of any payments against individuals and households who received Food Stamp Program benefits to which they were not entitled.

8. The FSS Classification Specification states, in part:

Nature of Work

Under general supervision, performs work at full-performance level by providing case management services requiring development of a time limited personal responsibility contract for applicants and recipients of public assistance and employment programs provided by the Office of Family Support.

Conducts personal interviews with applicants and/or recipients, recording, evaluating and verifying social and financial information, determining services needed to enable fulfillment of personal responsibility contract goals, analyzing and interpreting aptitude and interest test results to direct the development of employment goals for applicants/recipients, coordinates with other social service and community organizations when appropriate to ensure completion of personal responsibility contract and conducting case management activities related to continuing eligibility for services.

Employee must possess a valid driver's license and must have access to transportation for required travel. Performs related work as required.

Examples of Work

Negotiates a Personal Responsibility Contract with clients to outline goals, and a plan of action.

Provides or arrange for delivery of needed services and monitor the progressof the plan.

Develops employability plans to assist client in attaining employment goals, and provide/arrange services that may be necessary.

Arranges needed testing to determine general functional levels, aptitude and interest for vocational planning.

Counsels client/families in achieving employment goals, and fulfilling Personal Responsibility Contract.

Conducts job development with community employers by interacting with a variety of professionals, elected officials, agency directors and community leaders to assess employment needs of the community and to refer clients to the appropriate agency.

Develops and monitor contracts with work sites for subsidized employment, work experience activities and community volunteer programs.

Conducts job search instruction when appropriate and direct clients in job search activities through utilization of job seeking skills and group or individual employment counseling.

Assesses the need for social service intervention, and direct the client to community resources when appropriate.

Explains the policies, rules, regulations and goals of the program to clarify requirements for the client and identify the agency.

Determines the level of services needed by using the appropriate guidelines and manuals.

Conducts interviews and process applications for services and evaluate the applicant/recipient needs by interviewing the client initially to gain an overview of the client's financial resources and social circumstances pertinent to eligibility for services.

Updates the case files by scheduling periodic home or office visits with the clients, recording progress reports and by communicating with the client by telephone to assist in monitoring the client's progress in achieving the goals of the Personal Responsibility Contract.

9. ESWs in general have a higher caseload than FSSs. Grievants, after the changeover, average about 450 cases each, while FSSs usually have about 55 caseseach. With the addition of the child only cases to their workloads, Grievants have been unable to maintain quality work.

10. DHHR has no formal caseload standards, but its own Income Maintenance Caseloads

Standards Committee has recommended an average caseload of 300 to 330 cases per ESW. Grievants' Exhibit No. 1.

11. Grievants have not been adequately trained on the TANF or W. Va. Works regulations controlling the child only cases they manage, so they must frequently consult an FSS who has had this training in order to resolve a problem.

DISCUSSION

Grievants have prevailed in their contention that DHHR defaulted at level three, because DHHR stipulated it did so. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); *Williamson v. W. Va. Dep't of Tax & Revenue*, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Even when the requested relief is contrary to law or clearly wrong, the law authorizes an Administrative Law Judge to fashion an appropriate remedy. W. Va. Code § 29-6A-3(a)(2) states: “If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.”

Aside from showing the relief requested is contrary to law or clearly wrong in its own right, the Grievance Board has also held the presumption created by W. Va. Code § 29-6A-3(a)(2) is rebuttable by showing the relief requested is clearly wrong by clear and convincing evidence that the basic facts underlying the asserted presumption are not true. (See footnote 3) *Lohr v. Div. of Corrections*, Docket No. 95-CORR-157D (Nov. 15, 1999).

In this case, the several grievances that were consolidated were consistent in challenging a common underlying grievable event, the transfer of Child Only cases from FSSs to the ESWs. Grievants variously claimed this violated equal pay for equal work principles, rendered them misclassified, and above all, so overburdened by their workloads that their ability to assist their clients was seriously impeded. As relief, they seek equitable pay by placement in a higher pay grade or reclassification to FSS, to have the cases reassigned back to the FSSs, or additional staff to help with the work overload.

In a misclassification grievance, the grievant must prove that the work he is doing is a better fit in a different classification than the one his is currently in. *See Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oiler v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001). Due to DHHR's default, it is presumed the ESWs would be more properly classified as FSSs. However, Respondents have rebutted this presumption, by assuming the burden of proving otherwise, and doing so clearly and convincingly.

Both ESWs and FSSs provide support for families seeking public assistance by completing forms, taking applications, determining eligibility and doing case maintenance. The difference is that FSS cases require a Personal Responsibility Contract (PRC) and are time-limited. These cases require training and knowledge of a different set of regulatorylaws than the cases ESWs usually manage, and development of the PRC is a collaborative effort that entails a more “hands-on” approach to working with the client. However, while the child-only cases receive assistance from the same TANF pool of money, those cases require no PRC and are not subject to the same time limitation. Accordingly, they are more like the cases ESWs usually manage, except for the different set of regulatory laws.

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. *Franklin v. W. Va. Dep't of Health and Human Res./Sharpe Hosp. and Div. of Personnel*, Docket No. 02-HHR-316 (Feb 18, 2003); *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of the Work" section of 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 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, DOP'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, 398, 431 S.E.2d 681, 687 (1993). Lowell Basford, DOP's assistant director for

classification and compensation, testified that, in his opinion, the child-only duties fall within the specification for ESWs, but even if it were not, the amount of time spent handling cases would not merit a change in classification, because it is nota “predominate duty.” Also, the ESWs do not perform any of the duties listed in the FSS specification, which is written to encompass programs requiring a PRC and have a time limit on the benefits.

Even with the additional work from the child-only cases, it would be clearly wrong to reclassify Grievants' positions to FSSs. Likewise, since the duties added to Grievants' positions fell within their classifications, it would be clearly wrong to grant them additional compensation. Further, doing so would do nothing to relieve the caseload disparity and overburdened workload of which Grievants complain.

That remaining issue, whether Grievants' ability to do their jobs properly due to their unmanageable caseloads, is also afforded the presumption that Grievants' claim has been proven. While Respondents have shown it would be clearly wrong to reclassify Grievants, they have not rebutted the assumption the reassignment of child only cases constituted a “substantial detriment to or interference with effective job performance . . . of the employees.” See W. Va. Code § 29-6A-2(i). In fact, Respondents presented no evidence on this important aspect of the case, while Grievants elicited substantial testimony that they were overworked even before the addition of the child only cases. Respondents conducted no studies or time-use analysis to evaluate the impact of the additional cases on the work quality of Grievants, and did not rebut their testimony that it was now almost impossible to perform to expectations and provide adequate customer service. Respondents apparently made their evaluation the same way an elementary physics problem is set up - free of friction. The real world, as Grievants have shown, makes the cases more time consuming and problematic.

Respondents have not shown clearly and convincingly that it would be contrary to law or clearly wrong to relieve the imposition on the ESWs by returning the child only casesfrom whence they came -- to the FSS positions that were created originally to handle them. The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure

for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); *Williamson v. W. Va. Dep't of Tax & Revenue*, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

2. Even when the requested relief is contrary to law or clearly wrong, the law authorizes an Administrative Law Judge to fashion an appropriate remedy to comply with the law and to make the grievant whole. W. Va. Code § 29-6A-3(a)(2)

3. The employer may demonstrate that the relief requested is clearly wrong, therefore rebutting the presumption created in W. Va. Code § 29-6A-3(a)(2), by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *See Lohr v. Div. of Corrections*, Docket No. 95-CORR-157D (Nov. 15, 1999).

4. In a misclassification grievance, the Grievant must prove that the work he is doing is a better fit in a different classification than the one his is currently in. *See Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oiler v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 00-HHR- 361 (Apr. 5, 2001).

5. 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. *Franklin v. W. Va. Dep't of Health & Human Res./Sharpe Hosp. and Div. of Personnel*, Docket No. 02- HHR-316 (Feb 18, 2003); *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of the Work" section of 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).

6. 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, 398, 431

S.E.2d 681, 687 (1993).

7. It would be clearly wrong to reclassify Grievants' positions as FSSs, or to grant them additional compensation for performing work that is squarely within the ESW classification specification,

8. The addition of the child only cases to the workloads of the ESWs constitutes a substantial detriment to or interference with effective job performance of the employees.

For the foregoing reasons, this grievance is hereby **GRANTED in part**. DHHR is ordered to remove the child only cases from the duties assigned to the ESWs. All other relief requested is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filedwithin 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 30, 2004 _____

M. Paul Marteney

Administrative Law Judge

Appendix A

"(R)" designates representative.

Tracy Baldwin (R)	Cabell
Misty Broyles	Cabell
Clarence Dillon	Cabell
Beverly Newton	Cabell
Cora Pinson	Cabell
Peter Samosky	Cabell
Gloria Adkins	Fayette

Carmella Browning	Fayette
Sara Grant	Fayette
Kathy Janell	Fayette
Susan Lanier (R)	Fayette
Alice M. Pritt	Fayette
Joann M. Bragg	Fayette
Josh Maxey	Fayette
Marie Murphy	Fayette
Tracy O'Dell	Fayette
Barbara Price	Fayette
Chris Watts	Fayette
Debbie White	Fayette
Barbara B. Akor	Kanawha
John Ballard, Jr.	Kanawha
April D. Cutlip	Kanawha
Sheila Davis	Kanawha
Danny Fields (R)	Kanawha
Randall Johnson	Kanawha
Patricia Landers	Kanawha
Barbara Polen	Kanawha
Donald Thomas	Kanawha
Thomas Biggs	Lincoln
Stacey Hawley (R)	Lincoln
Mary Maynard	Lincoln
Brenda Sheppard	Lincoln
Sue Smith	Lincoln
Wyatt Smith	Lincoln
Sonya Stickler	Lincoln
Debra Stowers	Lincoln
Sue Bush	Logan
Gerri Ellis	Logan
Rebecca Gore	Logan
Joya Howell	Logan
Louise Hunter	Logan
Mary Messer	Logan
Linda Smith (R)	Logan
Cynthia Spencer	Logan
Ann Starr	Logan
Gladys A. Jeffrey	Mercer

Jill A. Bryant	Mercer
Ernest B. Day	Mercer
Eleanor Carol Allen	Mercer
Harold Chatting	Mercer
Melanie Dewese	Mercer
Janet Honaker (R)	Mercer
Olive Jean Plass	Mercer
Kristie L. Emmert	Mercer
Betty L. Proffitt	Mercer
Debra L. Roberts	Mercer
Lucinda Lambert	Mercer
Beverly Matusevich	Mercer
Judith N. Shorter	Mercer
Sheri Vaught	Mercer
Zona W. Meskinish (R)	Mercer
Darlene Watkins	Mercer
Brenda Bailey	Mingo
Carolyn Blevins	Mingo
Norma Carrico	Mingo
Roy Charles Dotson, II	Mingo
Karen Dotson	Mingo
Chris Dotson	Mingo
Judith Lambert	Mingo
Paula N. Hunt	Mingo
Janee Scott	Mingo
Staci Sizemore	Mingo
Kristen Childers	Putnam
Nancy Cooper	Putnam
Deborah Copper	Putnam
Carol Edwards	Putnam
Deborah Fidler (R)	Putnam
Pamela Gillispie	Putnam
Mickey Justice	Putnam
Michelle Long	Putnam
Debra A. White (R)	Raleigh
Alice Crabtree	Raleigh
Sandra Crews	Raleigh
Jennie Fernandez	Raleigh

Deidra L. Zankowitz	Raleigh
Frances L. Foster	Raleigh
Linda Lane	Raleigh
Katherine Lawrence	Raleigh
Debbie Lester	Raleigh
Merena Martin (R)	Raleigh
William Morgan	Raleigh
Sharon Newman	Raleigh
Ronald O'Dell	Raleigh
Sylvia Proffitt	Raleigh
Brent R. Bragg	Raleigh
J. Shane Ingram	Raleigh
Susie Surface	Raleigh
Sara Trent	Raleigh
Rusty Udy	Raleigh
Adam Viski	Raleigh
Lora Weis	Raleigh
V. Alberta Kendall (R)	Roane
Tamela Bartlett	Roane
Benjamin P. Roberts (R)	Roane
Janet Parsons	Roane
Judy Rhodes	Roane
Kathy Berry	Wayne
Cathy Carico	Wayne
Denesa E. Clark	Wayne
Joy Ferguson	Wayne
Betty J. Haynie	Wayne
Pamela L. Davis	Wayne
Carolyn L. Perkins	Wayne
Sheri Ranson	Wayne
Gina Thompson (R)	Wayne
Teresa Toney	Wayne
Helen Y. Riggs	Wayne

Footnote: 1

Grievants comprise 117 ESWs, employed by DHHR in ten counties, who filed separate grievances that were consolidated at level four by Order dated September 30, 2003. For a full list of Grievants, refer to Appendix A attached hereto.

Footnote: 2

Representatives are indicated on Appendix A.

Footnote: 3

Grievants continuously objected to the presentation of any evidence that would be dispositive of the merits of the grievance rather than the relief requested, but the objection was overruled on the basis that Respondents were permitted to rebut the presumption created by the default.