THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ELEANOR MARSHALL,

Grievant,

v. **Docket No. 06-HHR-124**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH
and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant, Eleanor Marshall, filed a grievance against her employer, Department of Health and Human Resources ("DHHR") and Division of Personnel ("DOP") on December 21, 2005, alleging:

I am inappropriately classified. This position has the same level of responsibilities as other managers of statewide programs in the Bureau for Public Health.

Relief Sought:

To be appropriately classified as manager of the DUI Program for the Bureau for Public Health. I am requesting back pay with interest back to September, 1999.

This grievance was denied at all lower levels. A Level IV hearing was held at the Grievance Board's Charleston office on August 22, 2006. Grievant was represented by Todd Reed, Esq., DHHR was represented by Jennifer Akers, Assistant Attorney General, and DOP was represented by Karen

O'Sullivan Thornton, Assistant Attorney General. Thiscase became mature on that date, the parties declining to file proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts that since the departure of Dr. Lambert, the former Director of the Office of Laboratory Services, her duties relating to the DUI program have dramatically increased, and as such she should be reallocated to the position of Health and Human Resource Specialist, Senior. The current Director, Dr. Andrea Labik, supports Grievant's position.

Respondents assert Grievant's job duties do not warrant such reallocation, as her duties are clerical in nature.

Findings of Fact

1. Grievant is currently employed as an Administrative Services Assistant 1 ("ASA 1") with the Bureau for Public Health, Office of Laboratory Services, in Charleston.

2. In 1999, Dr. Lambert, the Director of the Office of Laboratory Services, retired. Upon her retirement, Grievant assumed additional duties related to the DUI program.

3. In October, 1999, Dr. Andrea Labik assumed the Director's position. Grievant continued to perform the added responsibilities of the DUI Program.

4. In November, 2004, the Second Lieutenant of the West Virginia State Police retired. Up until his retirement, he was the employee who managed the DUI program. When he retired, more DUI program duties were added to Grievant's position. 5. In October, 2005, Grievant submitted a Position Description Form ("PDF") (See footnote 1) to DOP requesting a review of her classification. DOP reviewed the form and determined Grievant was properly classified as an ASA 1.

6. Upon receipt of DOP's decision, Dr. Labik requested a reconsideration of Grievant's classification determination.

7. In December, 2005, DOP responded to Dr. Labik's reconsideration request by reiterating Grievant was properly classified as a ASA 1, as Grievant's position provided primarily administrative support functions.

8. Grievant reports directly to Dr. Labik. Her job duties involve verifying officers' training, monitoring and managing the database, and maintaining the registry of approved testing instruments in accordance with *W. Va. Code* § 64-10-1. Grievant also receives calls from the general public, prosecuting attorneys, and defense attorneys. Grievant handles those calls and provides the

requested information. She assists in ensuring attorneys have the appropriate documentation when going to court on DUI charges, and Grievant also provides court testimony as needed.

9. West Virginia State Police are responsible for training the officers and requesting approval for new machines to assist in enforcing the DUI laws.

10. The documents identifying which breath machines are on file as being approved for use in the enforcement of DUI law are prepared by Grievant, signed by Dr. Labik, and notarized by Grievant. 11. The documents verifying an officer's training has been completed are prepared by Grievant, signed by Dr. Labik, and notarized by Grievant.

12. The class specification for an Administrative Services Assistant 1 is as follows:

Nature of Work

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

Distinguishing Characteristics

Positions in this class are distinguished from the Administrative Services Assistant 2 by the size of the unit served and by the independence of action granted. Positions in a small agency or division may be responsible for a significant administrative component; other positions assist an administrative supervisor in a large state agency. Authority to vary work methods or policy applications or to commit the agency to alternative course of action is limited.

Examples of Work

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

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

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

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

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

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

13. The classification specification for Health and Human Resources Specialist,

Senior is as follows:

Nature of Work

Under general supervision, performs work at the advanced level by providing administrative coordination of and complex technical assistance in a component of a major statewide program, a statewide program in its entirety, or a major technical area specific to or characteristic of the Department of Health and Human Resources. Acts as a liaison to facilitate problem resolution and assure compliance with federal, state, and local regulations, laws, policies, and procedures governing the program or technical area. Has primary responsibility for developing standards for major systems and for monitoring and/or evaluation of major complex systems or multi program operations. May consult on highly complex individual situations that potentially have significant impact on systems or involve sensitive legal issues. Has responsibility for development and issuance of comprehensive training programs to insure basic competency and continued development of skills, knowledge and abilities relevant to the systems for which she/he are assigned responsibility. Uses independent judgement in determining action taken in both the administrative and operational aspects of the area of assignment. Exercises considerable latitude in varying methods and procedures to achieve desired results. May supervise or act as lead worker for other professional staff. Performs related work as required.

Distinguishing Characteristics

The Health and Human Resources Specialist, Senior, is distinguished from the Health and Human

Resources Specialist by the broader scope of administrative oversight and responsibility for planning and operational aspects of a system of program or technical areas. This level may function in a regularly assigned lead or supervisory capacity over professional, paraprofessional and clerical classes and, if not, must have responsibility for the conceptualization and development of major complex program and/or operational systems.

Examples of Work

Interprets federal and state laws, regulations, and guidelines for staff which provides services; guides others in developing and utilizing plans and recommends methods of improvement.
Effects or recommends operational changes to facilitate efficient and effective accomplishment of goals or delivery of service.
Informs director of technical area, program, or service deficiencies and recommends improvements.
Consults with other program or technical area staff, supervisors, or managers concerning projects and priorities.Develops rules, policies, and legislation regarding specific work projects.
Reads, reviews, and responds to correspondence or distributes to appropriate staff.
Develops research, information, or training programs.
Evaluates program or technical area effectiveness.
Writes, edits, or contributes to policy and procedure manuals.
Has contact with federal, state, local program representatives and officials, Department of Health and Human Resources management and staff, and legislature.
Plans and develops budget requests and short-and-long-range work plans.
May lead or supervise professional support staff.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6. *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

Grievant argues she is misclassified. Currently she is classified as an ASA 1, but asserts the

appropriate classification would be a Health and Human Resource Specialist, Senior. In order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely match another cited DOP classification specification than that under which she is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR- 88-038 (Mar. 28, 1989). DOP specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, *Captain v. W. Va. Div. of Health*, Docket No.90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of Work" section of a classification specification is its most critical section. *Atchison v. W. Va. Dep't of Health*, Docket No. 90-H-444 (Apr. 22, 1991); *See generally, Dollison v. W. Va. Dep't of Empl*. Security, Docket No. 89-ES-101 (Nov. 3, 1989).

Grievant asserts her position is misclassified, and she has requested her position be reallocated and placed in a higher pay grade. DOP's Rule 3.78 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *Kuntz/Wilford v. Dep't of Health and Human Res*., Docket No. 96- HHR-301 (Mar. 26, 1997). "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." Id.

Grievant clearly is a valued employee who is knowledgeable in the DUI program. She has accepted additional responsibility for the program at a time when her services were much needed. However, Grievant's job duties are basically clerical in nature. Because the class specification for Health and Human Resources Specialist, Senior requires work on a "major statewide program," a significant portion of the testimony dealt with whether the DUI program qualified. Lowell Basford, Assistant Director, Classification and Compensation, of DOP testified that a statewide program provided a service or product for DHHR. Based on that, he contended the DUI process was administered by lawenforcement, and Grievant's function was record keeping and certification. Grievant argued the DUI program did qualify as a "major statewide program."

Grievant's job does not meet the classification for HHR Specialist, Senior. First, the DUI program is not a "major statewide program" as anticipated under the classification specifications for Health and Human Resource Specialist, Senior. Second, the DUI program is administered by law enforcement. Third, Grievant is not responsible for developing standards and monitoring and/or evaluating complex systems. Instead, her role is limited to support functions. Also, Grievant is not involved in the development and issuance of comprehensive training programs to insure basic competency. Grievant's role is to ensure all the appropriate paperwork is on file and accurate in accordance with *W. Va. Code* § 64-10-1.

Grievant also argues that by ensuring all appropriate documents are on file with the office she is ensuring compliance with federal, state, and local regulations, laws, policies and procedures. However, Grievant merely reviews the paperwork to ensure the law enforcement agencies have navigated through the appropriate bureaucratic channels. This does not amount to ensuring the compliance mentioned in the classification specification.

That is not to say Grievant's position is not important. Clearly, Grievant is an asset to DHHR, and has many strengths. She has taken initiative and continues to be a valued employee, as evidenced by Dr. Labik's continual support in her reallocation. Unfortunately, her duties do not meet the requirements set for the in classification specification.

The following conclusions of law support the above discussion:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6. *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. In order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely match another cited DOP classification specification than that under which she is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR- 88-038 (Mar. 28, 1989).

3. DOP specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the

different sections to be considered as going from the more general/more critical to the more specific/less critical, *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of Work" section of a classification specification is its most critical section. *Atchison v. W. Va. Dep't of Health*, Docket No. 90-H-444 (Apr. 22, 1991); *See generally, Dollison v. W. Va. Dep't of Empl*. Security, Docket No. 89-ES-101 (Nov. 3, 1989).

4. DOP's Rule 3.78 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to theposition." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *Kuntz/Wilford v. Dep't of Health and Human Res*., Docket No. 96-HHR-301 (Mar. 26, 1997). "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." Id.

5. Grievant did not meet her burden of proof in showing she was misclassified.

Accordingly, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, and 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: October 26, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

On the PDF, Grievant asserted 25% of her time was spent as the Human Resource Manager. However, at the Level IV hearing she testified she no longer performed that function.