THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ANDREA SCOTT,

Grievant,

v.

DOCKET NO. 06-HHR-389

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

Respondents.

DECISION

This grievance was filed by Grievant, Andrea Scott, on August 7, 2006, against her employer, the Department of Health and Human Resources/Bureau for Children and Families ("HHR"). Her statement of grievance reads:

> Grievant, a Social Service Worker II, is routinely assigned adult protective service duties. The protective service duties; including Protective Service on-call status that consumes approximately two weeks a month and that those duties are not consistent with the Division of Personnel's job specifications for Social Service Worker II.

The relief sought by Grievant is "[b]ack pay for the time spent on Protective Service work and the deletion of those duties from my current responsibilities."

Grievant's supervisor responded to the grievance at level one of the grievance procedure on August 15, 2006, stating the grievance was not timely filed, and the matter was not grievable. Grievant appealed to level two on August 16, 2006, where the grievance was denied on August 28, 2006. Grievant appealed to level three on August 28, 2006. The Division of Personnel was joined as a party respondent, and a level threehearing was held on October 16, 2006. A level three decision denying the grievance was issued by John J. Najmulski, Interim Commissioner, on October 23, 2006. Grievant appealed to level four on October 25, 2006. A level four hearing was held before Administrative Law Judge Wendy A. Campbell, on May 21, 2007, in Beckley, West Virginia. Grievant represented herself, HHR was represented by Jennifer K. Akers, Assistant Attorney General, and the Division of Personnel ("DOP") was represented by Karen O'Sullivan Thornton, Assistant Attorney General. The parties declined to submit written argument, and this matter became mature for decision at the conclusion of the level four hearing. Administrative Law Judge Campbell resigned her employment with the Grievance Board shortly thereafter. This matter was reassigned to the undersigned Administrative Law Judge on October 26, 2007. (See footnote 1)

Synopsis

Grievant argued she could not be assigned any duties which were Adult Protective Services Worker duties, pointing specifically to cases assigned to her which were Adult Protective Services Worker cases, and to situations she had to handle when she was on- call. Grievant relied upon an old Grievance Board case for the proposition that as a Social Service Worker II, she could not be assigned any Adult Protective Services Worker duties. That case, *Toney v. Department of Health and Human Resources*, Docket No. 93-HHR- 460 (June 17, 1994), has not been considered to be controlling on the issue raised by Grievant for many years, and Grievant's reliance on that case is misplaced. *Hager v. Dep't of Health and Human Resources*, Docket No. 95-HHR-241 (Sept. 29, 1995). Grievant also pointed to the fact that her position was temporarily upgraded after she filed her grievance, as support for her claim that she had been working out of her classification.

Respondents do not deny the fact that some of the duties Grievant has been performing are those of an Adult Protective Services Worker. DOP noted, however, that an agency may assign some duties to its employees which are not within the class specification for the employee's classification. The question is whether these additional duties are the employee's predominant duties. DOP noted

that Grievant's position was temporarily upgraded because her unit was short one person, and HHR needed Grievant to take on more of the Adult Protective Services Worker duties until a new employee was available. (See footnote 2)

It is within HHR's discretion to assign some Adult Protective Services Worker duties to Grievant as needed. However, these have not been her predominant duties. Grievant is not misclassified.

The following Findings of Fact are properly made from the record developed at levels two and four.

Findings of Fact

1. Grievant has been employed by HHR since March 2001, in Raleigh County. She is classified as a Social Service Worker II ("SSWII").

2. Prior to September 1, 2006, Grievant was assigned one to two cases per month which are generally considered to be the types of cases assigned to Adult Protective Services Workers ("APSW"). (See footnote 3)

3. On August 1, 2006, Grievant was placed on the on-call schedule to take crisis calls after hours. When Grievant is on-call, she must be available from 5:00 p.m. until 8:30 a.m. each day for one week, to take all calls involving crisis situations that arise during those hours. Some of the after hours calls that come in relate to Grievant's SSWII case assignments, but some of them relate to cases normally assigned to APSWs. Usually an after hours crisis can be handled by placing a few telephone calls to law enforcement personnel. Grievant rarely has to go out and personally deal with a crisis, although she must be available to respond in person within two hours to any crisis when she is on call.

4. Grievant prepared a new Position Description Form on August 22, 2006, and it was submitted to DOP for review. After completion of its review of the new Position Description Form, on October 5, 2006, DOP determined that Grievant was properly classified as a SSWII. 5. Grievant's Position Description Form lists her duties as follows: providing case management to Health Care Surrogate and Guardianship clients, 45 percent of the time; providing case management to Adult Family Care Home clients and providers, 25 percent of the time; providing case management to Homemaker clients, 10 percent of the time; and providing APS supervisor back-up duties when the supervisor is unavailable or needs assistance, 20 percent of the time.

6. Grievant does not spend a predominant or significant amount of her time performing duties which fall within the class specification for an APSW.

7. On September 1, 2006, Grievant received a temporary upgrade to APSW, and a corresponding pay increase. This temporary upgrade ended March 1, 2007. Grievant's position was upgraded because the unit was short one employee. While her position was upgraded, Grievant was assigned four to five APSW cases every week or two.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears 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 Resources*, 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993).

Additionally, *W. Va. Code* § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. In order for a 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 identified Division of Personnel class specification than the one under which she is currently assigned. *See generally*, *Hayes v. W. Va. Dep't of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989). Personnel 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. West Virginia Division of Health*, Docket No. 90-H-471 (April 4, 1991); for these purposes, the "Nature of Work" section of a class specification is its most critical section. *Atchison v. W. Va. Div. of Health*, Docket No. 90-H-444 (Apr. 22, 1991). *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 a grievant's current classification constitutes the "best fit" for her required duties. *Simmons v. W. Va. Dep't of*

Health and Human Resources/Div .of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Thomas v. W. Va. Dep't of Health and Human Resources*, Docket No. 95-HHR-187 (July 10, 1996); *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, the Division of Personnel's interpretation and explanation of the class specifications at issue should begiven great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Farber v. W. Va. Dep't of Health and Human Resources,* Docket No. 95-HHR-052 (July 10, 1995). Under the foregoing legal analysis, the holding of the Supreme Court of Appeals of West Virginia in *Blankenship* presents employees contesting their current classification and/or pay grade with a substantial obstacle to overcome in attempting to establish that they are currently misclassified.

It is also important in this case to refer to Division of Personnel Rule 143 C.S.R. 1 § 4.4, "Class Specifications," which provides, in pertinent part:

> The Director shall consider the class specification in allocating positions and shall interpret it as follows:
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> (a) Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.
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> (b) In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole. The Director shall give consideration to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the positions that the class intended to include.
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> (c) A class specification is a general description of the kinds of work characteristics of positions properly allocated to that class and not as prescribing what the duties of any position are nor as limiting the expressed or implied authority of the appointing authority to prescribe or alter the duties of any position.
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> (d) The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.

The pertinent sections of the class specifications for the classifications at issue are as follows:

SOCIAL SERVICE WORKER 2

Nature of Work Under general supervision performs full performance level social service work in providing services to the public in one or multiple program areas. Work requires the use of a personal automobile for local travel. Employee is subject to on-call status during non- business hours. May be required to deal with situations which are potentially dangerous to client and worker. Performs related work as required.

Distinguishing Characteristics All three levels of Social Service Worker provide professional social services to the public. The Social Service Worker 2 provides these services in one or more of the following areas: nursing home placement, adult family care, pre-institutionalization, admission and aftercare, generic social services, homeless, reception social work, or other services at this level.

Examples of Work Maintains a caseload for programs and services at this level. Takes, evaluates and approves client applications for services; explains services and eligibility criteria. Recruits, evaluates and approves providers of services at this level; conducts on-site evaluation of provider facilities and services. Develops client service plan designed to accomplish habilitation and rehabilitation of the client and to provide social services to assist client in attaining social, educational and vocational goals. Interacts with a variety of professional practitioners in the areas of social work, mental health, developmental disabilities, education and counseling and guidance to assess client's needs and provide appropriate services. Counsels clients/families in achieving goals of client service plan. Speaks before community organizations and groups regarding services available and to develop community resources. Writes report on case findings and summaries of client social and financial circumstances.

ADULT PROTECTIVE SERVICES WORKER

Nature of Work Under general supervision, performs advanced and complex social casework in the area of Adult Protective Services. Work is characterized by cases involving abuse/neglect/exploitation of adults. The nature of the situations requires expertise and judgment to

deal with problems that are potentially dangerous to the client and the worker. Work requires the use of personal automobile for travel. Employee is subject to being on- call during non-business hours and must be available and have access to a telephone. Performs related work as required.

Examples of Work

Conducts investigations concerning allegations of abuse, including sexual abuse, by talking with and visually observing affected individual; talks with immediate family, relatives, neighbors, teachers, doctors, and relevant others and reviews any pertinent records. Defuses possibly hostile situations wherein a person may be a threat to self or others. Makes initial assessments of validity of the allegation and the degree of danger that the adult is in; documents the results of the investigation. Assesses family and/or residential dynamics and problems that may be precipitating an abusive situation. Prepares a complete client service plan to remedy contributing problems and stop behavior patterns of abuse/neglect/exploitation and solicits family/caregiver cooperation. Engages family or caretaker in methods to solve problems, refers them to available resources, and monitors situation to prevent a reoccurrence of abuse. Files petition with the court when the adult is judged to be in imminent danger and testifies before the court in order to remove an adult from the family and/or residential situation; makes appropriate placement of adult with relatives, in Adult Family Care homes, nursing homes, residential boarding care, personal care homes, or in an emergency shelter. Offers alternatives to living environment if the client has been deemed incapacitated or incompetent; arranges placement of the adult client in an alternative living environment. Evaluates periodically the progress of the adult or living environment towards meeting objectives of the service plan, the need to modify the plan, and the eventual closing of the case. May complete and participate in court processes, including but not limited to guardianship/conservatorship hearings, mental hygiene petitions, and mental hygiene hearings following the execution of an Order of Attachment as dictated by the client's circumstances. Completes annual court reports for guardianship cases. May monitor Health Care Surrogate and guardianship cases according to policy, including end-of-life decision making.

Lowell D. Basford, Assistant Director in charge of DOP's Classification and Compensation Section, explained that class specifications are not to be rigidly applied. They are not intended to limit an agency's authority to assign duties to an employee as it deems necessary to respond to situations which arise. He also noted that nothing in the class specification for the SSWII prevents the agency

from requiring the employee to be on-call to meet the needs of the organization and the clients. Mr. Basford stated that the APSW duties assigned to Grievant did not rise to the level of being her predominant duties. He believed Grievant was properly classified. Grievant has indeed been regularly assigned some duties which are found within the class specification for an APSW. However, an agency is not precluded from making such duty assignments. It is noted that the class specification for a SSWII specifically states that the "[e]mployee is subject to on-call status during non-business hours," and the requirement that Grievant be on-call after hours is not an assignment outside her class specification. Because the predominant duties of the position are class controlling, the fact that Grievant has performed some tasks not specifically identified in the class specification for a SSWII, does not render her misclassified. Grievant was not performing APSW duties a predominant amount of her time, and she has not demonstrated that DOP's determination that she is properly classified as a SSW II, is clearly wrong.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In order for a 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 identified Division of Personnel class specification than the one under which she is currently assigned. *See generally*, *Hayes v. W. Va. Dep't of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989).

2. The predominant duties of the position in question are class-controlling. *Thomas v. W. Va. Dep't of Health and Human Resources*, Docket No. 95-HHR-187 (July 10, 1996); *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). 3. The Division of Personnel's interpretation of its own regulations and class specifications matters are within its expertise, and these interpretations are entitled to substantial weight. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Farber v. W. Va. Dep't of Health and Human Resources,* Docket No. 95-HHR- 052 (July 10, 1995).

4. The duties assigned to Grievant which were duties within the class specification for Adult Protective Services Worker were not Grievant's predominant duties. Grievant was not misclassified as a Social Service Worker II.

Accordingly, this grievance 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." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). Neither the West Virginia Public 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 properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: December 6, 2007

Footnote: 1

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 2

DOP also raised a timeliness defense at the level three hearing with regard to any claim for back pay, but DOP's counsel did not articulate this as an argument at level four. This argument is deemed to be abandoned.

Footnote: 3

The record does not describe the nature of these cases, but the parties did not dispute that Grievant has been assigned some cases which are normally assigned to APSWs.