WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SANDRA GARRETSON,

Grievant,

v.

Docket No. 07-HHR-397

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/OFFICE OF PERSONNEL

SERVICES and DIVISION OF PERSONNEL,

Respondents.

DECISION

Sandra Garretson ("Grievant") grieves the decision of the Department of Health and Human Resources, Office of Personnel Services ("DHHR"), and the Division of Personnel ("DOP"), that refused to reallocate her position from Administrative Services Assistant One ("ASA 1") to Administrative Services Assistant Three ("ASA 3").

The grievance in this matter was filed on April 18, 2007. (See footnote 1) The statement of grievance provides that

> [t]he duties of my position has [*sic*] substantially and permanently changed from that of the Administrative Services Assistant I to that of an Administrative Services III but

> my employer has failed to reallocate my position to that level of classification and salary compensation and therefore has violated Section 4.7 and 5.3(f)3 of the Administrative Rule. Thisreallocation was made effective October 1, 2006 and I began performing those duties at that time.

As relief, the Grievant seeks reallocation (See footnote 2) to the classification of ASA 3, adjustment of her salary and back-pay. (See footnote 3) The grievance was denied at all lower levels. A Level Four hearing was held on July 7, 2008, before Administrative Law Judge (ALJ) Thomas J. Gillooly. Grievant appeared by and through her counsel, Michael Payne, Esquire. Respondent DHHR appeared by and through its counsel, B. Allen Campbell, Senior Assistant Attorney General for the State of West Virginia. Respondent DOP appeared by and through its counsel, Karen O'Sullivan Thornton, Assistant Attorney General for the State of West Virginia. Findings of fact and conclusions of law were due on or about September 8, 2008, and both parties have submitted findings of fact and conclusions of law. This grievance was transferred to the undersigned ALJ on or about September 16, 2008, for administrative reasons.

This matter is now mature for consideration.

Synopsis

Grievant claims that her position is misclassified as an ASA 1 and should be properly classified as an ASA 3. Respondent DOP maintains that the ASA 3 classification is not the “best fit” for the Grievant's position and avers that the Claims Representative 2(“Claims Rep. 2") classification is the proper fit.

The duties of the Grievant's position concern reviewing, evaluating and filing workers' compensation claims. When compared to the three classifications at issue, the Claims Rep. 2 classification is the “best fit.”

For the reasons set-forth below, this grievance is GRANTED, in part, and DENIED, in part.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Sometime in 2005, (See footnote 4) the DHHR Employee Relations and Risk Management Unit underwent reorganization. Grievant's secretary position was reallocated to the classification of ASA 1.

2. Grievant is currently employed as an ASA 1 assigned to the DHHR, Employee Relations and

Risk Management Unit.

3. In October of 2006, Grievant took on some additional duties and retained most of her old duties. Grievant took on the duties of a co-worker who was classified as an ASA 3. (See footnote 5)

4. One-hundred percent of Grievant's work-time concerns workers' compensation claims. When a workers' compensation claim comes into Grievant's office, she gathers the injured employee's personal information and the incident form. She conducts an initialassessment of compensability for each claim filed and determines payment of temporary total benefits to the injured employee. Grievant determines whether there is any reason that DHHR should initially challenge the injured employee's claim. Grievant files claims with Brickstreet Insurance Company for DHHR. Throughout this process, she has contact with the injured employee, his or her immediate personnel/human resource department, health care provider(s) and DHHR payroll, to facilitate the completion of all paperwork necessary to file the claim. Further, Grievant maintains a database of all workers' compensation claims filed by DHHR employees.

5. In July of 2007, Grievant completed a Position Description Form ("PD Form"), (See footnote 6) describing her duties and responsibilities.

6. On July 18, 2007, DOP performed a desk audit for the Grievant's position. DOP determined that Grievant should be reallocated to the classification of Claims Rep. 2. DOP noted similarity between Grievant's PD Form and the Nature of Work section of the Claims Rep. 2 classification, not the ASA 3 classification.

7. The Grievant's job essentially mirrors the intended duties of the Claims Rep. 2 classification.

Discussion

In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. *Payne v. W. Va. Dept. of Energy*, Docket No. ENGY-88-015 (Nov. 2, 1988); *Unrue v. W. Va. Div. ofHighways*, Docket No. 95-DOH-287 (Jan. 22, 1996).

In a misclassification grievance, the focus is upon whether the grievant's duties for the relevant period of time more closely match those of another cited classification specification than the classification to which she is currently assigned. *See generally Hayes v. W. Va. Dep't of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989). The key to the analysis is to ascertain whether Grievant's current classification of ASA 1 constitutes the "best fit" for her required duties. *Simmons v.*

W. Va. Dep't of Health and Human Res./Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The predominate duties of the position in question are controlling. *Broaddus v. W. V. Div. of Human Services*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Moreover, class specifications are descriptive only and are not meant to be restrictive. The mention of one duty or requirement does not preclude others. 143 C.S.R. 1 § 4.4(a); *Coates v. W. Va. Dept. of Health and Human Resources*, Docket No. 94-HHR-041 (Aug. 29, 1994).

The Claims Rep. 2 classification is the “best fit” because the nature of the Grievant's work concerns filing and analyzing workers' compensation claims. In this matter, the Grievant's position is classified as an ASA 1. She seeks to be classified as an ASA 3. Respondents agree that ASA 1 is not the “best fit” for the Grievant's position. When determining the “best fit” for the Grievant's position, the specific tasks the Grievant performs and the job classifications established by the DOP must be considered.

The duties performed by Grievant concern reviewing, evaluating and processing workers' compensation claims and related activities. *See* Finding of Fact Four.

The duties of the Grievant's position must be compared to the DOP jobspecifications. Generally, personnel job specifications 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 the purpose of position comparison, the “Nature of 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).

First, the classification specification of ASA 3 must be examined. The Nature of Work section of the ASA 3 classification reads as follows:

> Under general direction, performs complex administrative and/or supervisory work in providing support services such as fiscal, personnel, payroll or procurement on a statewide basis or serves in a specialty role of a complex support program with extensive federal oversight. Responsible for the development and implementation of policies and procedures for the work unit; for the monitoring and evaluation of the specialized functional area. Works within general statute and regulatory parameters,

> but has considerable latitude to vary work methods, policy applications to achieve desired results. The work includes supervision of subordinate professional, technical or office support staff. The work is typically complex, varied and requires considerable interaction with local, state and federal agencies and the general public. Performs related work as required. (See footnote 7)

Next, the position of Claims Rep. 2 must be examined. The Nature of Work section of the Claims Rep. 2 reads as follows:

> Under general supervision, reviews, evaluates, and processes an assigned caseload of Workers Compensation claims. Responsible for a caseload involving lost time claims with less than one hundred and four weeks of indemnity benefits. Caseload will include hearing loss, and occupational disease (e.g., repetitive motion, carpal tunnel, chemical exposure, dermatitis, etc.) and claims requiring surgery. Performs related duties as required. (See footnote 8)

No party to this grievance has argued that the ASA 1 classification is the appropriate classification. Hence, as an initial matter, the Grievant has proven that her position is misclassified. Upon review of the Grievant's duties, it is clear that the “best fit” for her position is the Claims Rep. 2 classification. Grievant's duties should properly be classified as reviewing, evaluating and processing workers' compensation claims.

Grievant attempts to stretch her duties to 'fit' within the particular language of the ASA 3 classification. The issue is not whether there is a mere 'fit,' but rather, the “best fit.” Upon examining the Grievant's job duties, the Claims Rep. 2 classification is the “best fit.”

The Grievant argues that the duties of her position have transmuted and her position classification should be changed. First, Grievant argues that, insofar as her position subsumed the position of a former co-worker who was classified as a ASA 3, she should be classified as an ASA 3. The Grievant's argument is fatally flawed. Classification determinations are not made based upon comparison to other employees, but upon which classification description is the “best fit” for that employee's duties. *Baldwin v. Dep't Healthand Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999). The issue is “best fit” and it is clear that the Claims Rep. 2 position is the “best fit” for the Grievant's position.

Secondly, Grievant maintains that she works on a particular project for the Governor and this should be direct evidence of her position being properly classified as an ASA 3. Grievant is one of several individuals in DHHR assisting in work on a project for the Governor's office to determine impact of lost time claims (i.e., impact of absences due to workers' compensation injuries). Grievant suggested that working on this project in some way should cause her position to be reallocated. (See

footnote 9)

The second argument is unpersuasive. Employees who simply perform some duties normally associated with a higher classification may not be considered misclassified *per se*. *See generally Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (April 15, 1996). Incidental duties which require an inconsequential amount of employees' time will not warrant a higher classification, if the remainder of their duties are accurately described by their classification. *See Graham v. Nicholas County Bd. of Educ.*, Docket No. 93-34- 224 (Jan. 6, 1994).

The DOP did not err when finding that the “best fit” for the Grievant's position is the Claims Rep. 2 classification. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency'sdetermination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). The DOP was not clearly wrong.

The Grievant has *not* shown by a preponderance of the evidence that her duties fall more closely within the ASA 3 classification instead of the Claims Rep. 2 classification. However, the evidence does clearly indicate that the ASA 1 classification, which the Grievant currently holds, is not the “best fit.” The Claims Rep. 2 position is the appropriate classification. As such, the Grievant should be placed in said classification.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In order to prevail upon a claim of misclassification, a grievant must prove by a preponderance of the evidence that her duties for the relevant period of time more closely match those of another cited classification specification than the classification to which she is currently assigned. *See generally*, *Hayes v. W. Va. Department of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989).

2. DOP's interpretation and explanation of the classification specifications at issue, if the language is determined to be ambiguous, should be given great weight unless clearly erroneous. *See W. Va. Dept. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993). The clearly wrong standard requires the reviewing authority to presume an agency's actions are valid as long as the

decision is supported by substantial evidence orby a rational basis. *Adkins v. W.Va. Dept. Of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W.Va. 485, 655 S.E.2d 204 (2007); *Bennet v. Insurance Comm'n and the Div. Of Personnel*, Docket No. 07-INS-299 (June 27, 2008).

3. Grievant has proven that her current classification of ASA 1 is improper when compared to other classifications available.

4. Based on the duties and responsibilities performed by the Grievant, the Claims Rep. 2 classification is undoubtedly the “best fit” for Grievant's position.

Accordingly, this grievance is hereby **GRANTED**, in part, and **DENIED**, in part. The Grievant has proven by a preponderance of the evidence that the ASA 1 classification is not the “best fit” for her position. This ALJ hereby finds that the Claims Rep. 2 is the “best fit” for the Grievant's position. It is hereby **ORDERED** that the Grievant be paid back-pay, plus interest at the statutory rate, from October, 2006.

Insofar as Grievant seeks to be reallocated to the ASA 3, the grievance is hereby 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. W.Va. Code § 29-6A-7 (*See* Footnote 1*)*. 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 Board with the civil action number so that the record can be prepared and properlytransmitted to the appropriate circuit court.

Date: October 22, 2008

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Mark Barney

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, 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, which continue to control the proceedings in this case.

Footnote: 2

Reallocation is the "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.75.

Footnote: 3

It appears from the record Grievant changed her relief sought prior to the Level Three hearing. Prior to Level Three, she sought to be classified as an Health and Human Resources Specialist. Subsequently, she reverted back to the relief sought in the original grievance form. See generally June 17, 2008, Memorandum Order.

Footnote: 4

The exact date is unclear from the record.

Footnote: 5

While filling-in for this ill co-worker on sick-leave, the Grievant was temporarily upgraded to the ASA 3 classification.

Footnote: 6

Pursuant to 143 C.S.R. 1 § 4.5, the PD Form is the official document utilized by the DOP to allocate a position to the proper classification within the Classification and Compensation Plan.

Footnote: 7

The Examples of Work section of this classification includes the following tasks:

*1 **

> *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.*

*2 **

> *Conducts performance surveys and reviews agency methods of operation; devisesflowcharts and graphs; may conduct cost analysis studies.*

*3 **

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

*4 **

> *Updates records and contacts employees to gather information; represents the agency in the area of assignment in both internal and external meetings.*

*5 **

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

*6 **

Determines 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.

*7 **

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

*8 **

Supervises the work of Office Assistants, Accounting Assistants or other support staff.

Footnote: 8

The Examples of Work section of this classification includes the following tasks:

*9 **

Analyzes assigned new claims and reopening applications; determines applicability of coverage and chargeability.

*10 **

Contacts claimants, employers, physicians, witnesses, and others to gather and verify information; secures salary information and determines compensation rate. Determines claim compensability. Identifies claims needing vocational rehabilitation for referral to rehabilitation specialists and monitors progress of rehabilitation services rendered within assigned authority.

*11 **

Identifies subrogation opportunities; initiates recovery procedures. Requests treatment plans from physicians and other clinical providers; reviews and develops a case management plan under general supervision.

*12 **

Reviews requests for treatment, diagnostic studies, change of physicians, surgery, payment of medical expenses and payment of indemnity benefits. Evaluateshearing loss claims and determines employer allocation/chargeability; evaluates audiograms and determines impairment rating based on current accepted guidelines.

*13 **

Consults with medical management nurse on complex medical issues. Requests independent medical examinations; reviews treatment plans in relation to established treatment guidelines.

*14 **

Explains basis for and results of decisions and appeal rights to physicians, attorneys, government officials, other clinical providers and other interested parties. Reviews requests for settlement to determine that related payments are made in accordance with agency policies and procedures.

*15 **

Works with injured worker, physician and employer to identify return to work opportunities through

modified alternate job duties or trial return to work. Assists attorneys in litigated claims.

Footnote: 9

Lowell D. Basford, former Assistant Director for the Classification and Compensation section of the DOP, addressed this suggestion stating DOP would consider work on such a project to be occasional and intermittent work and as such it would not factor into the determination of the appropriate classification for Grievant's position. Mr. Basford explained that Grievant is still required to carry out all her other duties and responsibilities each day in addition to any work she may do on the project. Those duties are the predominant duties of the position that the DOP must consider for classification purposes.