



JAMES PAUL GEARY
Chairman

ORTON A. JONES
DAVID L. WHITE
Members

C. RONALD WRIGHT
Director

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

OFFICES:

240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone: 558-3361

PATRICE WEIRICK

v.

Docket No. 92-RS-189

**WEST VIRGINIA BOARD OF REHABILITATION/
DIVISION OF REHABILITATION SERVICES and
WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/
DIVISION OF PERSONNEL**

D E C I S I O N

Grievant Patrice Weirick, employed by Respondent West Virginia Board of Rehabilitation/Division of Rehabilitation Services (hereinafter "Rehab") as a Medical Counsellor, alleges that a position posted as a Rehabilitation Administrator II (hereinafter "RAII") was improperly classified, contending that the position should have been classified as a Rehabilitation Program Specialist (hereinafter "RPS"), and requests as relief reposting. Grievant was not considered for the position because she did not have the "two years in an administrative or supervisory capacity" required by the RAI classification specification.¹ She is fully qualified

¹Grievant filed her claim in April 1992. The Level I and II evaluators determined they had no authority to decide the grievance and at Level III, after hearing of May 10, 1992, the grievance was denied. Upon appeal to Level IV hearing was held July 8, 1992. At
(continued...)

for an RPS position and has a master's degree in homemaker rehabilitation counselling.²

The parties agreed at the Level IV hearing that the posting for the position, titled Chief of Education and Community Services, accurately described its duties:

Performs complex professional level duties involving responsibilities for the coordination and administration of program areas in the Rehabilitation Services Section. Provides technical assistance and oversight to statewide vocational rehabilitation programs. Administers the Cooperative School Program. Coordinates and supervises

¹(...continued)

that hearing, upon the calling of Lowell Basford, Director of the Classification and Compensation Section of the West Virginia Division of Personnel (hereinafter "Personnel"), as a witness, it was determined that Personnel was needed as an indispensable party and Personnel was joined thereas. The undersigned advised Mr. Basford that she would provide Personnel opportunity to present evidence and Mr. Basford advised the undersigned that he had no objection to the hearing's proceeding. Briefs were received from Grievant and Rehab in September and, upon listening to the taped recording of the hearing, the undersigned determined that Personnel may have been deprived of full opportunity to present evidence; Grievant's pro se brief also indicated further information was available that may prove compelling. The undersigned therefore queried the parties whether further hearing was wanted. In December Respondents, by counsel, advised the undersigned that no further hearing was necessary and that "this case is now ready for decision." On January 4, 1993, Grievant by telephone also requested the record be closed.

²The exact title of the degree was not provided by the record. In fact, Grievant, who represented herself at both hearings and testified only at Level III, did not testify that she had such degree but did refer to it in her questioning; the undersigned is relying on testimony of Mr. Quarles, identified infra, who was asked by Grievant whether he was aware of her master's degree in homemaker rehabilitation counselling and her field experience as a homemaker counsellor, and responded, "Yes." The specifications for RAI and RPS both require a Master's degree and allow substitution of experience therefor. The minimum experience requirements differ: As indicated, the RAI specification requires "four years of full-time or equivalent part-time professional experience in vocational rehabilitation, including two years in an administrative or supervisory capacity." The correlative first clause of the RPS specification is identical, but the final clause provides, "including two years in the area of assignment."

vocational rehabilitation programs. Administers the Cooperative School Program. Coordinates and supervises the Homemaker and Independent Living Programs. Manages and oversees the budget for the Independent Living Program. Manages the college financial aid program. Acts as liaison with the Department of Education and State College/University systems. Serves as member of the state level Medley Management Team. Represents the agency on the West Virginia Developmental Disabilities Planning Council Advisory Committee, the West Virginia Parent/Teacher Resource Center Advisory Committee, and the West Virginia University Affiliated Center for Developmental Disabilities Advisory Council. Performs related duties as required.

The "Nature of Work" section of the RAI specification provides,

Under administrative direction, an employee in this class performs complex administrative and supervisory duties in the administration of vocational rehabilitation services to the public. The scope of responsibility typically includes such areas as Assistant Administrative, Rehabilitation Center, Assistant Area Administrator (DDS), Client Service Supervisor, administrative or service section such as Quality Assurance, Program Coordination, Program Evaluation, Casework Service Staff Development or as an administrator in a large branch office with six or more rehabilitation counselors and where administrative and supervisory duties are the predominant work of the position.

The correlative section of the RPS specification provides,

Under general direction an employee in this class performs advanced professional level of work in the coordination and oversight of a program speciality area in rehabilitation services or disability determination services in the Division of Rehabilitation Services. The work may involve research and technical assistance as a specialist in the development, evaluation and operation of a statewide vocational rehabilitation speciality program. Areas of assignment include Deaf Services, Client Services Facilities Development, Fiscal Affairs and Statewide Medical Relations Officer.

The paygrades for an RAI and an RPS are, respectively, 23 and 24.

Moreover, the RAII position at issue here is not a supervisory one and its holder would report to an RPS,³ with the in-house title of "Chief, Administrative Services." Indeed, the vacancy in the RAII position at issue here was created when Judy Holland, its prior holder, was promoted to that Chief position.⁴ Additionally, some shifts in the duties were contemplated for the RAII position from those that Ms. Holland had carried out; notably, Ms. Holland had not had responsibilities for the homemaker and independent living programs.⁵

Lowell Basford, who is the Director of the Classification and Compensation Section of the West Virginia Division of Personnel (hereinafter "Personnel"), testified at Levels III and IV in support of the present classification of the position. At Level III he stated that when classifying a position as an RPS the emphasis is on skills and knowledge of specialized areas and that the original and classic specialties were blindness and deafness. Admitting that not all RPS positions involved such clearly defined specialties, he stated that those positions were so classified because of their level of responsibility; they fit in the hierarchy

³The undersigned was advised at hearing that, while an individual had been selected for the RAII position, that individual had not been inducted into the position due to the pendency of this grievance.

⁴Grievant was qualified for the "Chief" position and had applied for it.

⁵While here the undersigned has, like the posting, referred to separate independent living and homemaker programs, the witnesses often referred to them as one program and it is impossible to determine from the record whether the programs are truly separate.

between RAI and RAIII positions and were often supervised by RAIIs. "[W]e didn't want to develop yet another classification, so that was just the best fit that would equate to the value of the job or the organization hierarchy[.]" III.Tr.17 At Level IV he reemphasized the importance of a specialty area for an RPS position and stated that the "relative difficulty and complexity-level" of an RPS position is higher than that of an RAI. He stated that the nature of work section of the RPS specification provides for a "coordinating role," whereas the crux of the RA series is administration and/or supervision.

At Level III Grievant, contending that the programs referred to in the job posting are specialty areas, in particular stressing that homemaker and independent living is a specialty program, like those for the deaf and blind, asked Mr. Basford whether he was aware of that, and he responded,

Well, when we got the job description, the position description from the agency and then took care of the posting, we slotted it as a Rehab Administrator II based on the class stats and things like that. But I think what you have to do, you have to consider -- in terms of classifying this position, and the regulations even require us to classify positions based upon relationships to other positions, who does this position report to, what kind of position it reports. Where does it fall in the hierarchy, the organizational hierarchy.

All of those things in combination directed us to the Administrator II class rather than a Program Specialist.

IIII.Tr.24.

Deborah Lovely, who was not fully identified at Level III but who was identified at Level IV as Chief of Cooperative Programs and who has held a variety of positions in Rehab over a long employment

history, testified at Level III regarding the changes made in the job responsibilities of the RAI position at issue here. She stated that Ms. Holland's primary areas of responsibility had been "the employment program and also the school program." III.Tr.29. With Ms. Holland's vacating the position, "[t]he supported employment responsibility" was transferred from the position and homemaker and independent living were added. She stated that with the modifications the "primary areas of responsibility" for the position would be the school program and independent living and homemaking.

At Level IV Ms. Lovely testified that she did not see any difference regarding the level of responsibility between those Chiefs who are RAIs and those who are RPSs. She also testified that there are complexities of the homemaker and independent living programs that are not common to the general field counselling areas in rehabilitation. She stated that a general field counsellor has to have a broad range of knowledge but the primary focus is finding employment for the disabled, whereas the independent living and homemaker programs involve more severely disabled individuals for whom there is no employment goal; the goal is to allow the individual to "make it in the home." Knowledge of adaptive equipment for the home is needed. She also stated that if a person is employable but also needs adaptation of his or her home, the case will remain with a regular counsellor but the independent homemaker counsellor will work as a consultant to that counsellor.

The remaining witnesses appeared only at Level IV. Jim

Quarles, Rehab's Assistant Director of Human Resources, confirmed that there were special degrees for blindness, deafness, and homemaker rehabilitation counselling at the graduate level. Asked whether the individual hired into the RAI position might not have adequate knowledge of the specialty which he or she is administering, he replied that such was a possibility,

but what we're looking for is someone who can administer programs and does have some familiarity with the specialty of homemaker rehabilitation and community services and the education system; it's not just homemaker rehabilitation. What we're looking for is someone with administrative experience that can go in and administer that program, that can work with the school system administrators and provide guidance to our field counsellors in all these areas.

Asked to define a "specialty area," he replied,

If we have a separate program for any special services, that's essentially defined as a specialty area as opposed to the program that serves a broad number of people with all types of disabilities.

Asked why supervisory or administrative experience was required for the position at issue here, he replied that it is administrative experience that is critical because the holder

would be administering a state-level program for the Division of Rehabilitation Services and they're providing administrative guidance and support to the whole field program in these areas assigned to it.

He intimated that the position primarily entailed working with the school system.

William Tanzey, Assistant Director for Rehabilitation Services, who clarified that all positions in his hierarchy involve "field programs," testified that the RPS classification was designed because of the "esoteric skills" the positions required

and that "likewise, individuals with a broad scope of statewide responsibilities and who assist me in administering our rehabilitation services programs were so designated." He opined that the position at issue was a RAI rather than an RPS because "[i]t doesn't have the broad scope of responsibilities inherent to the program specialist; it's a step below that[,]" and "[i]t falls within the classic definition of what an RAI does." He further stated that, even with the changes in duties, it does not rate an RPS classification, for he did "not see it calling for any greater sophistication." He did admit that the new duties are specialty programs, and stated, with regard to the independent living duties, "One-half of the job, yes, there is a specialized masters."

Charles Lovely, Chief of Special Services and classified as an RPS, who has been in charge of the homemaker and independent living programs, was asked whether he considered homemaker, independent living and education specialties, and replied, "Certainly." He also stated that independent living, homemaker and transition school programs require special knowledge, such as for the blind.⁶ He also testified,

All programs need someone in charge or in the technical slot or seat or position that has some expertise in those areas. It certainly would facilitate better programs in the field and conversely the field staff would react better with them because they would feel they were dealing with someone with considerable knowledge. I think that's a given.

He also testified,

⁶He put deaf programs in a special category because that expertise requires a difficult skill of communication that is not comparable to any other skill needed in rehabilitation.

If you're asking me whether this job [at issue] requires a considerable amount of administrative and supervisory experience, no, I don't think it does because it's more of a technical nature.

Asked if he believed if anybody could oversee the independent and homemaker program without any specialized training, he replied, "Probably after a period of time." He stated that, while the expertise could be gained through training programs, it would "be better to have someone who could do it right up front." He described his diverse duties and explained that he had been able to spend only ten to fifteen percent of his time on homemaker and independent living, adding that the need to spend more time on those programs had been one of the reasons for removing it from his bailiwick.

Discussion

In order to prevail, Grievant must establish by a preponderance of the evidence that the duties of the position more closely match those described in the RPS specification than the RAI specification. Compare Captain v. W.Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991); Boggs v. W.Va. Tax Dept., Docket No. 89-T-174 (Sept. 22, 1989).⁷ Grievant argues that she fulfilled that burden.

⁷Grievant's standing is not as apparent as in the classical misclassification case, such as those cited, where the grievant is contending that the duties of the classified position he holds fit the specifications of a different classification. However, in that Grievant is contending that a position for which she applied was improperly posted, she does have standing. On the merits, since the issue is into which classification the duties of the position fit, the analysis is the same as for the classic misclassification case.

There can be no doubt that homemaker and independent living is a "program specialty area," as contemplated by the RPS specification, and if the position entailed duties in that area alone this grievance could be granted with little discussion. However, because it is clear from the posting that the holder of the position would be responsible for several programs other than homemaker and independent living and would have various duties for committees and councils, further determinations must be made.

There simply was almost no evidence regarding what the programs listed on the posting other than homemaker and independent living entail. However, the Cooperative School Program and the college financial aid program fit within Mr. Quarles's definition of a "specialty area" and Mr. Lovely specifically referred to "education" as a specialty. That testimony alone might warrant granting the grievance, particularly since Ms. Lovely's testimony that education and independent living were the position's "primary areas of responsibility" was uncontradicted. Moreover, consistent with Mr. Basford's testimony that a "coordinating role" is important for an RPS position and the first sentence of the "Nature of Work" section of the RPS classification, the posting makes clear that such coordination was not only required for homemaker and independent living but for the other programs and is a critical component of the position, although of course administration is also critical. Accordingly, while the testimony is limited,⁸ the

⁸For example, there was no evidence indicating that the holder of the position would be providing "technical assistance" in the
(continued...)

preponderance of the evidence does strongly support that the position's primary areas of responsibility, education and homemaker and independent living are such specialty areas, and even that all programs mentioned in the posting are specialty areas that qualify the position's holder as an RPS. Indeed, the record as a whole even supports that the position's responsibilities for homemaker and independent living would alone support the position's being classified as an RPS position, although again the testimony was also limited on how much of the time of the holder would be devoted to homemaker and independent living and there was no proper questioning on the issue. Nevertheless, Mr. Tanzey's testimony, indicating that about half the job was devoted to those specialties, is found more persuasive than Mr. Quarles's conflicting testimony indicating that education remains the prime responsibility because Mr. Tanzey heads the Rehabilitation Services section in which the position is administratively located. Accordingly, a

⁸(...continued)

programmatic areas mentioned other than homemaker and independent living. The RPS specification includes, as an "Example of Work," "Provides technical assistance and consultation to rehabilitation facilities, agency staff and advocacy groups in the development of rehabilitation service programs." While the testimony was extensive at Level IV, neither there nor at Level III was any witness questioned at all regarding whether the duties matched any of the "Examples of Work Performed" included in the specifications for both classifications; indeed, little questioning related directly to whether the duties matched the specifications. In the briefs Grievant and Rehab only refer generally to the "Nature of Work" sections of the specifications, although Grievant does argue that the Homemaker and Independent Living field counsellors "provide technical assistance, consultative and training services not only to their own clients but also to the other professional rehabilitation counselors within the district they work and associated state-level programs[,]" which is consistent with Ms. Lovely's testimony.

preponderance of the evidence supports that the position was improperly classified as an RAI1 position and that the RPS specification more closely matched its duties.

A contrary result is not mandated by the evidence that the level of responsibility of the position does not warrant the RPS classification. First and foremost, such a criterion for the RPS classification is utterly absent from its specification; the need for a classification between RAI1 and RAI11 in the hierarchy described by witnesses does not justify classifying a position as an RPS. In any case, while Mr. Basford and Mr. Tanzey opined that the position was not of the level of complexity or sophistication to justify its being classified as an RPS, Ms. Lovely, whose opinion was contrary, was the only witness who explained her answer and it is therefore given credence; her testimony supports that the independent living and homemaker specialties require a level of responsibility comparable to other RPS positions.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

Conclusions of Law

1. In order to establish that the "Chief of Education and Community Services" (Chief) position was improperly classified as a Rehabilitation Administrator II (RAI1) and should have been classified as a Rehabilitation Program Specialist (RPS) position, it was Grievant's burden to establish by a preponderance of the

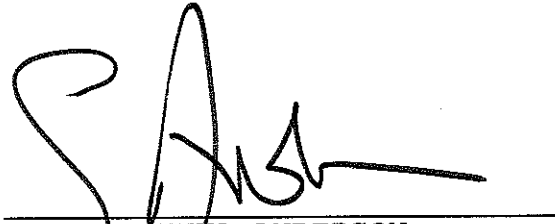
evidence that the duties of the position more closely matched the RPS specifications than the RAII specifications.

2. The uncontradicted evidence establishes that Homemaker and Independent Living is a specialty area or specialty areas, as contemplated by the RPS specifications, and, while contradicted, the more credible testimony, that of Mr. Tanzey, supports that Homemaker and Independent Living constituted more than half the duties of the Chief position. A preponderance of the evidence also establishes that homemaker and independent living and education are the primary areas of responsibility for the Chief position, that the Cooperative School Program and the college financial aid program are specialty areas, as contemplated by the RPS specification, and that the Chief position requires coordination of the programs listed on its posting.

3. Grievant therefore established by a preponderance of the evidence that the Chief position must be classified as an RPS one.

Accordingly, the grievance is GRANTED. Rehab is hereby ORDERED to repost the position as a Rehabilitation Program Specialist position, to consider the qualifications of the applicants as they were as of February 11, 1992, pursuant to the specification of the Rehabilitation Program Specialist classification in effect on that date, and to make a new selection retroactive to that date. Personnel is ORDERED to reclassify the position, retroactive to February 11, 1992.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.



SUNYA ANDERSON
ADMINISTRATIVE LAW JUDGE

January 26, 1993