WILLADEAN FISHER,

Grievant,

Docket No. 98-DOA-492

DEPARTMENT OF ADMINISTRATION/

DIVISION OF PURCHASING and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Willadean Fisher, filed this grievance on July 13, 1998, against her employer, the West Virginia Department of Administration/Division of Purchasing ("DOA") and the West Virginia Division of Personnel ("DOP"). Her Statement of Grievance reads:

> **Favoritism and/or discrimination in filling buyer position, error(s) in classification and/or job reallocation.**
>
> **RELIEF SOUGHT: I am requesting the Personnel Division to classify me properly as a buyer and pay me back pay since February, 1996[,] plus interest, any difference in benefits, buyer job position. No retaliation from Mr. Tincher.**

This grievance was denied at all lower levels. Grievant appealed to Level IV. A pre-hearing conference was held on June 29, 1999, to discuss the issue of whether the grievance had been granted at Level I, and whether Grievant's supervisor, Evan Williams, had authority to grant the grievance. The parties decided to present evidence on this issue, as well as the merits of the grievance. After numerous continuances for good cause shown, a Level IV hearing was held on July 7, 1999. This case became mature for decision on September 2, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1) **After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.**

Findings of Fact

1. Grievant has been employed with DOA since January 1989.

2. On February 6, 1996, Grievant's classification was changed from Office Assistant III to Purchasing Assistant. The main duties of a Purchasing Assistant are to assist a Buyer to perform the task of studying and completing state purchasing bid requirements and forms. The purpose of this lateral class change was to "increase Purchasing's capacity in ACA (See footnote 2) with no increase in personal services. Also creates a career path for (sic) clerical to buying[.]" Grievant's salary remained the same, and she agreed with this decision. Level IV, Grievant's Ex. No. 1, Personnel Action Form.

3. Also, after Grievant was reclassified in February 1996, Grievant's supervisor, Mr. Williams, was directed to teach Grievant the duties of a Buyer. (See footnote 3)

4. Mr. Williams did not believe this decision was correct and took the issue up his chain of command. He was instructed by Harold Curtis, his direct supervisor, and Ron Riley, then Director of the Division of Purchasing, to train Grievant. He was given thesame direction by then Secretary of Administration, Chuck Polan. Mr. Williams trained Grievant to perform the duties of a Buyer, and Grievant was assigned Buyer Number 41A.

5. Grievant performed the duties of a Buyer from February 1996 to March 1999.

6. Grievant was aware the duties she performed were those of a Buyer, and she willingly assumed these duties.

7. Grievant performed these duties in a satisfactory way and received an excellent evaluation from Mr. Williams.

8. On January 7, 1998, an opening for a Buyer was posted, and Grievant was not selected. She did not file a grievance at that time. (See footnote 4)

9. After David Tincher became the Director of the Division of Purchasing, he requested that DOP conduct a position description verification to review his agency, and check to see if all employees were properly classified.

10. Grievant completed her Position Description Form on January 8, 1998.

11. After Grievant completed her Position Description Form, Mr. Curtis and Mr. Tincher added comments and changed some areas and sections completed by Mr. Williams. Mr. Tincher and Mr. Curtis did not discuss these changes with Grievant's direct supervisor, Mr. Williams. These changes indicated Grievant did not perform all the duties of a Buyer. Further,

on January 15, 1998, Mr. Tincher attached a memo indicating he agreed with Mr. Curtis's comments, and explained "Employee does not perform at the Buyer level." He also wrote, "In addition to the lack of signature authority, the employeedoes not conduct training classes to state agency personnel, handle vendor complaints, conduct independent vendor visits, etc."

12. On February 3, 1998, Grievant received the following memo from Mr. Tincher.

> For some time you have been listed as a Buyer. At my request, your name has been deleted. From my perspective, this sends the wrong message to vendors and others, since your proper title is Purchasing Assistant and you do not have signature authority, etc. To those who do not know, it would appear you are a Buyer with all rights, responsibilities, duties and authority which is not true. Also I am concerned that by allowing this to happen, the Division could encounter Personnel problems. All file 41 projects will be listed properly under Evan's name.
>
> Curt and I discussed [this] previously and I'm sure he has told you by now, but I wanted you to know directly from me also.

13. Based upon the Position Description Form submitted to DOP, DOP found Grievant was properly classified as a Purchasing Assistant.

14. Grievant filed this grievance on July 13, 1998, indicating she was misclassified as a Purchasing Assistant as she was performing the duties of a Buyer.

15. Grievant was ill during the Winter and Spring of 1998 - 1999. When she returned to work in March of 1999, her duties were changed, and she no longer performs the duties of a Buyer. Grievant's testimony at Level IV.

16. The class specification for Buyer requires six years of full-time experience "in volume purchasing of commodities or services in a centralized purchasing function for use in the operation of a private industry or government unit. Purchasing experience must be for direct use of the industry or government unit not for retail sales." 17. Although Grievant testified about her past experience in ordering office supplies while working in the private sector, this experience did not meet the type and volume of experience required by the class specification.

18. Mr. Williams's Level I decision states "I agree with your statements and believe them to be true. I agree you should be paid back pay for your work since February, 1996." Later in this same decision Mr. Williams states, "I cannot recommend anything more than what she

demands." Attached to this decision were the directions for filing the grievance to Level II.

19. DOP, which administers the classification and compensation of state employees, was not a party to the Level I grievance.

20. Both Grievant and Mr. Williams were informed this grievance must be appealed to Level II.

21. Mr. Williams believed he had the authority to grant Grievant's reclassification and award back pay. He is not the appointing authority for the agency, and he had not been given the authority to sign Personnel Action Forms. Resp. DOA Exh. No. 1.

22. Grievant appealed this grievance to Level II where it was denied by Mr. Curtis. He stated there was no discrimination or favoritism in the filling of the Buyer position, Grievant did not meet the qualifications for the Buyer position, and DOP's decision that she was properly classified was correct. He further noted "[t]hat the relief sought (reclassify you as Buyer and pay back pay) are requests well beyond my ability to grant." 23. Grievant's salary at the time of filing this grievance was above the minimum starting salary for a Buyer.

Issues and Arguments

Grievant's first argument is that the Level I decision rendered by Mr. Williams granted the grievance, and should be binding on the parties. Second, Grievant alleges discrimination and favoritism in the filling of the Buyer position. (See footnote 5) **Grievant also argues she is currently misclassified.** (See footnote 6)

Respondents argued Mr. Williams did not have the authority to grant a grievance at Level I involving classification and back pay, and such decision was only a recommendation. Respondents further noted DOP was not involved in the grievance process at Level I, and without DOP's involvement the requested relief could not be granted. Respondents maintain Grievant was not misclassified. Respondents further contend Grievant is not qualified for the Buyer position, and she cannot be placed in this position.

Respondents also argue that even if Grievant is found to have been misclassified, this situation no longer exists as of March 1999, when Grievant returned to work. Respondents also note Grievant's relief should be limited to ten days prior to the filling ofthis grievance. Additionally, Respondents point out Grievant would still not be entitled to any back pay as her

salary was greater than the minimum starting salary for a Buyer.

The class specification for the classifications at issue are as follows:

BUYER

Nature of Work

Under general direction an employee in this class performs at the full-performance level in the volume purchasing of a variety of goods and services used in the operation of state agencies and institutions. The work involves the purchasing of specialized, technical or complex commodities or services characterized by changing specifications; purchase orders requiring special stipulations and standards interpretations reflecting an in-depth knowledge of the commodity area. Work is performed independently but is subject to review upon completion for compliance with statutes and procedures. Performs related work as required.

Examples of Work

Reviews requisitions for purchase for accuracy and completeness; assigns vendors; prepares price quotation exhibits; selects bid opening date.

Reviews bids and awards purchase order to lowest responsible bidder.

Contacts requisitioning agency for additional information on changes in the purchase requisition. Records award data in log book; prepares weekly report of awards and bid amounts.

Contacts agencies and vendors to resolve problems on incorrect or late delivers; advises agency officials on purchasing procedures; changes in commodity specifications.

Contacts vendors and suppliers, manufacturers and testing facilities to gain information on new products, sources of supply, changes in product specifications, price changes and design and capabilities of commodities.

Assists in developing standards and specifications for new commodities.

Knowledge, Skills and Abilities

Knowledge of principles and practices of volume purchasing of goods and services.

Knowledge of the various types and grades of commodities and sources of supply.

Knowledge of the laws and rules and regulations relating to governmental purchasing.

Knowledge of the organization and function of state government.

Ability to gather and analyze technical data relating to the characteristics of highly complex and varied commodities.

Ability to express ideas clearly in oral and written communication.

Ability to establish and maintain effective working relationships with associates, vendors and the general public.

Minimum Qualifications

Training: Graduation from an accredited four-year college or university.

Substitution: Full-time or part-time equivalent paid experience as described below may substitute on a year-for-year basis for the required training.

Experience: Two years of full-time or equivalent part-time paid experience in volume purchasing of commodities or services in a centralized purchasing function for use in the operation of a private industry or governmental unit. Purchasing experience must be for direct use of the industry or governmental unit, not for retail sales.

Substitution: Master's degree from an accredited college or university may substitute for one year of the required experience.

Established:

9/19/90

Effective:

10/16/90

PURCHASING ASSISTANT

Nature of Work

Under general supervision, at the full-performance level, performs complex clerical work, organizing and coordinating the purchasing activities within an agency. Performs related work as required.

Examples of Work

Reviews purchase requisitions and determines if required merchandise is contracted or if manufacturer bids must be solicited; collects bids, if required, and screens to determine most cost efficient meeting the requirements of the requisition.

Checks purchase orders for accuracy, completeness, and clarity; corrects any ambiguities in purchase orders and adds needed information.

Types and/or composes purchase orders, correspondence, memoranda and reports.

Obtains all necessary product information from requester including size, quantity and color in order to accurately complete the purchase order.

Records order and requisition number and delivery data in ledger and retains for use in billing and order verification.

Contacts contract vendors to confirm shipping channels and delivery costs.

Oversees the order to assure that it meets the contract agreement and arrives in good condition and in a reasonable amount of time.

Knowledge, Skills and Abilities

Knowledge of basic arithmetic and/or bookkeeping.

Knowledge of governmental purchasing procedures.

Knowledge of basic clerical procedures.

Ability to review forms and merchandise accurately in order to determine that certain standards and specifications are met.

Ability to work with numbers and perform close detailed review of merchandise and documents.

Ability to type accurately.

Ability to communicate effectively with others, both verbally and in writing.

Minimum Qualification

Training: Graduation from a standard high school.

Experience: Two years full-time or equivalent part-time paid clerical experience which included familiarity with purchasing.

Established:

9/19/90

Revised:

11/21/91

Effective:

12/1/91

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 § 4.19 (1996); 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 first issue to discuss is whether Mr. Williams granted the grievance at Level I, and if so, did he have the authority to do so. At Level IV, Mr. Williams testified he believed he had the authority to grant the grievance, he also testified he knew and had been told the grievance must go to Level II. He did not clearly explain how these two pieces of datawent together. What is clear, is that he thought the grievance should be granted and was surprised he was expected to hear it, given his feelings.

What is also clear is that Mr. Williams did not have the required authority to grant the grievance at issue, because he is not an appointing authority, and he had not been granted the authority to sign off on Personnel Action Forms. "Nothing in the grievance procedure prevents an agency from making the decisions rendered at the lower levels from being recommended decisions prior to their approval by a designated authority." Franz v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-228 (Nov. 30, 1998). Grievance Evaluators are only vested with the authority granted them by W. Va. Code §§ 29-6A-1, et seq., and the appointing agency. See Gains v. Dep't of Transp./Div. of Highways, Docket No. 97-DOH- 203 (Dec. 12, 1997); Smith v. W. Va. Dep't of Tax and Revenue, Docket No. 97-ABCA-066 (Aug. 25, 1997). Further, "DOP is to be involved in all grievances granting changes to an employee's classification and compensation." Franz, supra. See Trimboli v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 93-HHR-322 (July 7, 1997). The Level I decision was not a final decision as Mr. Williams did not have the authority to grant it. (See footnote 7)

The next issue to address is whether Grievant was misclassified from February 1996 to March 1999. In order for Grievant to prevail upon a claim of misclassification, shemust prove

by a preponderance of the evidence that her duties for the relevant period more closely match another cited Personnel classification specification than the one 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). Personnel specifications are to be read in "pyramid fashion," i.e., 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. 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). Of course, an employee must meet the minimum qualifications or requirements identified in the class specification to be placed in the position. DellaMae v. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 26, 1999).

Usually, the key to the analysis in a misclassification grievance is to ascertain whether Grievant's classification constituted the "best fit" for her required duties. Propst v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 93- HHR-371 (Dec. 3, 1993); 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. Broaddus v. W. Va. Div. of Human Serv., Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990). Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one quality or requirement does not exclude others. W. Va. Admin. Rules § 4.04(a). Even though a job descriptiondoes not include all the actual tasks performed by a grievant, it does not make that job classification invalid. Id. at § 4.04(d). Finally, Personnel's interpretation and explanation of the classification specifications should be given great weight unless clearly erroneous. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (W. Va. 1993). Thus a grievant attempting to establish she is misclassified has a difficult task due to the deference afforded DOP in classification matters.

The analysis in this case is different, as Grievant is not qualified to be placed in the class specification she seeks. Grievant, as a Purchasing Assistant, was trained in the duties of a Buyer in order to gain experience so she could later be qualified as a Buyer. In essence, she was placed in an apprenticeship with her full knowledge and consent. The purpose of the plan

was to help her qualify for the Buyer position sometime in the future. Grievant performed these duties, and she performed these duties well. Although there appear to have been certain duties she did not perform, she did execute the majority of the duties to such an extent that Mr. Tincher felt it necessary to send Grievant the February 1998 memo, and later remove these duties all together.

Mr. Tincher was not the Director at the time Mr. Williams was directed to train Grievant for a position for which she did not have the required qualifications. It would appear Mr. Tincher would not have been in favor of this plan. When he became responsible for the Division of Purchasing he was concerned about Grievant working in the Buyer position without the necessary qualifications. He reduced her duties so they would clearly comport with her Job Description. Since Grievant willingly performed the duties of a Buyer for three years, she should receive credit for this experience, but shecannot be classified as a Buyer because she does not possess the required qualifications. See DellaMae, supra.

Additionally, even though Grievant proved she worked in the Buyer position, she is not be entitled to any monetary relief, as her salary was above the minimum starting salary for a Buyer. DOP's Rules at 143 CSR 1, Section 5.4 (f)(2)(a)(2) state that upon reclassification "[w]here the salary of the incumbent coincides with a pay rate in the new range, the salary shall remain unchanged." Accordingly, even though Grievant demonstrated she performed the duties of a Buyer, and was misclassified for the three year period, no compensation can be awarded. See Kuntz and Wilford v. Dep't of Health and Human Resources, Docket No. 96-HHR-301 (Mar. 26, 1997).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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 Personnel classification specification than the one 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).

2. Additionally, a grievant must meet the minimum qualifications before she or he can be

placed in the position. DellaMae v. Div. of Natural Resources, Docket No. 98- DNR-204 (Feb. 26, 1999).

3 Grievant cannot be placed in a Buyer position as she does not meet the minimum qualifications stated in the class specification. 4. Mr. Williams did not have the authority to render a Level I decision granting the grievance as he was not the appointing authority, had not been given the authority to handle personnel actions, and had not joined DOP in an action involving classification issues. Franz v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-228 (Nov. 30, 1998); See Trimboli v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 93-HHR-322 (July 7, 1997).

5. Because Grievant performed the majority of the duties of a Buyer position for three years she should be credited with this experience.

6. DOP's Rules at 143 CSR 1, Section 5.4 (f)(2)(a)(2) state that upon reclassification "[w]here the salary of the incumbent coincides with a pay rate in the new range, the salary shall remain unchanged." The relief awarded in misclassification grievances is to raise the salary of that employee to the minimum or starting level. Grievant is already receiving compensation at that level. See Kuntz and Wilford v. Dep't of Health and Human Resources, Docket No. 96-HHR-301 (Mar. 26, 1997). Thus, even though Grievant performed the duties of a Buyer for the time indicated, she is not entitled to any monetary relief for that time period, as her salary was above the minimum staring salary for a Buyer.

Accordingly, this grievance is DENIED. Respondents are directed to grant Grievant three years of Buyer experience.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which thegrievance occurred." Any 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 28, 1999

Footnote: 1

Grievant was represented by Representative Fred Tucker from the United Mine Workers of America, Respondent DOP was represented by Tim Basford, Assistant Director of Classification and Compensation, and DOA was represented by Senior Deputy AttorneyGeneral, Don Darling.

Footnote: 2

No explanation of this acronym was given.

Footnote: 3

Apparently, Ron Price was directed to train another employee, Terri Myers, in the same manner. This decision was based on the "Inspire" program and was an effort to allow employees, who did not possess the necessary education, to move up the career ladder through experience gained while working as a state employee.

Footnote: 4

It is unclear from the record whether Grievant even applied for that position.

Footnote: 5

Grievant presented no evidence on the filling of the Buyer position. Thus, this argument is deemed abandoned.

Footnote: 6

Grievant also testified at hearing that her statements on her Position Description Form had been altered and the form had been falsified. Upon closer questioning, Grievant indicated that some of Mr. Williams's comments had been changed, and that this should not be allowed. The changes and additional comments were made by Mr. Curtis with the knowledge and approval of Mr. Tincher.

As previously noted Grievant no longer performs the duties of a Buyer.

Footnote: 7

Additionally, although not directly raised by the parties, if the grievance process was used to circumvent DOP's policy or to grant reclassification without review, this act would constitute an ultra vires act, and as such cannot be utilized to grant Grievant her requested relief. Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts. See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).