SANDRA MORRIS,

Grievant,

v. DOCKET NO. 05-DMV-041

DEPARTMENT OF TRANSPORTATION/

DIVISION OF MOTOR VEHICLES and

DIVISION OF PERSONNEL

Respondents.

DECISION

This Grievance was filed by Sandra Morris on December 2, 2004, stating, “transferred to a new work area (whse. to Records) five days after request for reclassification.” She seeks to have her reclassification request (based on her former position) reviewed by the Division of Personnel, plus back wages and interest commensurate with the new classification.

A level four hearing was held in the Grievance Board's office on May 20, 2005. Grievant represented herself, Respondent Division of Motor Vehicles (DMV) was represented by Janet James, Assistant Attorney General, and Respondent Division of Personnel (DOP) was represented by Assistant Director Lowell Basford. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Issues and Arguments

The Statement of Grievance essentially alleges Ms. Morris' assignment to a different work area was reprisal for her request for a reclassification. Grievant argues as a collateral matter that her former position of Customer Service Representative (CSR) should have been classified as an Accounting Technician 4. DMV denies that the move was retaliatory, and DOP contends that Ms. Morris was misclassified, but that the position more closely fit the Accounting Technician 3 classification.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Ms. Morris is presently classified as a CSR assigned to the Records Division of the DMV.

3. When Ms. Morris first began working in the Support Services section more than two years ago, her then-supervisor, Norma Peck, asked her and all the other employees in the section to complete new Position Description Forms, which would be submitted to the Division of Personnel for reclassification, if needed.

4. Ms. Morris ignored repeated requests over the years to get her form completed, until she finally did so on November 5, 2004.

5. Ms. Morris was transferred to the Records Division from Support Services on November 10, 2004. She retained her CSR classification title and salary.

6. DOP reviewed the Position Description Form and determined, on or about January 14, 2005, that the position was misclassified as a Customer ServiceRepresentative, pay grade seven, and that it should be classified as an Accounting Technician 3, pay grade seven.

6. The DOP classification specification for the Accounting Technician 3 classification lists the following requirements and characteristics:

> **Nature of Work**
>
> Under general supervision, performs full-performance accounting support duties. The incumbent is responsible for performing moderately complex posting, encumbering of funds, and examining records to assure adherence to accounting laws and regulations. Performs related work as required.
>
> **Distinguishing Characteristics**
>
> This is the full-performance level of paraprofessional accounting. Responsibilities may include training and reviewing work of subordinate staff.

7. The DOP classification specification for the Accounting Technician 4 classification lists the following requirements and characteristics:

> **Nature of Work**
>
> Under general supervision, performs advanced accounting support duties. The incumbent is responsible for posting complex journal entries that require the use of specialized accounting procedures, assisting the supervisor in preparing agency budgets, and examining records to assure adherence to accounting laws and regulations. Performs related work as required.

Distinguishing Characteristics

This is advanced level paraprofessional accounting work. Job duties include performing complex balancing and reconciling of multiple accounts. Employees in this class are responsible for accuracy of accounts for others and require little supervision. Responsibilities may also include being a lead worker.

Discussion

Resolution of the first issue in this case, that of whether Ms. Morris' transfer was retaliatory, makes the second issue, whether Ms. Morris' former position was misclassified, moot. Since the determination below is that the transfer was proper, Ms. Morris no longerhas a grievable interest in the classification of her former position. This grievance is not about discipline, so Ms. Morris must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. (See footnote 1)

To demonstrate a prima facie case of retaliation, or reprisal as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements: (See footnote 2)

that he engaged in a protected activity, e.g., filing or participating in a grievance;

that he was subsequently treated in an adverse manner by the employer or an agent;

that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;

that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and

that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Here, Grievant bases her argument on the fact that she was transferred to another work location shortly after submitting a Position Description Form and reclassification request. Her argument falls short on several counts. First, she was repeatedly directed by her supervisor to submit the position description form, and she was not singled out for the treatment. Grievant's failure to actually get the form completed for over two years isa symptom of the trouble her supervisor had with her, that likely led to the transfer to someone else's unit. In any case, Ms. Morris was not engaged in a “protected activity,” the first element of a retaliation or reprisal claim.

“Protected activities” are usually defined by the courts or legislature on a case-by- case basis, but generally trend toward an employee's attempts to redress a wrong, prosecute a grievance, exercise a constitutional right, correct a safety issue, or report wrongdoing on the part of the employer. Carrying out a directive of an employee's supervisor to complete a position description form does not fall under the rubric of “protected activities.”

Although Respondent contends Ms. Morris' transfer was not an adverse action, that too, is of little consequence, because the evidence points to the facts that 1) Grievant knew about the decision, or at least the plan, to transfer her before she submitted her Position Description form; and 2) Ms. Morris' supervisor, Norma Peck, who made the decision to transfer her, did not know Ms. Morris had made the reclassification request, because Ms. Morris took steps to bypass her. It is the opinion of the undersigned, after reviewing the totality of the evidence, that Ms. Morris knew about her transfer, and both manufactured evidence she thought would help a reprisal claim and manipulated the timing of her action in order to “set up” respondent for this grievance.

Ms. Peck credibly testified, corroborated by Ms. Morris' testimony, that Ms. Morris never gave her the November 5, 2004 position description form. Ms. Peck also denied having signed the form or making any comments on it. Instead, Ms. Peck pointed out that, not only had she long ago and repeatedly asked Grievant for the form, but that she haddone so from all of her subordinates and that, as she had suspected, they were found to be misclassified and eventually were reclassified.

The position description form submitted by Grievant, in evidence as Grievant's Level Four Exhibit No. 1, has a comment on the last page that Grievant attributes to Ms. Peck, which states, “The employees [sic] duties have not changed, therefore, I do not agree to this reclass request.” Following this is the purported signature of “Norma L. Peck” with a date of “12-17-04.” Ms. Peck denied ever

having seen the form and denies signing it. She did not know who could have written the comment or appended her signature. I find Ms. Peck's testimony to be credible, as the comment on the form is in direct opposition to the explicit directions she gave to Grievant, to submit just such a form because her duties differed from her classification. Also, Grievant admitted she did not submit the form to Ms. Peck.

Ms. Morris attempted to argue that Ms. Peck's comment on the form was evidence that she did not actually want her position to be reclassified, but this argument fails for lack of evidence that the comments actually were Ms. Peck's. In addition, Grievant testified that she knew, from overhearing a conversation of Ms. Peck's, that there was a plan to move Ms. Morris long before the Position Description form was submitted. Grievant's failure to file the Position Description form, when she finally did, with her actual supervisor, as she was directed to, is inexplicable, unless one assumes Ms. Morris had no intention to let Ms. Peck know what she was doing.

As to the classification issue, that matter was mooted by Ms. Morris' transfer to a different position. In case of misclassification "'any relief is limited to prospective relief andto back relief from and after [ten] days preceding the filing of the grievance.'" (See footnote 3) Even if Ms. Morris were entitled to a higher pay grade when she was working in the Support Services Section, she left that section on November 10, 2004. This grievance was not filed until December 2, 2004, thirteen working days later.

Even if Grievant's claim were not moot on that point, it would be mooted by the fact she received the relief she stated she was seeking, i.e., review of her Position Description form by DOP. Grievant introduced evidence at levels three and four indicating she thought her former position should be classified as an Accounting Technician 4, but she never mentioned that classification in her statement of grievance or her statement of relief sought, and she never amended her grievance to ask for that classification. All she asked for was DOP review of her former position, and this DOP did, determining the position was, in fact, misclassified and was a better fit in the Accounting Technician 3 classification.

Nevertheless, Ms. Morris failed to prove she was entitled to the higher classification of Accounting Technician 4. In order for grievants to prevail upon a claim of misclassification, they must prove by a preponderance of the evidence that their duties more closely match another cited DOP classification specification than that under which they are currently assigned. DOP specifications are to be read in

"pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. (See footnote 4) For these purposes, the "Nature of Work" section of a classification specification is its most critical section. (See footnote 5)

DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. (See footnote 6) DOP Assistant Director Lowell Basford made the initial review of Ms. Morris' Position Description Form and determined the duties assigned to the position best fit the Accounting Technician 3 classification. Based on the additional evidence of Ms. Morris' level four testimony, Mr. Basford opined that the position might be a better fit in the Storekeeper series. In any event, his determination that the position, under general supervision, performs full-performance accounting support duties was not rebutted by Ms. Morris. She provided no evidence that the position performed “advanced level paraprofessional accounting work,” as would be required for the Accounting Technician 4 classification specification. She provided no evidence that Mr. Basford's explanation was clearly erroneous.

The following conclusions of law support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.* 2. To demonstrate a prima facie case of reprisal as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

that he engaged in a protected activity, e.g., filing or participating in a grievance;

that he was subsequently treated in an adverse manner by the employer or an agent;

that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;

> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
>
> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003). *See W. Va. Dep't of Natural Res. v. Myers*, 443 S.E.2d 229 (W. Va. 1994); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997).

3. Grievant did not meet her burden of proving Respondent retaliated against her for filing a position description form.

4. In case of misclassification "'any relief is limited to prospective relief and to back relief from and after [ten] days preceding the filing of the grievance.'" *Curkendall v. W. Va. Dep't of Health & Human Res.*, Docket No. 03-HHR-078 (Sept. 26, 2003) (quotingSyl pt. 5, *Martin v. Randolph County Bd. of Educ*., 195 W. Va. 297, 465 S.E.2d 399 (1995)).

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

6. DOP's interpretation and explanation of the classification specifications at issue should be

given great weight unless clearly erroneous. *See W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

7. Grievant did not meet her burden of proving DOP's determination that the position at issue should be classified as an Accounting Technician 3 was clearly erroneous.

For the foregoing reasons, this grievance is hereby **DENIED**.

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 the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

June 21, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (1996); Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (1993).

Footnote: 2

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (2003).

Footnote: 3

Curkendall v. W. Va. Dep't of Health & Human Res., Docket No. 03-HHR-078 (2003).

Footnote: 4

Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (1991).

Footnote: 5

Atchison v. W. Va. Dep't of Health, Docket No. 90-H-444 (1991).

Footnote: 6

See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).