THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

ROGER CAMPBELL,

Grievant,

v. Docket No. 05-DOH-385

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS

and DIVISION OF PERSONNEL,

Respondent.

D E C I S I O N

Grievant, Roger Campbell, filed this grievance against his employer, the Division of Highways ("DOH") on May 18, 2005, alleging he should be reallocated from a TRSVMG 1 to a TRSVMG 3 because of a substantial change in his duties. He also asserted he was being treated differently than other employees. At the Level III hearing, Grievant changed his relief sought to requesting that he be reallocated to a TRSVMG 2.

This grievance was denied at all lower levels. Grievant appealed to the Grievance Board on October 18, 2005. After several continuances for good cause, a Level IV hearing was held on February 2, 2006. This case became mature for decision on March 14, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by Bernard Mauser, Esq., Respondent Division of Personnel was represented by Lowell Basford, Assistant Director in charge of the Classification and Compensation Section, and Respondent DOH was represented by DOH Attorney Barbara Baxter. After a detailed review of the entire

record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by DOH for more than thirty years and has worked in the Materials Control, Soils, and Testing Division that entire time.

2. In November 2002, Grievant was promoted from a Transportation Services Supervisor to a Transportation Services Manager 1 (TRSVMG 1) and received a 10% pay increase. The duties of this position were to manage the Subsurface Investigation and Motor Pool Units, including planning, organizing, and scheduling core drilling throughout the state and supervising the employee in charge of the motor pool. He is responsible for equipment and supplies for these areas. Grievant also ensures the Materials Division is in compliance with the Division of Environmental Protection regulations.

3. Grievant received a merit increase in June or July of 2004.

4. On February 3, 2004, Grievant completed a Position Description Form seeking to be reallocated to a TRSVMG 3. His supervisor, Richard Genthner, agreed with this action. By letter dated March 15, 2004, Mr. Basford stated that after a review of Grievant's duties and responsibilities, he decided these duties were "essentially the same as those used for reallocation in November 2002," and no significant change was found. Grievant was properly classified.

5. On April 28, 2004, Grievant completed another Position Description Form. At this time Grievant requested reallocation to a TRSVMG 2. Again, Mr. Basford found Grievant was properly classified. 6. In November 2004, Mr. Genthner requested an on-site audit, and on January 6, 2005, DOH submitted that request to the Division of Personnel. This audit was conducted on January 25, 2005. By letter dated May 3, 2005, Mr. Basford reported the audit revealed Grievant was performing the same duties for which he had been reallocated in 2002, and the request for another reallocation was denied. During this audit, Mr. Basford asked Grievant how long he had been performing the duties listed on his current Position Description Form, and Grievant's reply was since he had been reallocated in 2002. Testimony, Basford and Grievant at Level III.

7. Grievant does not supervise any technical employees. He supervises crafts workers

and one supervisor. The main reason he was reallocated to a TRSVMG 1 was because he supervised a supervisor. Testimony, Basford at Level III.

8. Grievant used to supervise the drug and alcohol testing program for just the Materials Division, but he now oversees this testing for the Traffic Engineering Division and District One employees as well. Grievant is also currently engaged in active research in testing core samples, and he provides technical expertise to engineer consultants in the field. (See footnote 1)

9. Grievant spends 50% of his time performing his duties as a unit supervisor, planning and organizing projects for the state, and another 30% reviewing projects and checking information to ensure tasks are completed correctly and on time. Only 2% of histime is spent on supervising the drug and alcohol testing program for the Division. (See footnote 2) **Jt. Exh. No. 1 at Level IV.**

10. At the Level III hearing, Grievant compared himself to other employees who are classified as TRSVMG 3. These employees supervise professional and technical employees.

11. The duties Grievant currently performs are of the kind or level of duties and responsibilities stated in his class specification.

The pertinent sections of the classification specifications at issue are written below:

TRANSPORTATION SERVICES MANAGER 1

Nature of Work

Under administrative direction, manages a program or service organizational unit in the Department of Transportation where the operation, policy, work processes and regulatory requirements are typically predictable and stable. The scope of responsibility includes planning and organizing the work procedures, directing the work procedures, directing the work of employees, developing employees, evaluating unit operations, developing budget needs, researching new work procedures, [and] interpreting statutes, regulations and policies. Performs related work as required.

Distinguishing Characteristics

Positions in this class have responsibility for a primary unit in the Division of Motor Vehicles or a secondary program section in the Division of Highways. The incumbent

normally supervises technical and clerical positions.

Examples of Work

Plans, directs, oversees and coordinates the activities in the area of assignment.

Develops and recommends policies and procedures in the area of assignment.

Supervises the monitoring of unit activities to determine compliance with state and federal regulations, policies and work standards.

Supervises and trains staff; may direct regional or other field staff. Recommends the selection of staff to supervisors; conducts interviews for prospective employees.

Prepares reports reflecting the operational status of the unit and/or agency programs.

Compiles and/or analyzes data; develops program or procedures from this data.

May attend hearings providing facts or knowledge of the area of assignment.

TRANSPORTATION SERVICES MANAGER 2

Nature of Work

Under administrative direction, manages a major program or service organizational unit in the Department of Transportation where the operation, policy, work processes and regulatory requirements are typically predictable and stable. The scope of responsibility includes planning and organizing the work procedures, directing the work procedures, directing the work of employees, developing employees, evaluating unit operations, developing budget needs, researching new work procedures, [and] interpreting statutes, regulations and policies. Serves as upper-level manager assisting the director and provides supervision to supervisory, technical and clerical positions. Performs related work as required.

Distinguishing Characteristics

Positions in this class have responsibility for a major unit in the Division of Highways or the Division of Motor Vehicles. The positions report directly to the Transportation Systems Director. Typically supervises the work of supervisory, professional, technical and support personnel.

Examples of Work

Plans, directs, oversees and coordinates the activities in the area of assignment.

Develops and recommends policies and procedures in the area of assignment.

Supervises the monitoring of unit activities to determine compliance with state and federal regulations, policies and work standards.

Supervises and trains staff; may direct regional or other field staff.

Recommends the selection of staff; conducts interviews for prospective employees.

Prepares reports reflecting the operational status of the unit and/or agency programs.

Compiles and/or analyzes data; develops program or procedures from this data.

May attend hearings providing facts or knowledge of the area of assignment.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 Res., 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 Res., 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. State agencies, such as DOH which utilize such positions, must adhere to that plan in making their employees' assignments. Toney v. W. Va. Dep't of Health & Human Res., Docket No. 93-HHR-460 (June 17, 1994).

Grievant asserts his position is misclassified, and he has requested his position be reallocated and placed in a higher pay grade. DOP's Rule 3.78 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties and the number of employees supervised does not necessarily establish a need for reallocation. Kuntz/Wilford v. Dep't of Health and Human Res., Docket No. 96-HHR-

301 (Mar. 26, 1997). "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." Id.

Additionally, in order for Grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match another cited Division of Personnel classification specification than the one under which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Res., 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. 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). The key to the analysis is to ascertain whether a grievant's current classification constitutes the "best fit" for his 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 predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue 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 (1993). Under the foregoing legal analysis, the West Virginia Supreme Court of Appeals' holding in Blankenship presents an employee contesting his current classification and/orpay grade with a substantial obstacle to overcome in attempting to establish he is currently misclassified.

Mr. Basford testified at both Level III and IV that Grievant was correctly classified. He stated Grievant's position did not warrant reallocation because there had been no significant change in his duties since his last reallocation in 2002, and that this information was verified by Grievant at the on-site audit. Mr. Basford found Grievant's current duties were within the TRSVMG 1 classification, and his current duties conformed with the original position posting which had been classified as a TRSVMG 1.

Mr. Basford also noted Grievant did not supervise technical or professional employees, and this is a major difference between TRSVMG 1 and TRSVMG 2. The Distinguishing Characteristics Section of the TRSVMG 1 class specification states "this position normally supervises technical and clerical positions." (Emphasis added). Clearly, the supervision of technical employees is not required. On the other hand, the Nature of Work Section of the TRSVMG 2 states this position "[s]erves as upper-level manager assisting the director and provides supervision to supervisory, technical and clerical positions." (Emphasis added). The Distinguishing Characteristics Section of the TRSVMG 2 class specification states this position "[t]ypically supervises the work of supervisory, professional, technical and support personnel." (Emphasis added). Since Grievant does not supervise any professional, or technical personnel, he cannot be classified as a TRSVMG 2.

After a review of Grievant's Position Description Form, the witnesses' testimony, and the rules and regulations governing reallocation, the undersigned Administrative Law Judge finds Grievant is correctly classified as a TRSVMG 1, and this classification is the best fitfor his duties. While some of Grievant's duties have expanded, such as more people contained in his drug and alcohol testing program, this is an increase in volume not complexity. See Kuntz, supra. As noted by Mr. Basford, the duties Grievant performs fall within those identified in his classification specification and the job posting. Further, Grievant has not demonstrated "a significant change in the kind or level of duties and responsibilities" that would indicate a need to reallocate his position. DOP Rule 3.78.

Grievant clearly has an important position, is hard-working, and is well respected by his supervisor and other employees at DOH, but the TRSVMG 1 position is the best fit for the duties he currently performs. While it is understandable Grievant would want an increase in pay and classification as a reward for his excellent work, improper reallocation is not the answer. Meritorious service within the state system is to be rewarded by a merit increase, and it is noted Grievant received a merit increase in June 2004.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of

proving his 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 Res., 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). 2. The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

3. The Division of Personnel's determination of its own regulations and classification specifications matters is within its expertise, and these determinations are entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985); Farber v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR-052 (July 10, 1995).

4. An employee who challenges the pay grade or classification to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1995); Bennett v. Dep't of Health and Human Res., Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Res., Docket No. 94-HHR-206 (June 15, 1995); Thibault v. Div. of Rehab. Serv., Docket No. 94-RS-061 (May 31, 1995); Frome v. Dep't of Health and Human Res., Docket No. 94-HHR-140 (Nov. 29, 1994). See O'Connell v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR- 251 (Oct. 13, 1995).

5. Grievant has not demonstrated by a preponderance of the evidence that he is misclassified, or that the position of TRSVMG 1 is not the "best fit" for his normal duties, as the tasks he performs fall within the class specifications for his position.

6. Grievant has not demonstrated by a preponderance of the evidence that his duties warrant reallocation, as there has not been a significant change in his duties. Kuntz/Wilford v. Dep't of Health and Human Res., Docket No. 96-HHR-301 (Mar. 26, 1997).

Accordingly, this grievance is 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." 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: May 26, 2006

Footnote: 1

As these activities are not listed as a separate category on Grievant's last submitted Position Description Form, it must be assumed they are not very time consuming.

Footnote: 2

It is unclear from Grievant's Position Description Form and testimony if this 2% includes District 1 and the Traffic Engineering Division.