THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TWILLA CASSELL,

Grievant,

v. **Docket No. 06-DEP-335D**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF ENVIRONMENTAL PROTECTION

and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Twilla Cassell ("Grievant"), employed by the Department of Environmental Protection ("DEP") as an Environmental Resource Specialist 1, filed a level one grievance on July 17, 2007, after her request for reallocation was denied by the Division of Personnel ("DOP"). For relief, Grievant requested reallocation to the position of Environmental Resource Specialist 2, with a salary increase of 35%, effective December 21, 2005. The administrators at levels one and two lacked authority to grant the requested relief. Following an evidentiary hearing at level three, Grievant filed a claim for default with this Grievance Board on October 17, 2006, stating that DEP failed to issue a level three decision by the agreed upon date of October 4, 2006.

A default hearing was held in the Grievance Board's Charleston office on January 18, 2007, and default was granted by order of the same date. A hearing on whether the relief requested was contrary to law or clearly wrong was held on March 30, 2007. Grievant appeared *pro se,* while DEP was represented by Assistant Attorney General A.M. "Fenway" Pollack, and DOP was represented by Assistant Attorney General Karen O. Thornton. The grievance became mature for decision upon receipt of proposed findingsof fact and conclusions of law filed on or before April 23, 2007. (See footnote 1) The grievance was thereafter transferred to the undersigned following the resignation of

Chief Administrative Law Judge Paul Marteney.

Synopsis

After a finding that default had occurred at level three, DEP and DOP requested a hearing to prove that the requested relief was clearly wrong and/or contrary to law. Respondents met their burden of proof by establishing that the duties completed by Grievant fall within the ERS 1 classification specification rather than the requested ERS 2 classification. Grievant's reliance on the opinion of her supervisor, and her comparison to other employees was not persuasive. Finally, Grievant's interpretation of her duties compared to a job posting for a position of ERS 2 was in error.

The following facts have been derived from a preponderance of the credible evidence made part of the record at level three and level four.

Findings of Fact

___1. Grievant has been employed by DEP for approximately eighteen years, and has held the position of Environmental Resource Specialist 1 ("ERS 1") since 2002. She is presently assigned to the Permit Review Unit of the Division of Mining and Reclamation in Oak Hill, West Virginia.

2. In November 2005, Grievant submitted a position description form to the DOP, requesting that her position be evaluated for reallocation to ERS 2. 3. DOP determined that Grievant's position was correctly classified, and denied the request for reallocation, on December 27, 2005. Grievant's requested reconsideration of the decision was denied on June 21, 2006.

4. The predominate duties of Grievant's position are to: conduct administrative reviews of section A through E of surface mine permit applications; permit renewals, Permit Transfer/Assignment or Sale applications, Dam Transfer applications, Quarry Transfer applications, Operator Assignment applications, Quarry Annual Bonding applications, and Incremental Bonding applications.

5. The classification specification for ERS 1 states

ENVIRONMENTAL RESOURCES SPECIALIST 1

Nature of Work

Performs beginning level professional work in a specialty area in the acquisition, preservation, management and enhancement of the state's environmental/natural resources. Acquires the knowledge, skills and abilities to function at the beginning level; assists higher level specialist in programmatic areas. Work involves the application of scientific principles, laws and regulations and

program planning techniques in the areas of assignment. Areas may include grants and contract administration, environmental/natural resource program development and evaluation, education, or environmental monitoring and compliance. Assists in the planning, organization and implementation of a state-wide or regional specialty program. Travel over difficult terrain and in inclement weather may be required.

Distinguishing Characteristics

Environmental Resources Specialist 1 is distinguished from the other levels by acquiring the knowledge, skills and abilities to function at the beginning level; assists higher level specialist in programmatic area.

Examples of Work

Assists higher level specialists in collection and review of technical/scientific data related to environmental/natural resources quality; assists in preparing detailed statistical/narrative reports.
Conducts field inspections to identify pollution sources, monitor contract activities and to assess environmental/natural resources quality impact.
Collects data, composes and compiles statistical and narrative reports relating to operational and comprehensive plans.
Consults on the technical development of grants, grant proposals and programs relating to the area of assignment.
Presents findings of studies and explains proposed plans to state and local officials and the general public.
Implements and monitors programs supported by planning agency grants.
Performs site examination of land to determine land-use feasibility.
Processes leases and agreements of rights-of-way for surface and mineral lands and improvements.
Schedules and participates in public meetings to explain the environmental impact of a proposed project or environmental permits.
Composes correspondence and memorandums.

Knowledge, Skills and Abilities

Knowledge of environmental/natural resource laws and regulations.

Knowledge of the principles, practices and objectives of the various phases of planning.

Knowledge of the socio-economic factors involved in state, regional and community planning.

Ability to collect, analyze and evaluate data and technical information in the area of assignment.

Ability to present results of research effectively in oral, written or graphic form.

Ability to analyze planning problems and to recommend an effective course of action.

Ability to communicate effectively with a wide variety of individuals, both verbally and in writing.

Minimum Qualifications

Training:

Bachelor's degree from an accredited four-year college or university with a major in chemistry, physics, geography, geology, biology, economics, engineering, environmental studies, natural science, or archeology.

Substitution:

Full-time or equivalent part-time paid technical or paraprofessional experience in the acquisition, preservation, protection and enhancement of environmental/natural resources may be substituted on a year-for-year basis.

6. The ERS 2 classification specification states:

ENVIRONMENTAL RESOURCES SPECIALIST 2

Nature of Work

At the full-performance level, performs complex professional work in a specialty area in the acquisition, preservation, management and protection of the state's environmental/natural resources. Work involves the application of scientific principles, laws and regulations and program planning techniques in the specialty area. Areas include grants and contract administration, environmental/natural resources, program development and evaluation, education, or environmental monitoring and compliance. Typically, positions are involved in a state-wide specialty program. Travel over difficult terrain and in inclement weather may be required. Performs related work as required.

Distinguishing Characteristics

This classification differs from the Environmental Resources Specialist 1 by the full-performance level work and complex work in the assigned area. Incumbents are involved in a state-wide specialty program area. The Environmental Resources Specialist 3 differs from Environmental Resources Specialist 2 by the performing as lead worker in complex program assignment with responsibility for multi-agency and multi-level coordination of program activities.

Examples of Work

Collects and reviews technical/scientific data related to environmental/natural resources quality; assists in preparing detailed statistical/narrative reports.
Conducts field inspections to identify pollution sources, monitor contract activities and to assess environmental/natural resources quality impact.
Collects, analyzes and evaluates data in the area of assignment.
Presents findings of studies and explains proposed plans to state and local officials and the general public.
Collates data, composes and compiles statistical and narrative reports relating to operational and comprehensive plans.
Consults on the technical development of grants, grant proposals and programs relating to the area of assignments.
Implements and monitors programs supported by planning agency grants.
Conducts testing of plans developed by lower level planners.
Composes correspondence and memos.
Visits project sites to monitor projects, collect samples or to take photographs.Develops and presents a variety of solutions to problems uncovered by data collection.
May supervise subordinate specialist and/or clerical staff.
Verifies ownership and property rights from county court records; conducts negotiations with landowners.

Knowledge, Skills and Abilities

Knowledge of environmental/natural resources laws and regulations.
Knowledge of the principles, practices and objective of various phases of planning.

Knowledge of the socio-economic factors involved in the state, regional and community planning.

Skill in drawing final value conclusions and in justifying and documenting conclusions for negotiation purposes.

Ability to prepare, review and evaluate comprehensive detailed reports of field work.

Ability to collect, analyze and evaluate data and technical information in the area of assignment.

Ability to present factual material effectively in written, oral and graphic form.

Ability to communicate effectively with a wide variety of individuals both orally and in writing.

Ability to instruct subordinate employees and clerical support staff.

Minimum Qualifications

Training:

Bachelor's degree from an accredited four-year college or university with a major in chemistry, physics, geography, geology, biology, economics, engineering, environmental studies, natural science, or archeology.

Substitution:

Full-time or equivalent part-time paid professional experience as described below may be substituted on a year-for-year basis.

Experience:

Two years of full-time or equivalent part-time paid professional experience in the acquisition, preservation, protection and enhancement of environmental/natural resources, environmental protection or in an agency-specific area related to environmental impact.

Substitution:

Master's degree from an accredited four-year college or university with a major in chemistry, physics, geography, geology, biology, economics, engineering, environmental studies, natural science or archeology may be substituted for the required experience on a year for-year basis.

Discussion

Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the

remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. *W. Va. Code* § 29-6A-3. The employer may rebut the presumption by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Lohr v. Div. of Corr.*, Docket No. 99-CORR-157D (Nov. 15, 1999). This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt." *Headley v. Div. of Highways*, Docket No. 04-DOH-397D (Aug. 22, 2005).

In a misclassification grievance, the focus is upon the grievant's duties for the relevant period, and whether they more closely match those of another cited classification specification than the classification to 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 job specifications generally 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 moregeneral/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 the Work" sectionof 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).

The key to the analysis is to ascertain whether the employee's current classification constitutes the "best fit" for his required duties. *Simmons v. W. Va. Dep't of Health and Human Res.*, 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). Importantly, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. *See, W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

Respondents argued the relief requested is clearly wrong and contrary to law, because the onsite job audit conducted by Lowell Basford, Assistant Director of Personnel's Classification and Compensation Section, reveals that a significant part of Grievant's work remains the same as it had

been when the position was reclassified to ERS 1 in 2002. Mr. Basford testified that ERS 1 serves in a support role to the application process, and is actually a “mixed position” in that it is in part clerical and part technical with the technical aspects serving as the basis for the ERS 1 classification. Grievant has been given additional responsibility of reviewing applications for certain permits for which she had not originally been assigned. However, these additions consist of reviewing and verifying information on the application to insure its accuracy and completeness, and areconsidered to be at the same level and complexity as the original predominant duties assigned. Mr. Basford further testified that when he compared the work performed by Grievant with the ERS 2 classification specification, it was not even close to matching.

Grievant supports her claim for reallocation by noting that the Welch DEP office employs an ERS 2, and that a recent job posting for an ERS 2 position listed duties consistent with those she performs. Grievant also called her immediate supervisor, Edward Wojtowicz, as a witness. His testimony that Grievant's position should be reallocated as an ERS 2 was his personal opinion, based on his perception of her duties and how they should be valued.

DOP Administrative Rule, Section 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." *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.*

Personnel has demonstrated by clear and convincing evidence that there has not been a significant change in Grievant's job duties so as to warrant a reallocation. While it is undisputed Grievant has taken on additional duties, they are no more complex than her primary role, which is to assist the higher levels in the assessment of the process byperforming a preliminary technical review of applications. By comparison, an ERS 2 engages in analyzing and evaluating data, and drawing conclusions from that data.

DOP has also established that Grievant's comparison of herself to an employee in another office does not support a claim for reallocation, because the standard of comparison is the individual's job

description with the classification specification, not with another employee. Even if another employee performs the same duties as Grievant, but holds a higher classification, “[t]he remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that she performs, is not to similarly misclassify the grievant. *Akers v. W. Va. Dept. of Tax and Revenue*, 194 W. Va. 956, 460 S.E.2d 702 (1995).” *Myers v. Dep't of Health and Human Res.*, Docket No. 00-HHR- 392D (Mar. 30, 2001). Therefore, DOP has proven that to reallocate the position held by Grievant would be clearly wrong and contrary to law.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. “Upon finding a default occurred, it is presumed the grievant prevailed on the merits of the grievance, and the respondent must prove by clear and convincing evidence that to grant the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt.” *Headley v. Div. of Highways*, Docket No. 04-DOH-397D (Aug. 22, 2005). The employer may rebut the presumption by presenting clear and convincing evidence that the basicfacts underlying the asserted presumption are not true. *Lohr v. Div. of Corr.*, Docket No. 99-CORR-157D (Nov. 15, 1999).

2. "Reallocation" of a position is defined 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." DOP Administrative Rule, Section 3.78.

3. The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997).

4. "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.*

5. Personnel has demonstrated by clear and convincing evidence that there has not been a significant change in Grievant's job duties to warrant a reallocation.

6. Because the ERS 2 classification specification is not a better fit for Grievant's duties than ERS 1, granting the requested remedy of reclassification would be contrary to law and clearly wrong. *Myers v. W. Va. Dep't of Health and Human Res.*, Docket No. 00-HHR-392D (Mar. 30, 2001).

Accordingly, this grievance is **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 (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 appealingparty 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.

DATE: MAY 23, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *DEP did not filed proposals following this hearing.*