THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

PATRICIA KEYS,

Grievant,

v. DOCKET NO. 06-DEP-307

DEPARTMENT OF ENVIRONMENTAL PROTECTION, Employer,

DIVISION OF PERSONNEL,

Third Party.

DECISION

Grievant, Patricia Keys, filed this grievance on July 10, 2006, asserting she should be reallocated from Environmental Resource Specialist ("ERS") 1 to an ERS 2. Her stated relief sought is:
I would like the DOP decision overturned and be reallocated from an Environmental Resource Specialist I to an Environmental Resource Specialist II.

I would like to have back pay retroactive to December 21, 2005 when the DOP determined that my position would remain an as Environmental Resource Specialist I.

According to the Division of Personnel "Pay Plan Implementation, effective May 1, 1994, latest revision: July 1, 2005" Part C: 3: "Additional increments beyond the 5% rate may be granted, at the discretion of the appointing authority, if the employee being promoted as [sic] qualifications exceeding the minimum required for the new class. The appointing authority may grant an additional increase of up to 10% for each 6 months of pertinent training or experience beyond that required for the new class." As I have been performing the duties of an ERS II since January 2003, this is three years of experience at 10% per each six months of experience. This equates to a 60% increase; however, I am requesting a 30% salary increase.

A level four hearing was held in the Grievance Board's Charleston office on December 18, 2006.

Grievant appeared pro se, Department of Environmental Protection("DEP") was represented by Fenway Pollack, Assistant Attorney General, and the Division of Personnel ("DOP") was represented by Karen Thornton, Assistant Attorney General. The matter became mature for decision on February 5, 2007, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Synopsis

Grievant asserts she should be reallocated to the position of an ERS 2. Respondents avers Grievant's work is not of the same level of complexity as the work done by ERS 2's. Respondent argues an ERS 1 is the best fit for Grievant.

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

Findings of Fact

1. Grievant is employed by DEP as an ERS 1. She is located at the Permitting Unit in Oak Hill, West Virginia.

2. In 2002, Grievant was reallocated from an Office Assistant 2 to an ERS 1.

3. Around December 13, 2005, Grievant completed a Position Description Form ("PDF"), requesting DOP reallocate her to an ERS 2.

4. In the section labeled "Duty Statements," Grievant stated 85% of her time was spent performing the following tasks:

I perform a technical review of pending Article 3 Transfers, Dam Transfers, Quarry Transfers, Operator Assignment, Quarry Annual Bonding, Incremental Bonding, and Renewal applications. I perform technical review of pending Section A-E of the Surface Mine Application. This is done in accordance with the West Virginia Surface Mining and Reclamation Regulations, Surface Coal Mining and Reclamation Act, and West VirginiaRules for Quarrying and Reclamation and Quarry Reclamation Act. I do research and investigations to insure that the applicant claiming control of the permit is in compliance with federal and state agencies by using the Applicant/Violator's System (AVS), Environmental Resources Information System (ERIS), and WV Secretary of State, as well as other various Secretary of State offices. I analyze permit histories and permit activity for the general public, inspectors, supervisors, and other DEP personnel. I analyze bonding information in ERIS for

correctness and completeness. I interact daily with the public, coal company officials, consultants, DEP employees, and other state and federal employees such as the U. S. Office of Surface Mining, the WV Division of Labor, the WV Division of Worker's Compensation, and the WV Office of Miner's Health Safety and Training.

She then explained 15% of her duties were:

I review legal documents such as leases, right-of-entries, transfer agreements, escrow agreements, surety bonds, certificate of deposits, and letter of credit for clarity and correctness. I insure that filing fees and cash transactions are correct when received by the receptionist. I analyze permit histories and permit activity for the general public, inspectors, supervisors, and other DEP personnel. I analyze bonding information in ERIS for correctness and completeness.

5. The class specifications for an ERS 1 is as follows:

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 regulation 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 areas.

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.

6. The class specifications for an ERS 2 is as follows:

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 [sic] performing as lead worker in complex programassignment 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.

7. On May 8, 2006, DOP conducted an on-site job audit. During the audit, it was determined Grievant had been given the additional responsibility of reviewing applications for certain permits.

8. On December 21, 2006, DOP informed Grievant of the determination that she was properly classified.

9. Grievant requested DOP reconsider, and on June 21, 2006, DOP issued a memorandum

standing by its original determination that Grievant was properly classified.

Discussion

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 DOP classification specification than that under which she is 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).

Grievant alleges she has been performing the duties of an ERS 2 and should be classified as such. Respondent argues, Grievant is properly classified. 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 requirereallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id*.

Grievant has not demonstrated a significant change in job duties to warrant a reallocation. While it is undisputed Grievant has taken on additional duties, Grievant has not proven those additional duties amounted to a significant change, as they were no more complex than her primary role which is to perform a preliminary technical review of surface mine applications.

Lowell Basford, Assistant Director, Classification and Compensation Division of DOP testified that Grievant's position was actually considered a “mixed position,” meaning that it is part clerical and part technical with the technical aspects of the job being the reason the position was reallocated to an

ERS 1.

That is not to say Grievant's position is not important. Clearly, Grievant is an asset to DEP, and has many strengths. Unfortunately, her duties do not meet the requirements set forth in the classification specification.

The following conclusions of law support this discussion:

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 DOP classification specification than that under which she is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR- 88-038 (Mar. 28, 1989). 2. 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).

3. 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.

4. Grievant has not met her burden of proof that there has been a significant change in the kind or level of duties and responsibilities to warrant a reallocation.

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

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal.

W. Va. Code § 6C-2-5(c). Neither the WestVirginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

DATE: April 20, 2007

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Proposed findings of fact and conclusions of law were only received from DOP.