THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DAVID WHEATCRAFT, et al.,

Grievants,

v. **Docket No. 06-DEP-228**

DEPARTMENT OF ENVIRONMENTAL

PROTECTION and DIVISION OF

PERSONNEL,

Respondents.

D E C I S I O N

Grievants, David Wheatcraft, Louis Spatafore, Rusty Joins, and Robert Sattler are employed by the Department of Environmental Protection ("DEP"). They are grieving their classification as an Environmental Resource Specialists 2 and assert they should be reallocated to Environmental Resource Specialists 3 because they believe they perform the duties of that classification. DEP and the Division of Personnel ("DOP") assert Grievants are correctly classified, and the Environmental Resource Specialist 2 classification is the "best fit" for their duties.

This grievance was filed on May 19, 2006, and denied at Levels I, II, and III. Grievants appealed to Level IV on July 13, 2006, and a Level IV hearing was held on October 31, 2006. Grievants represented themselves, the Division of Personnel was represented by Karen Thornton, Assistant Attorney General, and DEP by Heather Connelly, Esq. This case became mature for decision on that day, as the parties elected not to submit proposed findings of fact and conclusions of law. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following

Findings of Fact.

Findings of Fact

1. Grievants are employed as Environmental Resource Specialists 2 by the DEP at Pay Grade 16.

2. Grievants deal with statewide, emergency situations involving hazardous materials, such a meth labs, tire fires, hazardous spills, and questions from individuals about chemicals and substances they find. Grievants also respond to reports of weapons of mass destruction, but this is only a small portion of their duties.

3. Grievants respond to approximately 100 requests and situations in a year, and each Grievant is assigned by his supervisor, Tom Blake, to be in charge of approximately 25 sites a year. Sometimes the assigned Grievant handles this assignment alone, and, at other times, the other Environmental Resource Specialists 2 assist him.

4. Grievants do not supervise anyone, but do relate to a variety of other agencies and community employees during the course of their work.

5. Each Grievant has an area he is in charge of overseeing. Grievant Wheatcraft is the safety coordinator and in charge of situations dealing with weapons of mass destruction, and communications. Grievant Sattler is assigned to manage the hazardous waste storage pad and arranging for the transport and disposal of wastes. Grievant Joins deals with the purchase of equipment and supplies and takes care of the vehicles. Grievant Spatafore deals with respiratory issues and has oversight of the electroplating ground water remediation project. 6. Grievants' supervisor is classified as an Environmental Resources Program Manager 1, Pay Grade 19.

7. In Winter 2006, Grievants sought reallocation, and to support their request, they completed Position Description Forms. That request was denied on March 10, 2006, by Lowell Basford, the Manager of the Division of Personnel the Classification and Compensation Section, who found Grievants to be properly classified.

8. Grievants requested reconsideration, and on May 4, 2006, DOP determined Grievants were properly classified.

9. While the volume of Grievants' duties has increased and the type of hazardous materials has changed somewhat, the majority of the duties Grievants currently perform are of the kind and/or

level stated in the class specification.

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

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. TheEnvironmental 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.

ENVIRONMENTAL RESOURCES SPECIALIST 3

Nature of Work

At the advanced level performs complex professional work in a state-wide specialty area in the acquisition, preservation, management and enhancement of the state's environmental/natural resources. Work involves the application of complex scientific principles, complex laws and regulations and extensive program planning techniques in the specialty area. May supervise subordinate Environmental Resources Specialist and support positions; performs as a lead worker in complex program assignments withresponsibility for multi-agency and multi-level coordination of program activities. Responsible for planning, organizing and implementing a state-wide program in the area of assignment. Performs related work as required.

Distinguishing Characteristics

This class differs from the Environmental Resources Specialist 2 by performing at the advanced level as a lead worker in complex program assignment with responsibility for multi agency and multi-level coordination of program activities. Responsible for planning, organizing and implementing a state wide program in the areas of assignment.

Examples of Work

Develops policies in relation to state and regional resources.

Conducts meetings of local, statewide, public and/or private agencies relating to planning programs or policies dealing with environmental concerns.

Conducts field reviews of projects proposed, under construction, or completed, to assure environmental safeguards are being implemented.

Collects and researches data such as air, soil and water quality from reports of federal or state agencies, permits or through field reviews of proposed or existing sites.

Coordinates environmental analysis activity with federal and state or local agencies and recommends modifications or mitigations to reduce or alleviate aspects of the impacts.

Consults with public officials regarding planning programs and policies.

Acts as a liaison between agency and others involved in the process.

May supervise subordinates and clerical support staff.

Reviews progress of subordinate staff and provides technical guidance.

Evaluates plans, proposals, grants, permits, policies and other documents submitted for accuracy, completeness and compliance with rules and regulations.

May prepare annual budget requests.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of theW. 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 DEP 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).

Grievants assert their positions are misclassified, and request their positions be reallocated to an Environmental Resource Specialists 3. DOP's Rule, 143 C.S.R. 1 § 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.

Additionally, 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 the one 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). 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, DOP'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 employees contesting their current classification and/or pay gradewith a substantial obstacle to overcome in attempting to establish that they are currently misclassified.

Further, as stated in Division of Personnel Rule 143 C.S.R. 1 § 4.4, "Class Specifications":

> The Director shall consider the class specification in allocating positions and shall interpret it as follows:

(a) Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.

(b) In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole. The Director shall give consideration to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the positions that the class intended to include.

(c) A class specification is a general description of the kinds of work characteristics of positions properly allocated to that class and not as prescribing what the duties of any position are nor as limiting the expressed or implied authority of the appointing authority to prescribe or alter the duties of any position.

(d) The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.

Mr. Basford testified Grievants were correctly classified. He stated Grievants' position did not warrant reallocation because there had been no significant change in their duties, and their current duties were within the Environmental Resource Specialist 2 classification. While there has been a change in the organizational chart and an increase in the volume of Grievants' duties, Grievants' duties still fall within the class specification. Mr. Basford noted the Environmental Resource Specialist 2 classification was the "best fit" for the work Grievants perform.

Mr. Basford also testified the major difference between the Environmental Resource Specialist 2 and Environmental Resource Specialist 3 is the level of complexity of tasks and the scope of responsibility, as well as Lead Worker duties.

Grievants assert they are Lead Workers. The definition of Lead Work/Lead Worker is "a level of work at which an incumbent is assigned the <u>on-going responsibility of scheduling and/or reviewing the work of other co-workers and guiding and training them while performing identical or similar kinds</u>

of work." (Emphasis added).

Grievants believe they are Lead Worker for two reasons. First, Grievants argue that because each of them has special areas of concentrations, this responsibility makes them a Lead Worker. While each Grievant does have a specific area of responsibility, this responsibility frequently dilutes the complexity of their duties. For example, Grievant Joins orders supplies. Grievants are currently assigned Pay Grade 15. The duties of ordering, receiving, recording, storing, and shipping of materials and equipment are those of a Purchasing Assistant, and the pay grade for this position is 7. Many of these duties could also be attributed to a Storekeeper. The pay grades for these duties are 3, 5, and 7. (See testimony of Basford at Level IV for multiple example of Grievants' duties that dilute the complexity of their pay grade.)

Secondly, Grievants argue they are Lead Workers, because they all serve in this position. This same argument was asserted in Cunningham, et al. v. Division of Environmental Protection and the Division of Personnel, Docket No. 98-DEP-454 (May 25, 1999). In Cunningham, the grievants asserted they were lead workers because when therewas a large project, they were assigned by their supervisor to direct the work of their co- workers. This type assignment varied according to the facility involved and was not a predominant portion of any of these grievants' duties. The administrative law judge in Cunningham found, "Grievants do not supervise each other on a day-to-day basis, or routinely assign and review each others' work." She held these employees were not Lead Workers.

The same situation is presented here. Grievants have emergency response duties for hazardous materials incidents, and they are assigned to a site by Mr. Blake based on availability. Depending upon the size of the site, a Grievant may work alone, or other Grievants may be assigned by Mr. Blake to assist the Grievant in charge. Each Grievant is assigned to be in charge of approximately 25% of the hazardous waste situations, and fairly frequently they do not have other Environmental Resource Specialists 2 assigned with them, as there is no need. Thus, the amount of time they would be assigned to be in charge of the other workers must be less than 25%. Grievants do not perform lead worker duties a predominant portion of their time.

Additionally, it is not the intent of the classification scheme, to have every single position within a unit be classified as a lead worker, and it is not intent for the lead work responsibility to apply to occasional, ad hoc tasks. Cunningham, supra. As previously stated, lead work is described as an on-going responsibility for scheduling and/or reviewing the work of other co-workers. It is intended to be

a regular and recurring element in the position. Lead workers are intended to be "quasi-supervisors" and to perform the more routine elements of supervision such as assigning and reviewing work and training subordinate employees, as well as signing leave slips and assisting in evaluations. Cunningham, supra. Even when Grievants function as their version of a "lead worker", they still do not perform the duties normally assigned to this position, such reviewing and evaluating work, and scheduling and approving leave. These duties are performed by Grievants' supervisor, Mr. Blake.

After a review of Grievants' Position Description Forms, the witnesses' testimony, and the rules and regulations governing reallocation, the undersigned Administrative Law Judge finds Grievants are correctly classified as an Environmental Resource Specialists 2, and this classification is the best fit for their duties. While Grievants may perform some duties that are outside their class specification, this is to be expected. Since these duties are not predominant, this difference is acceptable and covered under the catchall phrase which is the last line of the "Nature of Work" Section, "Performs related work as required." As noted by Mr. Basford, the duties Grievants perform fall within those identified in their classification specification. Further, Grievants have not demonstrated "a significant change in the kind or level of duties and responsibilities" that would indicate a need to reallocate their positions. DOP Rule 143 C.S.R. 1 § 3.78. In summary, Grievants do not serve as lead workers, and their duties and responsibilities fall squarely within the Environmental Resource Specialist 2 classification.

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, Grievants have the burden of proving their 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 are 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. Grievants have not demonstrated by a preponderance of the evidence that they are misclassified, or that the position of Environmental Resource Specialist 2 is notthe "best fit" for their normal duties, as the vast majority of the tasks they perform fall within the class specifications for their position.

6. Grievants have not demonstrated by a preponderance of the evidence that their duties warrant reallocation as while there has been an increase in the volume of the works they complete, there has not been a significant change in their duties. Kuntz/Wilford v. Dep't of Health and Human Res., Docket No. 96-HHR-301 (Mar. 26, 1997).

7. Grievants have not demonstrated they serve as lead workers.

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 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.

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Janis I. Reynolds

Senior Administrative Law Judge

Date: February 27, 2007