THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

THOMAS BLAKE,

Grievant,

v. **Docket No. 06-DEP-323**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF ENVIRONMENTAL

PROTECTION and DIVISION OF

PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Thomas Blake, is employed by the Department of Environmental Protection ("DEP"). He is grieving his classification as an Environmental Resources Program Manager 1 and asserts he should be reallocated to an Environmental Resources Program Manager 2 with a minimum of a 10% raise retroactive to February 1, 2006. (See footnote 1) DEP and the Division of Personnel ("DOP") assert Grievant is correctly classified, and the Environmental Resources Program Manager 1 classification is the "best fit" for his duties.

This grievance was filed on May 16, 2006, and denied at Levels I, II, and III. Grievant appealed to Level IV on September 26, 2006, and a Level IV hearing was held on January 29, 2007. Grievant represented himself, the Division of Personnel was represented by Karen Thornton, Assistant Attorney General, and DEP was represented 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.

Synopsis

Grievant asserts there has been a substantial increase in his duties and responsibilities and notes DEP has determined his position is an executive position exempt from overtime. Grievant seeks reallocation.

Respondents assert Grievant is correctly classified as an Environmental Resources Program Manager 1, and while there has been an increase in the volume of his duties,there has not been an increase in the complexity and difficulty so as to warrant reallocation to an Environmental Resources Program Manager 2, Pay Grade 21.

Grievant did not meet his burden of proof and demonstrate he should be reallocated to an Environmental Resources Program Manager 2.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as an Environmental Resources Program Manager 1, Pay Grade 19.

2. Grievant is the Director of DEP's Hazardous Material Emergency Response Unit and supervises five people: one Office Assistant 3 and four Environmental Resource Specialists 2. This unit deals with emergency situations statewide involving hazardous materials, such as hazardous spills, drug labs, chemical fires, and overseeing and directing the removal/remedial work performed by private contractors hired by DEP or the responsible party.

3. This Unit also operates a hazardous waste storage facility for the wastes generated by the Unit through its responses to emergencies. Grievant oversees this facility to ensure careful monitoring and tracking of all the waste containers.

4. In February 2006, Grievant sought reallocation, and to support his request, he completed a Position Description Form, submitted to his supervisor and then to DOP.

5. On his new Position Description Form, Grievant identified the amount of time he spent on his various duties as: 1) 25% - managing the Unit; 2) 25% - responding tohazardous waste

emergencies; 3) 35% - managing the hazardous waste facility; 4) 10% - maintenance of equipment and building, spill line coordination; and 5) 5% - training.

6. On this Position Description Form, Grievant's supervisor's, Mike Dorsey, the Director of the Homeland Security and Hazardous Waste Emergency Response Unit, indicated two changes since the last review: 1) the definition of hazardous waste had expanded; and 2) the addition of responsibility for the hazardous waste facility.

7. On March 10, 2006, Lowell Basford, the Assistant Director of the Division of Personnel's Classification and Compensation Section denied the request for reallocation and found Grievant to be properly classified.

8. On March 21, 2006, Grievant appealed DOP's ruling, and on May 4, 2006, DOP determined Grievant was properly classified quoting from the Environmental Resources Program Manager 1 class specification and stating Grievant "Serves as the manager of a formally designated specialized environmental resources program or subsidiary environmental resources program. Directs the operations of a small organizational unit identified as a statewide program." (See "Nature of Work" and "Distinguishing Characteristics" sections of the class specification for the statements contained in this quote.)

9. While the volume of Grievant's duties has increased and the type of hazardous material has changed somewhat, the majority of Grievant's current duties are of the kind and/or level identified in the class specification. Further, the added duties are ones that tend to dilute the complexity of Grievant's overall responsibilities.

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

ENVIRONMENTAL RESOURCES PROGRAM MANAGER 1

Nature of Work

> Under administrative direction performs professional work at the managerial level. Serves as the manager of a formally designated specialized environmental resources program or subsidiary environmental resources program under direction of an administrator, manager or agency head and as may be outlined by state code. Exercises delegated authority to staff organizational unit to pursue goals through orderly and efficient planning, directing and controlling of activities where objectives, operations, and statutory requirements are of a specific program of singular scope and require specialized knowledge of the methodology of the technical field. Work requires analysis and interpretation of scientific or technical theory and principles; professional practices; agency philosophy, operational policies and regulations; and knowledge of a specific field where situations may be atypical or precedent setting. Duties include direction and supervision of a small professional or technical staff. Has latitude to

exercise independent judgment in execution of duties within jurisdiction. Work is reviewed primarily for results obtained; timeliness; compliance with laws, rules, regulations, procedures and policies. Performs related work as required.

Distinguishing Characteristics

Directs the operations of a small organizational unit identified as a statewide program. Work requires knowledge of specific scientific or technical theory and principles of an environmental specialty area. Operational policy and procedures are relatively stable and singular in theme. Exercises latitude in determining work procedures and priorities and advises and makes recommendations regarding program policies, rules, regulations and procedures. Includes supervision of a limited variety of technical or professional support staff. Is accountable to an administrator, manager or the agency head.

Examples of Work

Administers an integral part of an environmental program of the state consistent with state policy and accepted principles.

Staffs organizational unit to effect orderly, efficient and economical operations.

Recommends and assists in preparation of legislation and administrative procedures as necessary to maintain conservation activities consistent with current needs and circumstances.

Delivers speeches; writes articles and disseminates other informational materials to explain conservation principles and acquaint publicand private organizations with mission, policies, regulations; details impact on activities; and encourages cooperation and support.

Assists with preparation of budget and/or grant documents covering staff and equipment needs, and approves expenditures.

Attends meetings, seminars and symposiums to maintain knowledge of technical, scientific and professional advancements in the area of assignment.

Plans, organizes, implements, monitors and controls activities of professional, technical or scientific staff.

Coordinates plans and programs of the section with functions and services of other divisions, offices and activities of local, state, interstate, and federal government entities, and interested parties, and seeks agreement to resolve problems and/or establish common goals.

Testifies at legislative, judicial, or public hearings on behalf of the agency or as a subject-matter expert.

Administers and enforces laws, rules and regulations regarding conservation, development, protection, enjoyment and use of natural resources of the state for maintenance of intrinsic, ecological or beneficial value.

Negotiates utilization of resources consistent with public interest. Modifies or recommends action to revoke or suspend operational licenses or permits and may

seek injunction, or civil action against violators. May initiate writs and warrants, make arrests, and/or review, recommend or develop consent agreements.

Researches new procedures and directs scientific investigations to develop plans and recommendations for development, improvement, protection, preservation, regulation and use of natural resources based on predicted outcome. Prepares studies including descriptions of status, current practices, mitigation procedures, and progress reports regarding resource conservation, utilization and recovery. Recommends standards for resource depletion.

Develops and implements informational plans to advertise, promote and publicize state natural resources and conservation, preservation, use, and husbandry activities consistent with state plan.

ENVIRONMENTAL RESOURCES PROGRAM MANAGER 2

Nature of Work

Under administrative direction, performs professional work at the managerial level. Serves as the administrative officer of a statewide specialized environmental resources program under direction of the agency head or in complete charge of a secondary program as may be outlined by state code. Exercises delegated authority to staff organizational unit to pursue goals through orderly and efficient planning, organizing, directing and controlling of activities where objectives, operations, and statutoryrequirements are analogous, of defined scope, and require specialized knowledge of specific environmental resources programs or fields; or serves as the principal assistant to an administrator with extensive technical, program-specific expertise. Work requires analysis and interpretation of scientific or technical theory and principles; professional practices; agency philosophy, operational policies and regulations; and knowledge of the field where situations may be atypical, precedent setting or controversial. Duties typically include direction and supervision of administrative and managerial activities, through subordinate leaders, including a sizable professional, technical and clerical staff. Has latitude to exercise independent judgment in execution of duties within jurisdiction. Work is reviewed primarily for results obtained; timeliness; compliance with laws, rules, regulations, procedures and policies. Performs related work as required.

Distinguishing Characteristics

Directs the operations of a moderate sized secondary organizational unit or a statewide environmental resources program with multiple broadly-related components. Work requires knowledge of scientific theory and principles of an environmental field. Operational policy and procedures may be mutable. Exercises latitude in organizing and administering program elements and advises and makes program recommendations to supervisor regarding policies, rules, regulations and procedures. Includes supervision of technical and/or professional and support staff organized into multiple organizational units of related specialty areas. Is directly accountable to the agency head or administrator a major and primary organizational unit.

Examples of Work

Administers an integral part of a major environmental program of the state consistent with state policy and accepted principles.

Staffs organizational unit to effect orderly, efficient and economical operations.

Recommends and assists in preparation of legislation and administrative procedures as necessary to maintain conservation activities consistent with current needs and fluctuating circumstance.

Chairs meeting, delivers speeches; writes articles and disseminates other informational materials to explain conservation principles and acquaint public and private organizations with mission, policies, regulations; details impact on activities; and encourages cooperation and support.

Prepares budget and/or grant request documents covering staff and equipment requirements, allocates funds within organizational unit, and approves expenditures.

Attends meetings, seminars and symposiums to maintain knowledge of technical, scientific and professional advancements in the area of assignment.

Plans, organizes, implements, monitors and controls activities of professional, technical or scientific staff in units through subordinate leaders.

Coordinates plans and programs of the section with functions and services of other divisions, offices and activities of local, state, interstate, and federal government entities, and interested parties, and seeks agreement to resolve problems and/or establish common goals.

Testifies at legislative, judicial, or public hearings on behalf of the agency or as a subject-matter expert.

Administers and enforces laws, rules and regulations regarding conservation, development, protection, enjoyment and use of natural resources of the state for maintenance of intrinsic, ecological or beneficial value.

Negotiates utilization of resources consistent with public interest. Revokes, suspends or modifies operational licenses or permits and may seek injunction, or civil action against violators. May initiate writs and warrants, make arrests, and/or review, recommend or develop consent agreements.

Researches new procedures and directs scientific investigations to develop plans and recommendations for development, improvement, protection, preservation, regulation and use of natural resources based on predicted outcome. Prepares studies including descriptions of status, current practices, mitigation procedures, and progress reports regarding resource conservation, utilization and recovery. Recommends standards for resource depletion.

Develops and implements informational plans to advertise, promote and publicize state natural resources and conservation, preservation, use, and husbandry activities consistent with state plan.

(Emphasis added).

11. At Level III, Grievant submitted a list of significant changes in his duties and

responsibilities. He indicated as building manager for the hazardous waste facility he made sure all aspects were in compliance with all regulations and safety requirements, as well as performing various janitorial functions and grass cutting and snow removal. He reiterated his responsibilities as the manager of a hazardous waste facility, and the need to oversee the detailed and extensive tracking of wastes. Grievant also noted that with anorganizational change in January 2006, Homeland Security duties were added to his responsibilities. (See footnote 2)

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 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).

Grievant asserts his position is misclassified, and requests his position be reallocated to an Environmental Resources Program Manager 2. 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 significantchange 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 DOP 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, 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 grade with a substantial obstacle to overcome in attempting to establish that they are currently misclassified.

Mr. Basford testified Grievant was correctly classified. Mr. Basford noted the size of Grievant's Unit and the basic purpose of the Unit had not changed since Grievant became manager in 1995. Mr. Basford pointed out that several of the new duties Grievant assumed actually diluted the complexity of his Pay Grade 19 position. For example, in terms of building manager duties, Mr. Basford noted that the manager of the PSC building, which houses several hundred employees, was at a Pay Grade 16, the maintenance duties would be at a Pay Grade 8 or 9, and the Manager of Homeland Security is at a Pay Grade 16. Mr. Basford also pointed out the duties of managing the hazardous waste facilities were the type of duties encompassed within his class specification.

Additionally, a review of the class specifications reveals that the Environmental Resources Program Manager 1 classification is for a small statewide organization and the Environmental

Resources Program Manager 2 is for a "moderate sized secondary organizational unit or a statewide environmental resources program with multiple broadly-related components," and "Includes supervision of technical and/or professional and support staff organized into multiple organizational units of related specialty areas." Grievant supervises five employees in technical positions and one in a clerical position. Mr. Basford testified Grievant's position did not warrant reallocation because there had been no significant change in his duties, his current duties were within the Environmental Resources Program Manager 1 classification, and this classification was the "best fit" for the work Grievant performs.

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 an Environmental Resources Program Manager 1, and this classification is the best fit for his duties. The duties Grievant performs fall within those identified in his classification specification, and Grievant did 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 143 C.S.R. 1 § 3.78. In summary, Grievant's duties and responsibilities fall squarely within the Environmental Resources Program Manager 1 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, 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 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. Grievant has not demonstrated by a preponderance of the evidence that he is misclassified, or that the position of Environmental Resource Program Manager 1 is not the "best fit" for his normal duties, as the majority of 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. While there has been an increase in the volume of the work,there has not been a significant change in the complexity and difficulty of 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 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: March 29, 2007

Footnote: 1

At Level III Grievant sought to amend this back pay to 2003, and DOP objected.

Footnote: 2

Grievant also noted he wrote the permit for the hazardous waste facility, but as this is not an on-going activity, it will not be discussed further.