THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CALLIE BENNETT,

Grievant,

v. Docket No. 07-INS-299

INSURANCE COMMISSION,

and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant Callie Bennett grieves Respondents' refusal to reclassify her from Office Assistant II to Office Assistant III. Her May 16, 2007, statement of grievance was:

> **The event causing this grievance was being denied by DOP [the Division of Personnel] in regards to getting reclassified as an Office Assistant III. I am currently classified as an Office Assistant II. I am performing duties the same as an Office Assistant III that works in the same office as I. Also I have an extra duty since the merge [sic] of Workers Comp.**

The grievance form was altered slightly when it was retyped at some point. The typed statement of grievance was:

> **"The event causing this grievance was being denied by DOP in regards to getting reclassified as an Office Assistant III. I am currently classified as an Office Assistant II. I am performing the same duties as Vee Russell, who is an Office Assistant III. Also I have an extra duty performing fixed assets reports at the end of each month since the merge [sic] of Workers Comp."**

The differences in the two versions of the grievance statement are not significant. The relief Grievant sought was "[t]o be classified/reallocated from an Office Assistant II to an Office Assistant III and to receive back pay from when I began my new duties." Following an informal Level One conference (See footnote 1) on May 18, 2007, Tonya Childress Gillespie, Director of Rates and Forms, the grievance evaluator, signed a decision which concluded that she lacked authority to grant the relief sought. On May 22, 2007, the Grievant appealed to Level Two. On May 24, 2007, the parties entered into a written agreement to "advance the grievance to the level with the authority to grant the relief." By Order entered November 13, 2007, the Division of Personnel ("DOP") was joined as a Respondent. Because of legislative changes which affected the grievance procedure and the Grievance Board (*see* footnote 1), a Level Four hearing before the undersigned was not scheduled until January 17, 2008. The hearing took place at the Board's Charleston office.

Summary

The Grievant claims that her Office Assistant II position is misclassified and seeks to have it reallocated to Office Assistant III, a higher pay grade, which she maintains more closely matches her current duties. Because the Grievant failed to sustain her burden to prove by a preponderance of the evidence that the work she does fits the OA III classification better than the OA II classification, because controlling precedent affords "great weight" to DOP's determination, and because the evidence failed to establish that DOP's determination was clearly erroneous, this grievance must be DENIED. After thorough review of the record, the undersigned finds the following facts:

Findings of Fact

1 1. Grievant occupies a position classified as Office Assistant II ("OA II") in the Offices of the Insurance Commissioner ("OIC"), in Charleston.

2 2. On March 14, 2006, the Grievant completed a Position Description Form ("PD") and submitted it to the DOP for consideration. At the time the PD was submitted, Grievant's position was classified as OA II.

3 3. On February 5, 2007, DOP determined that the allocation of Grievant's position to

the OA II classification was proper. Level Four, Exhibit R1.

4 4. On March 8, 2007, Grievant requested that DOP reconsider its classification determination. Level Four, Exhibit R2.

5 5. By correspondence to the Grievant dated May 9, 2007, the DOP Director reaffirmed DOP's original determination that Grievant's position was properly allocated to the OA II classification. Level Four, Exhibit R3.

6 6. By correspondence dated May 24, 2007, Grievant requested a desk audit of her position. On July 17, 2007, Senior Personnel Specialist Debbie L. Anderson of DOP's Classification and Compensation Section conducted an onsite job (desk) audit.

7 7. Ms. Anderson reviewed with Grievant each duty statement on her PD. She determined that the PD accurately reflected the Grievant's job duties, with two exceptions: the preparation of monthly fixed asset reports, and of daily deposit reports. The additional duties did not require the expenditure of significant additional time.

8 8. Ms. Anderson determined that Grievant's duties were consistent with the full performance level work of an OA II. 9 9. As the Grievant and her supervisor testified, the PD, with the addition of the two exceptions specified above, fairly and accurately described the work of the position Grievant occupies.

10 10. After comparing the Grievant's actual duties with the classification specifications for OA II, The DOP determined that, within the current Classification Plan, the OA II classification was the best fit for Grievant's position.

Discussion

Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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). Recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion). "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).

The Grievant claims that her position is misclassified and seeks to have it reallocated to a higher pay grade, which she maintains more closely matches her current duties. In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work he or she is doing is a better fit in a different classification than the one the grievant is currently in. *See generally Hayes v. W. Va. Dep't of Natural Res*., Docket No.NR-88-038 (Mar. 28, 1989); *Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement*, Docket No. 00HHR-361 (Apr. 5, 2001). DOP specifications are read in "pyramid fashion," i.e., from top to bottom, with the different sections considered as going from the more general and more critical to the more specific and 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 text of the OA II classification specification is reproduced below:

OFFICE ASSISTANT 2

Nature of Work

Under general supervision, performs full performance level work in multiple-step clerical tasks calling for interpretation and application of office procedures, rules and regulations. Performs related work as required.

Distinguishing Characteristics

Performs tasks requiring interpretation and adaptation of office procedures as the predominant portion of the job. Tasks may include posting information to logs or ledgers, and checking for completeness, typing a variety of documents, and calculating benefits. May use a standard set of commands, screens, or menus to enter, access and update or manipulate data.

At this level, the predominant tasks require the under standing of the broader scope of the work function, and requires an ability to apply job knowledge or a specific skill to a variety of related tasks requiring multiple steps or decisions. Day-to-day tasks are routine, but initiative and established procedures are used

to solve unusual problems. The steps of each task allow the employee to operate with a latitude of independence. Work is reviewed by the supervisor in process, randomly or upon completion. Contacts are usually informational and intergovernmental.

Examples of Work

Posts information such as payroll, materials used or equipment rental to a log or ledger; may be required to check for completeness; performs basic arithmetic calculations (addition, subtraction, division or multiplication);corrects errors if the answer is readily available or easily determined. Maintains, processes, sorts and files documents numerically, alphabetically, or according to other predetermined classification criteria; reviews files for data and collects information or statistics such as materials used or attendance information. Answers telephone, screens calls, takes messages and complaints; gives general information to callers when possible, and specific information whenever possible. Receives, sorts and distributes incoming and outgoing mail. Operates office equipment such as adding machine, calculator, copying machine or other machines requiring no special previous training. Types a variety of documents from verbal instruction, written or voice recorded dictation. Collects, receipts, counts and deposits money. Calculates benefits, etc., using basic mathematics such as addition, subtraction, multiplication, division and percentages. Posts records of transactions, attendance, etc., and writes reports. May compile records and reports for supervisor. May operate a VDT using a set of standard commands, screens, menus and help instructions to enter, access and update or manipulate data in the performance of a variety of clerical duties; may run reports from the database.

Knowledge, Skills and Abilities

Knowledge of office procedures and methods.

Knowledge of business English, spelling and arithmetic. Ability to operate the common types of office equipment related to the job. Ability to understand and follow oral and written instructions.

Minimum Qualifications Training: Graduation from a standard high school or the equivalent.

Experience: Two years of full-time or equivalent part-time paid experience in routine office work.

Substitution: College hours, related business school, or vocational training may be substituted through an established formula for the required experience. The text of the OA III classification specification is reproduced below:

OFFICE ASSISTANT 3

Nature of Work Under general supervision, performs advanced level, responsible and complex clerical tasks of a complicated nature involving interpretation and application of policies and practices. Interprets office procedures, rules and regulations. May function as a lead worker for clerical positions. Performs related work as required.

Distinguishing Characteristics Performs tasks requiring interpretation and adaptation of office procedures, policies, and practices. A significant characteristic of this level is a job inherent latitude of action to communicate agency policy to a wide variety of people, ranging from board members, federal auditors, officials, to the general public.

Examples of Work Analyzes and audits invoices, bills, orders, forms, reports and documents for accuracy and initiates correction of errors. Maintains, processes, sorts and files documents numerically, alphabetically, or according to other predetermined classification criteria; researches files for data and gathers information or statistics such as materials used or payroll information. Types a variety of documents from verbal instruction, written or voice recorded dictation. Prepares and processes a variety of personnel information and payroll documentation. Plans, organizes, assigns and checks work of lower level clerical employees. Trains new employees in proper work methods and procedures. Answers telephone, screens calls, takes messages and complaints and gives information to the caller regarding the services and procedures of the organizational unit. Receives, sorts and distributes incoming and outgoing mail. Operates office equipment such as electrical calculator, copying machine or other machines. Posts records of transactions, attendance, etc., and writes reports. Files records and reports. May operate a VDT using a set of standard commands, screens, menus and help instructions to enter, access and update or manipulate data in the performance of a variety of clerical duties; may run reports from the database and analyze data for management.

Knowledge, Skills and Abilities Knowledge of office methods of practices and procedures. Knowledge of business English, spelling and arithmetic.Knowledge of program operations and policies with respect to general functions performed. Ability to maintain or supervise the maintenance of records of some complexity and to prepare reports and tabulations from these records. Ability to establish and maintain effective working relation ships with other employees and the public. Ability to understand and effectively carry out complex oral and written directions.

Minimum Qualifications Training: Graduation from a standard high school or the equivalent.

Experience: Four (4) years of full-time or equivalent part time paid experience performing routine office work.

Substitution: College hours, related business school, or vocational training may be substituted through an established formula for the required experience.

The key to the analysis is whether a grievant's current classification constitutes the "best fit" for the duties the grievant performs. *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 are class-controlling. *Broaddus v. W. Va. Div. of Human Serv*., Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990).

Finally, DOP's interpretation and application of the classification specifications at issue are given great weight unless clearly erroneous.

> **"Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syllabus Point 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981), *appeal dismissed,* 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284.**

Syllabus Point 1, *Dillon v. Bd. of Ed. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588(1983). In a *per curiam* decision, the West Virginia Supreme Court of Appeals applied the foregoing principle to DOP's interpretation of classification specifications. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993). Grievances contesting a grievant's current classification are therefore decided under rules of law which give DOP's interpretation of classification specifications "great weight" unless that interpretation is shown to be "clearly erroneous." Construing the "clearly erroneous" standard for trial courts, our Supreme Court has said:

> **A circuit court's finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Board of Educ. v. Wirt*, 192 W. Va. 568, 579 n.14, 453 S.E.2d 402, 413 n.14 (1994), *quoting United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948).**

***Public Citizen v. First Nat'l Bank*, 198 W. Va. 329, 480 S.E.2d 538, 543 (1996). It is fair to say that a grievant challenging her classification has an uphill battle.**

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 require reallocation. The

performing of a duty not previously done, but identified within the classspecification also does not require reallocation." *Id.*

The statement of grievance contends that the Grievant is "performing the same duties as Vee Russell, who is an Office Assistant III." The Grievant's evidence at hearing focused almost exclusively on a comparison of her duties with those of Ms. Russell. It is well established in Grievance Board's decisions, however, that classification determinations are not based on comparison with another employee, but on comparison with the classification descriptions involved, from which it is determined which classification is the best fit for the employee's duties. *Harmon v. W. Va. Dept. of Health and Human Resources*, Docket No. 99-HHR-432 (May 15, 2000); *Baldwin v. Dep't Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999). In any event, "[w]hen a grievant compares himself to others who are employed in a higher classification and are performing similar work, but the others are misclassified, the remedy is not to similarly misclassify the grievant. *Akers v. W. Va. Dep't of Tax and Revenue*, 194 W. Va. 456, 460 S.E.2d 702 (1995); *Kunzler v. Dep't of Health and Human Serv*., Docket No. 97 HHR-287 (Jan. 18, 1996)." *Weaver v. Preston County Bd. of Educ*., Docket No. 03-39-129 (Aug. 28, 2003).

In this case, the Grievant failed to sustain her burden to prove by a preponderance of the evidence that the work she does fits the OA III classification better than the OA II classification. Because controlling precedent requires the undersigned to afford "great weight" to DOP's determination, and because the evidence failed to establish that DOP's determination was clearly erroneous, this grievance must be DENIED.

Conclusions of Law

1 1. Because this grievance does not involve a disciplinary matter, the Grievanthas the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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). Recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion). "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).

2 2. In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work he or she is doing is a better fit in a different classification than the one the grievant is currently in. *See generally Hayes v. W. Va. Dep't of Natural Res*., Docket No. NR-88-038 (Mar. 28, 1989); *Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement*, Docket No. 00HHR-361 (Apr. 5, 2001). DOP specifications are read in "pyramid fashion," i.e., from top to bottom, with the different sections considered as going from the more general and more critical to the more specific and 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).

3 3. The key to analyzing whether a grievant's classification is correct is whetherit constitutes the "best fit" for the duties the grievant performs. *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 are class-controlling. *Broaddus v. W. Va. Div. of Human Serv*., Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990).

4 4. DOP's interpretation and application of the classification specifications at issue are given great weight unless clearly erroneous.

> **" 'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syllabus Point 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981), *appeal dismissed,* 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284." Syllabus Point 1, *Dillon v. Bd. of Ed. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588 (1983). The West Virginia Supreme Court of Appeals applied the foregoing principle to DOP's interpretation of classification specifications. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).**

5 5. 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 require reallocation. The performing of a duty not previously done, but identified within the classspecification also does not require reallocation." *Id.*

6 6. Classification determinations are not based on comparison with another employee, but on comparison with the classification descriptions involved, from which it is determined which classification is the best fit for the employee's duties. *Harmon v. W. Va. Dept. of Health and Human Resources*, Docket No. 99-HHR-432 (May 15, 2000); *Baldwin v. Dep't Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999). "When a grievant compares himself to others who are employed in a higher classification and are performing similar work, but the others are misclassified, the remedy is not to similarly misclassify the grievant. *Akers v. W. Va. Dep't of Tax and Revenue*, 194 W. Va. 456, 460 S.E.2d 702 (1995); *Kunzler v. Dep't of Health and Human Serv*., Docket No. 97 HHR-287 (Jan. 18, 1996)." *Weaver v. Preston County Bd. of Educ*., Docket No. 03-39-129 (Aug. 28, 2003).

7 7. In this case the Grievant failed to sustain her burden to prove by a preponderance of the evidence that the work she does fits the OA III classification better than the OA II classification.

Accordingly, the 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 (2006) (repealed, *see* fn. 1 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy ofthe 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.

Thomas J. Gillooly

Administrative Law Judge

Date: June 27, 2008

Footnote: 1

Reference to the levels of the grievance procedure are to those in effect before July 1, 2007. In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.