THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CRAIG STIHLER,
Grievant,

v. **DOCKET NO. 07-DNR-360D**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Grievant, Craig Stihler, filed a grievance against his employer, the Division of Natural Resources, on December 29, 2005, alleging he was misclassified as a Wildlife Biologist 2. As relief, Grievant sought, "[r]eclassification of my position to Wildlife Biologist III and a minimum of a 5 percent increase in salary." A conference was held at level one on January 25, 2006, and on that same date, Grievant's supervisor responded that he was without authority to grant the relief requested. Grievant appealed to level two on January 30, 2006, and a level two conference was held on January 31, 2006. Curtis I. Taylor, Chief of the Wildlife Resources Section, responded in writing to the grievance at level two on that same day, stating he was without authority to grant the relief requested. Grievant appealed to level three on February 4, 2006. Nothing further occurred at level three, and on July 10, 2007, Grievant filed a claim of default.

On January 31, 2008, an Order was entered by the undersigned Administrative Law Judge granting the Default. A hearing on the remedy was held before the undersigned Administrative Law Judge on July 22, 2008, in Elkins, West Virginia. Grievant represented himself, the Division of Natural Resources was represented by William R. Valentino,

Assistant Attorney General, and the Division of Personnel was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on September 8, 2008.

Synopsis

Grievant believes his position should be classified as a Wildlife Biologist 3, rather than a Wildlife Biologist 2. Respondents demonstrated that the nature of Grievant's job has not changed, and that his duties have not changed significantly. Accordingly, it would be clearly wrong and contrary to law to reallocate Grievant's position to a different classification. Respondents further demonstrated, by clear and convincing evidence, that the Endangered Species Program is not a major program for the Division of Natural Resources, and therefore, the Wildlife Biologist 2 classification is the best fit for Grievant's position. It would be clearly wrong and contrary to law to place Grievant's position in the Wildlife Biologist 3 classification.

The following Findings of Fact are made based upon the evidence presented at the default remedy hearing.

Findings of Fact

1. Grievant is employed by the Division of Natural Resources ("DNR") as a Wildlife Biologist 2, in DNR's Elkins office. He has been employed by DNR since 1979, and has been in his current position since 1987.

2. Grievant is employed in the Wildlife Resources Section, Wildlife Diversity Unit, Endangered Species Program. His supervisor is Walter Kordek, Assistant Chief of the Wildlife Resources Section. The Wildlife Diversity Unit deals with non-game species.

3. Grievant runs the Endangered Species Program, which is a statewide program. He decides the direction of this Program, and advises Mr. Kordek of his decisions. Mr. Kordek has the authority to override Grievant's decisions, but does not generally do so, because of Grievant's expertise and competence.

4. Grievant supervises two full-time employees, and two part-time, seasonal employees. There are no other employees in the Endangered Species Program.

5. The purpose of Grievant's position, as stated on the Position Description Form ("PDF") submitted by Grievant to the Division of Personnel ("Personnel") for review, is:

> This position oversees the statewide management and conservation of all federally threatened and endangered animals and other rare animal species considered to be "of concern" in West Virginia. Through a cooperative agreement with the US Fish and Wildlife Service (Service), the WVDNR assists the Service with implementation of the Endangered Species Act by providing scientific data and technical assistance. This position coordinates with various state and federal agencies and private land owners to develop and implement conservations [sic] strategies for rare, threatened, and endangered species and their habitats.

DOP Exhibit Number 1.

6. Grievant spends 25% of his time coordinating with other state and federal agencies, primarily the U.S. Fish and Wildlife Service, the U.S. Forest Service, and the National Park Service, to "develop and implement conservation plans and management strategies for rare, threatened, and endangered species on public lands," assessing the impacts of proposed projects on these species, and developing ways to minimize impacts;

25% of his time designing and implementing “field investigations to obtain information on species’ distributions, life histories, and population trends to assist with development of conservation strategies;” 15% of his time compiling data and analyzing data “to provide up-to-date information on the status of rare species in the state and preparation of reports and technical papers to archive information and to share data with other researchers/land managers;” 10% of his time assisting “private land owners with the conservation of [rare, threatened and endangered] species on their lands;” 10% of his time “[w]riting proposals for and administration of federal grants to fund rare, threatened, and endangered species projects and identifying and subcontracting experts to conduct specific work that cannot be conducted in-house, and reviewing the results of contracted projects;” 5% of his time working on activities related to “national and regional groups addressing conservation needs” on a regional scale, sharing information and resources; 5% of his time supervising subordinate employees, including planning and assigning tasks; and 5% of his time on other activities, such as reviewing grant proposals, production of educational presentations, preparing articles and brochures, and answering information requests from the public. DOP Exhibit Number 1.

7. Grievant’s responsibilities have increased as the amount of grant money received by the Endangered Species Program has increased.

8. The nature of Grievant’s job has not changed since his position was first placed in the Wildlife Biologist 2 classification, the focus of the work has not changed, and the reason the position exists has not changed. Grievant’s duties likewise have not changed significantly, except that, because of the grant funding for research projects, he can now engage in research and monitoring that he was not able to do in the past.

9. The Wildlife Biologist 2 and 3 classifications are part of a class series, with the first step in the series being the Wildlife Biologist 1, and the last step being the Wildlife Biologist 3. The class series was developed by Personnel, with input from DNR. There is significant overlap throughout the series in the language used to describe the work performed, because the kind of work performed by those in each of the three classifications is the same. The difference is in the level of work, that is, the difficulty and complexity, and in the nature of the programs overseen. A Wildlife Biologist 3 oversees a major statewide program, generally supervising a large number of employees. A Wildlife Biologist 2 "[s]erves as the supervisor of a regional component of a major statewide program or as program specialist (advisor) of a recognized statewide program." DOP Exhibit Number 4 (classification specification).

10. The Endangered Species Program was a small statewide program when Grievant took over responsibility for it in 1987, and it remains a small statewide program, despite the increase in the number of employees assigned to the Program, the increased grant funding, and the attendant increase in the number and complexity of research and species monitoring projects.

Discussion

Because Grievant is presumed to have prevailed by default, the burden of proof is upon Respondents to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law.[1] This standard requires the party with the

[1] In 2007, the Legislature in S.B. 442 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 §§

burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

W. VA. CODE §29-6-10 authorizes Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies which utilize such positions must adhere to that plan in making assignments to their employees. *Toney v. W. Va. Dep't of Health & Human Resources,* Docket No. 93-HHR-460 (June 17, 1994).

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 Resources*, 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 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 the Work" section

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6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being 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.

of 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 Resources*, 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).

Although Grievant has stated that he seeks to be reclassified, it is Personnel's position that this grievance must be evaluated pursuant to Personnel's Rule on reallocation. 143 C.S.R. 1 § 3.75 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one class to a different class 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." *Keys v. Department of Environmental Protection,* Docket No. 06-DEP-307 (Apr. 20, 2007)*; Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301(Mar. 26, 1997); *See, Siler v. Div. of Juvenile Serv.*, Docket No. 06-DJS-331 (May 29, 2007). An increase in the number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *Kuntz/Wilford, supra.* "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.*

Grievant is classified as a Wildlife Biologist 2. He believes the proper classification for his position is a Wildlife Biologist 3. The relevant portions of the classification specifications for these two positions are as follows.

WILDLIFE BIOLOGIST 2

Nature of Work
Under limited supervision, performs professional biological and technical work at the advanced and supervisory level. Serves as the supervisor of a regional component of a major statewide program or as program specialist (advisor) of a recognized statewide program. Oversees and reviews scientific research and investigations. Interprets scientific results obtained. Recommends operating procedures to be utilized in research and investigation activities within specialized biological field. Work requires interpretation of scientific theory and principles, investigative methodology, and operational procedures of a specific program. Duties include supervision of a limited variety of professional, technical and/or non-technical staff including planning, coordinating, conducting, and reviewing scientific laboratory field activities. Has latitude to exercise independent judgement in execution of duties within jurisdiction. Work is reviewed primarily for conformance to operational and scientific procedure, technical judgement, scientific findings, data interpretation, action plan, and performance in meeting defined objectives. Work requires overnight travel and is performed outside in varying weather conditions, over difficult terrain and/or state waters. Performs related work as required.

Distinguishing Characteristics
Plans, conducts, and/or oversees program activities in scientific research, applied resources management and investigations. Work is program oriented and at the supervisory and technically advanced level. Work requires specialized knowledge of a natural science specialty field as noted in areas of assignment. Plans and implements sequence of activities and assumes responsibility for deviations from program plan and operational procedures.

Examples of Work
Serves as regional program supervisor or program specialist and supervises lower-level staff performing technical or non-technical duties in scientific investigations or natural resource management activities.
Develops operational procedures and recommends operational policies and research activities. Interprets regulations, policies and statutes.

Interprets and evaluates technical reports of hydrological, biological, or chemical research data compiled; assesses cause and/or factors effecting status and impact on quality of life conditions; and recommends harvest practices or recovery plans.
Applies findings and conclusions to the development and implementation of strategic or operational resource management plans, documents environmental impact or toxicity, and/or investigates abatement or mitigation activities or plans.
Designs statistically sound scientific investigations and population surveys to estimate or monitor prevalence, distribution, and movement of species using biotelemetry or sampling techniques. Collects data and performs analyses to determine population status and adequacy of study plan.
Reviews proposed projects, assesses environmental impact on wildlife, and seeks mitigation activities. Documents findings and testifies in court as an expert witness.
Investigates reports of wildlife sightings and kills, habitat disturbances, property damage, and assists public with nuisance wildlife problems.
Coordinates meetings and participates in public information activities including educational presentations and public speaking; may prepare news releases and scientific articles, reports, and brochures.
Represents organizational unit in multi-agency, academic, research and sporting groups. May participate in completing grant applications, contract proposals, federal aid projects, land acquisitions, public access applications, and review procedures.
Performs field maintenance and minor repairs on testing and sampling equipment, vehicles, boats and attire.

WILDLIFE BIOLOGIST 3

Nature of Work

Under limited supervision, performs professional biological and technical work at the advanced and supervisory level. Serves as the supervisor of a major statewide program or directs activities at the district level under the direction of a manager or administrator. Develops operational policies and procedures to be utilized in resource management, research and investigation activities. Work requires analysis and interpretation of scientific theory, principles and practices; investigative methodology, and operational procedures of a specific program. Duties include supervision of professional, technical and/or non-technical staff including planning, coordinating, directing scientific program activities. Has latitude to exercise independent judgement in the direction of duties within jurisdiction. Work is reviewed primarily for interpretation of findings, conclusions and recommendations, technical judgement, and performance in meeting defined objectives. Work requires overnight travel and may require work outside in varying weather conditions, over difficult terrain and/or state waters. Performs related work as required.

Distinguishing Characteristics

Directs program activities in conduct of resource management, scientific research, and investigations. Work encompasses program or district authority. Work requires specialized

knowledge of a natural science specialty field as noted in areas of assignment. Exercises latitude in determining work procedures and priorities and recommends statewide policies and procedures.

Examples of Work
Serves as program or district biologist and plans, coordinates and directs program or regional activities through varied staff performing technical or non-technical duties in scientific or natural resource activities.
Evaluates and interprets scientific and technical research data compiled; assesses causes and draws conclusions; formulates strategic and operational plans, for resource management or protection or supervisory review.
Applies investigative findings to current program objectives and status, and develops and implement modifications to plan or operational procedure as necessary.
Reviews and analyzes proposed projects, assesses and documents environmental impact, and investigates or negotiates modification or mitigation activities or plans.
Prepares technical and status reports, scientific findings, and resource management plans for publication.
Participates in public relations activities including presentation to educational, civic, collegiate, public, and sporting groups.
Coordinates meetings and represents and reports on program status in multi-agency, academic, research and professional groups.
Writes news releases and publication articles covering area of assignment.
Monitors prevalence and/or movement of species. Studies data patterns to evaluate success of plans and recommend harvest or protection modifications to regulations or plans.

Respondents demonstrated that the nature of Grievant's job has not changed, and that his duties have not changed significantly. In fact, Grievant did not assert that his duties had changed significantly, other than the increased responsibilities associated with the increased grant funding being received by the Endangered Species Program. Grievant believed his position had been misclassified since 1987. Because Grievant's job has not changed, it would be clearly wrong and contrary to law to reallocate Grievant's position to a different classification.

Respondents likewise demonstrated by clear and convincing evidence that the Wildlife Biologist 2 classification is the best fit for Grievant's position. Lowell D. Basford, former Assistant Director of Personnel's Classification and Compensation Section for many

years, explained that the duties of the positions in this class series overlap. One of the keys used by Personnel in distinguishing between the Wildlife Biologist 2 and the Wildlife Biologist 3 is the nature of the programs overseen by the position. The Wildlife Biologist 3 manages or oversees a major statewide program. It is obvious that Grievant is very dedicated to his work, and proud of where he has taken his Program. He has worked hard to obtain additional grant funding so that his Program can conduct research and monitoring of endangered species which had not been done before. However, Grievant's efforts have not changed the status of the Endangered Species Program. It is still a small program, not a major program for DNR.

Grievant pointed out that the research and monitoring his team does is new and specialized, while deer have been "studied to death," so that there is not much new to learn about them in his view. While this may well be true, the undersigned will take judicial notice that there exists a major population of game animals in this State, and that hunting is a significant source of revenue. Managing the population of game animals is a significant concern. There are many Wildlife Management areas in the State. DNR's District Game Management Unit consists of six districts, with approximately 70 employees. Grievant's Exhibit Number 3. It is no surprise that programs which involve the management of game animals are major programs, while a very small, but important program like Grievant's is not. Respondents have demonstrated that it would be clearly wrong and contrary to law to place Grievant's position in the Wildlife Biologist 3 classification.

Finally, Grievant argued, in support of his claim, that other DNR employees who do research like he does are classified as Wildlife Biologist 3's. Classification determinations

do not involve a comparison of the duties of a grievant to those of other employees in the classification sought. Those to whom the grievant compares himself may themselves be misclassified, or they may have some duties and responsibilities which the grievant has no knowledge of. Further,

> "[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, 460S.E.2d 702 (1995)." *Myers v. Dep't of Health and Human Resources*, Docket No. 00-HHR-392D (Mar. 30, 2001).

Bender v. Dep't of Health and Human Res., Docket No. 00-HHR-305 (Apr. 26, 2001). The key is to compare Grievant's duties and responsibilities to the classification specifications at issue, utilizing the clearly wrong standard.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because Respondent defaulted at level one of the grievance procedure, the Grievant prevails by default unless the remedy requested is contrary to law or clearly wrong. W. VA. CODE § 29-6A-3.

2. The burden of proof is upon Respondents to prove by clear and convincing evidence that the relief requested by the grievant is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

3. In a misclassification grievance, the focus is upon whether the grievant's duties for the relevant period 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 Resources,* Docket No. NR-88-038 (Mar. 28, 1989).

4. The key to the analysis is to ascertain whether the grievant's current classification constitutes the "best fit" for his required duties. *Simmons v. W. Va. Dep't of Health and Human Resources,* 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).

5. 143 C.S.R. 1 § 3.75 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one class to a different class 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." *Keys v. Department of Environmental Protection,* Docket No. 06-DEP-307 (Apr. 20, 2007)*; Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301(Mar. 26, 1997); *See, Siler v. Div. of Juvenile Serv.*, Docket No. 06-DJS-331 (May 29, 2007).

6. An increase in the number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *Kuntz/Wilford, supra.*

"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.*

7. The Wildlife Biologist 3 classification is not a better fit for Grievant's duties than Wildlife Biologist 2, so granting the requested remedy of reclassification would be contrary to law and clearly wrong. *Myers v. W. Va. Dep't of Health and Human Resources,* Docket No. 00-HHR-392D (Mar. 30, 2001).

8. Grievant's duties have not changed, so reallocation of Grievant's position would be in violation of Personnel's Rules, which would be contrary to law and clearly wrong.

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. *See* W. VA. CODE § 29-6A-7 (*See Footnote 1)*. Neither the West Virginia Public 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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BRENDA L. GOULD
Administrative Law Judge

Date: February 6, 2009