WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL A. RHODES,
Grievant,

v. **Docket No. 2009-1283-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS and DIVISION
OF PERSONNEL,
Respondent.

D E C I S I O N

Grievant, Michael A. Rhodes filed a grievance against Respondent, Department of Transportation/Division of Highways (hereinafter "DOH"), on or about March 6, 2009, protesting his classification. Respondent, West Virginia Division of Personnel (hereinafter "DOP"), is an indispensable party. The Statement of Grievance reads: "On 3/5/09, informed of refusal of reallocation." Grievant seeks relief as follows: "Reallocation granted with back pay & interest; to be made whole."

A waiver agreement was executed by the parties and as authorized by W. VA. CODE § 6C-2-4 (a)(4) this matter proceeded directly to level three. A level three hearing was held before the undersigned Administrative Law Judge on January 21, 2010, in the Grievance Board's Charleston office.[1] Grievant appeared in person and was represented by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent DOH was represented by counsel Robert Miller, Division of Highway's Legal Division. Respondent DOP was represented by Karen O'Sullivan Thornton, Assistant Attorney General. During

[1] It was clarified at the level three hearing that Grievant was not refused a reallocation on 3/5/09, rather he discovered that he had been denied a temporary upgrade. The hearing proceeded with the grievance as a classification matter, seeking a reallocation of Grievant's position to the classification of Administrative Services Assistant 1.

the litigation of this Grievance, the following individuals testified: (1) Grievant, (2) Jeff Black, Director Human Resources, DOH, (3) Barbara Jarrell, Senior Personnel Specialist, Classification and Compensation, DOP, (4) Darrell Allen, Division Director Contract Administration Division, DOH, and (5) Assistant Director Michael Skiles.

This case became mature for decision on February 26, 2010, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. The parties submitted fact/law proposal documents.[2]

Synopsis

Grievant commenced employment with Respondent as an Office Assistant 3, pay grade 7 with responsibilities for personnel processes in the Contract Compliance Division. Some of the former responsibilities of one or more employees no longer with the agency were assimilated into Grievant's assigned activity. The pay grade of one retired employee, an Accounting Technician 4, was pay grade 9. Grievant has been granted a 5% increase for assumption of additional duties. Grievant is of the opinion his position is misclassified and should be reallocated to the position of Administrative Services Assistant 1, pay grade 10.

West Virginia Division of Personnel is the entity of West Virginia State government charged with classifying positions in the West Virginia Classified Service. DOP, after proper review, made the determination that Grievant's position was properly allocated to the OA 3 classification. Simply because Grievant now performs some duties that were

[2] DOH deferred to DOP's decision on the issue of appropriate placement of Grievant's position in the classification system and did not submit separate fact/law proposals.

previously performed by an employee in a higher pay grade does not establish misclassification nor necessitate reallocation of a position. Where those duties are at the same level of difficulty and complexity of the current duties in the position, then the position need not be reallocated. This Grievance is DENIED.

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

Findings of Fact

1. Grievant was hired into an Office Assistant 3 (hereinafter "OA 3") classified position, pay grade 7, on June 14, 2002. For the general duties and responsibilities of an OA 3, see finding of fact 18.

2. Grievant was employed by Respondent DOH, in a position classified as an OA 3, at all times relevant to this grievance. Grievant is employed in the Contract Administration Section, Construction Division. This unit has approximately thirty employees.

3. Some time near the end of January 2004, an employee by the name of Joyce Gurski retired from the DOH. Ms. Gurski occupied a position classified as an Accounting Technician 4, pay grade 9.

4. Upon the retirement of Ms. Gurski, Grievant assumed numerous duties that had previously been performed by Ms. Gurski in addition to the duties and responsibilities he was already assigned.

5. Duties assumed by Grievant included some additional payroll and accounting duties; managing of equipment inventory including fleet vehicles and assisting in administrative services.

6. On October 1, 2004, DOH submitted a personnel transaction along with a Position Description Form[3] (hereinafter "PDF") to DOP requesting a reallocation of Grievant's position for assuming the additional duties.

7. Grievant and his supervisors, Assistant Director Micheal Skiles and Director Darrell Allen, signed the PDF certifying that the duties and responsibilities listed for Grievant's position on the PDF were accurate and complete. R. Ex. 3.

8. DOP reviewed the PDF and made a determination the position was properly allocated to the OA 3 classification.

9. In December of 2004, a request for reconsideration of the October classification determination was submitted to DOP with a revised PDF for Grievant attached thereto. On December 21, 2004, DOP again determined that the position Grievant occupied was properly allocated to the OA 3 classification. The duties and responsibilities described in the PDF did not persuade or trigger DOP to reallocate the position occupied by Grievant. R. Ex. 2.

10. DOP had occasion to review a PDF of Joyce Gurski. Ms. Gurski was originally employed in a different section of the DOH. The PDF reviewed was dated prior to her transfer into the division in which Grievant works. DOP determined that Ms. Gurski's position in 1998, was classified as an Accounting Technician 4. DOH did not have Ms. Gurski's position reviewed when it was transferred. A 2004 PDF of Ms. Gurski's position was not available.

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[3] The Position Description Form is a document which describes the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a position. This document is the basic source of official information utilized by the DOP to allocate the position to the proper classification. See W. VA. CODE R §§ 143-1-3.70 and §143-1-4.5 *et seq*.

11. DOP, upon reviewing both Ms. Gurski's PDF and all of the PDF's submitted by Grievant, determined that Grievant does not perform the duties that were detailed in the PDF for Ms. Gurski.

12. Some time in early 2005, DOP conducted an on-site audit of Grievant's position. On May 3, 2005, Lowell D. Basford, Assistant Director, DOP, sent a memorandum to Jeff Black, Director Human Resources, DOH, indicating that after yet another review of Grievant's position in addition to the on-site audit, DOP maintained the position was still properly allocated to the OA 3 classification. DOP explained that simply because duties had been added to the position, does not in and of itself justify a reallocation to a higher classification. DOP suggested that DOH consider utilizing the Pilot Strategic Compensation Policy to reward Grievant for the additional duties his position had been assigned. R. Ex. 4.

13. On July 21, 2005, DOH submitted a personnel transaction requesting a salary adjustment of five percent pursuant to the Pilot Strategic Compensation Policy to compensate Grievant for the additional duties he assumed in 2004. This salary adjustment was approved and Grievant was granted a five percent increase in his salary. R. Ex. 4.

14. In May of 2007, after Grievant had been granted and had begun receiving a five percent salary increase as compensation for assumption of the new duties he took on in 2004, DOH submitted to DOP another personnel transaction requesting a reallocation of Grievant's position, based on the same "new" duties he began performing in 2004. A third PDF for Grievant dated April 11, 2007, was attached to the request. This transaction request was disapproved by the DOP on July 6, 2007. R. Ex. 5.

15. On March 19, 2008, Director Black requested the approval to post new duties that had been identified within the DOH in compliance with the DOP's Administrative Rule 9.5a. DOP approved the request to post the new duties. On June 30, 2008, DOH submitted a fourth PDF for Grievant contending the PDF included the new duties that were assigned based on the June 3rd request and sought again to have Grievant's position reallocated. R. Ex. 6.

16. "New" duties listed on the June 2008 PDF were actually the same duties that were assigned to Grievant back in 2004 and no new duties have been recently added to the position. These were the same duties for which Grievant received a five percent salary adjustment in 2005.

17. In review of a June 27, 2008, PDF of Grievant's duties, a November 5, 2008, Position Review Determination Memorandum from Barbara Jarrell, Senior Personnel Specialist, Classification and Compensation, DOP, to Jeff Black, Director Human Resources, DOH, indicating that;

> [DOP] compared the current information for the position against the next previous position description dated April 11, 2007, and did not find a substantial change in the position. The predominate duties of the position are: (1) to provide administrative support for the contract administration division such as payroll, personnel, training and fiscal services; (2) serve as training coordinator, maintaining CEU's for technical staff and supervisory training; and (3) responsible for fleet vehicles. These are the same primary duties assigned to the position at the last review. The duties listed at item #26 in the position description form by the supervisor are still consistent with the current classification.

R. Ex. 6. It was DOP's determination that Grievant's position was properly allocated to the Office Assistant 3 classification.

18. The pertinent sections of the classification specifications for the OA 3 and ASA 1 reveal the following:

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.

ADMINISTRATIVE SERVICES ASSISTANT 1

Nature of Work
Under general supervision, performs administrative work in providing support services such as fiscal, personnel, payroll or procurement in a small division or equivalent organization level. May function in an assist role or in a specialized capacity in a large agency or department. Develops or assists in developing and implements plans/procedures for resolving operational problems and in improving administrative services. Work is typically varied and includes inter- and intra-governmental and public contact. Performs related work as required.

Distinguishing Characteristics
Positions in this class are distinguished from the Administrative Services Assistant 2 by the size of the unit served and by the independence of action granted. Positions in a small agency or division may be responsible for a significant administrative component; other positions assist an administrative supervisor in a large state agency. Authority to vary work methods or policy applications or to commit the agency to alternative course of action is limited.

Examples of Work
Confers with inter- and intra-agency personnel to transact business, gather information, or discuss information; may be in a position with public or federal government contact.
Gathers and compiles information for state records; writes reports, balances tally sheets, and monitors inventories, purchases, and sales.
Updates records and contacts employees to gather information; represents the supervisor or unit in the area of assignment at in-house meetings.
Maintains files of information in hard copy files or electronic format; runs reports for regular or intermittent review.
Assists in determining the need for changes in procedures, guidelines and formats; devises a solution; monitors the success of solutions by devising quantitative/qualitative measures to document the improvement of services.
Assists in the writing of manuals in the area of assignment; clarifies the wording and describes new procedures accurately.

19. Further, in December 2008, the DOH requested a temporary upgrade of Grievant's position. This request was disapproved by the DOP on December 23, 2008.

20. DOP made the determination that Grievant's position was properly allocated to the OA 3 classification no less than four different occasions: December 21, 2004, March 27, 2005, July 6, 2007, and June 27, 2008. *See* R. Ex. 2, 3, 4, and 6.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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 the Department of Highways, which utilize such positions, must adhere to applicable portions of the plan in making their employees' assignments. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994). When an employee believes he is performing the duties of a classification other than the one to which he is assigned, DOP must determine whether reallocation is appropriate. *Hart v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009).

Grievant believes he is misclassified. He has requested his position be reallocated to the classification of Administrative Services Assistant 1 and be compensated in a higher

pay grade. DOP Legislative Rule 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." 143 C.S.R. 1 § 3.75. To receive a reallocation, an employee must demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties 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). "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 more closely match another cited Division of Personnel classification specification than the one under which she is currently assigned. *See generally, Hayes v W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); also *see Campbell v. Dep't of Transp./Div. of Highways,* Docket No. 05-DOH-385 (May 26, 2009).

A review of the pertinent sections of the classification specifications for the OA 3 and ASA 1 reveal the classifications are meant to be significantly different. *See* Finding of Fact (FOF) 18. The goal of the reallocation analysis is to ascertain whether an employee's current classification constitutes the "best fit" for the 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). *See Hart supr; Falquero v. Dep't of Envtl. Prot.,* Docket No. 2008-1902-DEP (Feb. 3, 2010).

Grievant has assumed duties over the years and most likely has developed some degree of proficiency. He is respected and thought well of by his supervisors. However, a change of duties alone is not sufficient to qualify for a reallocation. There must be a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.75. Ms. Jarrell testified DOP is required to determine that a significant change in the work performed by a position has occurred when determining whether or not a reallocation is appropriate. The change has to be significant enough that it would cause the scope and nature of the position's work to fit or match another job classification. Classification determinations are made based upon the predominant duties of the position. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990); *See Hart v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009)*; Falquero v. Dep't of Envtl. Prot.,* Docket No. 2008-1902-DEP (Feb. 3, 2010). Ms. Jarrell testified that while Grievant's work has changed since he first took on the position of an OA 3, the new duties assigned to the position did not raise the level of complexity of the job to require a reallocation.[4]

Grievant submitted PDF's to the DOP on 4 different occasions in a period of 5 years between 2004 and 2009.[5] The only time new duties were added to the position was in 2004 when the first PDF was submitted. The duties and responsibilities Grievant listed as

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[4] Further, while Grievant claimed that he took on <u>all</u> of Ms. Gurski's duties when she retired, it came to light that he merely assisted the assistant director after Ms. Gurski's retirement with invoicing and vouchers and they were eventually assigned in full to other employees, not Grievant. It was not established with any degree of certainty that Grievant performed all the duties of an Accounting Technician 4 or those performed by Ms. Gurski.

[5] Each and every time, the DOP made a determination that Grievant's position was properly allocated to the OA 3 classification.

changes did not raise the level of complexity of the job beyond the position's predominant duties associated with the OA 3 classification. An increase in the number of duties 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). Classification determinations are not made based upon comparison to other employees, but upon which classification description is the best fit for that employee's duties. *Baldwin v. Dep't Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999).

Grievant testified that when Ms. Gurski retired, he assumed new duties related to payroll, time and attendance, leave, equipment, inventory and dealing with maintenance and mileage reports for the fleet of under ten vehicles. These duties were in addition to maintaining the duties he was first assigned when hired by the DOH. Grievant contends his job is more administrative work than his classification prescribes. In support of this proposition, Grievant testified that he has represented his division at DOH meetings with other sections, where information relating to personnel and human resources type training, policies, procedures, etc. is discussed and disseminated. Incidental duties which require an inconsequential amount of an employee's time will not warrant a higher classification, if the remainder of his duties are accurately described by his current classification. *Graham v. Nicholas County Bd. of Educ.*, Docket No. 93-34-224 (Jan. 6, 1994).

It was DOP's determination that Grievant does not perform duties that rise to the level of the Accounting Technician 4, pay grade 9, classification, much less to the level of the ASA 1, paygrade 10, classification to which he seeks to be reallocated. Lastly, Ms. Jarrell testified she heard nothing new in the testimony or evidence presented at the hearing that would cause her to believe Grievant's position should have been reallocated

to the ASA 1 classification and the "best fit" within the current classification plan for Grievant's position is the OA 3 classification. DOH deferred to DOP's statutory authority in regard to determining the classification of employees.

It was determined, repeatedly, that the duties performed by Grievant justified a 5% increase in salary in 2005, however, these duties do not constitute a significant change in the kind of duties performed by Grievant. *See* R. Ex. 6, Position Review Determination Memorandum dated November 5, 2008. The Division of Personnel's interpretation and explanation of the classification specifications 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). The clearly wrong standard requires the reviewing authority to presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W.Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007). DOP's determination regarding the classification of Grievant's position is supported by the evidence and Grievant was unable to prove that determination was clearly wrong. Consequently, the grievance is denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. In order to prevail upon a claim of misclassification, a Grievant must prove by a preponderance of the evidence that his duties for the relevant period of time more closely match those of another cited classification specification than the classification to which he is currently assigned. *See generally*, *Hayes v. W. Va. Department of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989). *See Campbell v. Dep't of Transp./Div. of Highways,* Docket No. 05-DOH-385 (May 26, 2009).

3. To receive a reallocation a grievant must demonstrate a significant change in the kind or level of duties and responsibilities. An increase in number of duties 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). "The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id*.

4. Classification determinations are not made based upon comparison to other employees, but upon which classification description is the best fit for that employee's duties. *Baldwin v. Dep't Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999). The key to the analysis is to ascertain whether Grievant's current classification constitutes the "best fit" for their 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). *See Hart v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009)*; Falquero v. Dep't of Envtl. Prot.,* Docket No. 2008-1902-DEP (Feb. 3, 2010).

5. The Grievance Board's role is not to act as an expert on matters of classification of positions. *Moore v. W. Va. Dep't of Health & Human Resources*, 94-HHR-126 (Feb. 3, 1997).

6. The State Personnel Board and the Director of DOP have wide discretion in performing their duties although they cannot exercise their discretion in an arbitrary or capricious manner. *See, Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *Aff'd* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

7. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See, Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

8. The Division of Personnel's interpretation and explanation of the classification specifications 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). The clearly wrong standard requires the reviewing authority to presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W.Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

9. DOP performed the required examination of Grievant's position and determined that the best fit for the position is the OA 3 classification. DOP's determination regarding the classification of Grievant's position is supported by the evidence and Grievant was unable to prove that determination was clearly wrong.

10. Grievant has not shown by a preponderance of the evidence that his duties and responsibilities of his position fall more closely within the ASA 1 classification than the OA 3 classification.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 15, 2010

Landon R. Brown
Administrative Law Judge