THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRETT CABELL, ET AL,
Grievants,

v. **Docket No. 2010-1552-CONS**

DIVISION OF HIGHWAYS and
DIVISION OF PERSONNEL,
Respondents.

DECISION

Brett Cabell, Larry "Mike" Vasarhelyi, Randy Blevins, Harold Facemyer, Donald Underwood, Shelby Sharps and Paul Lister ("Grievants") are all employed by the West Virginia Division of Highways in the Claims Section of the DOH Legal Division. At the time the grievance was filed, six of the Grievants were employed in the Investigator 2 classification and one was employed as an Investigator 1. Grievants filed individual level one grievances on February 7, 2006, in which they alleged that their positions are misclassified and that their positions should be in the Investigator 3 classification. They also alleged that they were not receiving similar pay as others in the Investigator classification which constituted discrimination. As relief Grievants sought:

> . . . [T]hat the disparity in pay be corrected in that [Grievants'] salaries be increased to be commiserate with that of other Investigators conducting this level of work. That [Grievants] should be promoted to Investigator 3s as that is the job [Grievants] currently perform. In short that [Grievants] be made whole.

Grievants also requested that their grievances be consolidated.

A Level one informal conference was held with Grievants' immediate supervisor, Ben Savilla, on February 13, 2006.[1] On the same day, Mr. Savilla sent a letter to Anthony Halkias, Esquire[2], Director of the DOH Legal Division, stating that he agreed with the Grievants but he lacked authority to grant the relief sought and he forwarded their grievance to level 2.[3]

Grievants appealed their separate grievances to level two where they were consolidated. Director Halkias issued a memorandum dated March 6, 2006, in which he also stated that he was unable to grant the relief requested by Grievants because it was beyond his authority to do so.[4] He also noted that the Grievants and Respondent DOH agreed to extend the statutory time limit for filing an appeal to level three and the Grievants would submit their positions to be audited for reallocation by the Division of Personnel. The parties agreed that the time period within which the Grievants must file an appeal to level three would begin "on the day [Grievants were] notified of the outcome of [the] job audits." [5]

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[1] 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). This grievance was initially filed under the old grievance procedure which had four steps including an informal conference held with the Grievants immediate supervisor. When the grievance advanced to level three, the parties agreed to proceed under the new grievance procedure. Therefore, it is being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

[2] Anthony Halkias, Esquire, has served in the position of Director of the DOH Legal Division for approximately four decades.

[3] Grievant's Exhibit 17.

[4] Grievant's Exhibit 19.

[5] Grievant's Exhibit 19.

Grievants prepared position description forms ("PDF")[6] and submitted them to Jeff Black, Director of the DOH Human Resources Division, who forwarded the PDF to the Division of Personnel ("DOP"). After making an initial assessment of the PDF, the Manager of the DOP Classification and Compensation Section at that time, Lowell Basford[7], determined that the DOP should take no further action on the PDF because there was a Grievance pending.[8]

After an exchange of letters between counsel for Grievants and counsel for DOH, Grievants' counsel filed a Petition for Writ of Mandamus in the Circuit Court of Kanawha County against the DOH, DOP, and the Public Employees Grievance Board seeking, among other things, a level three hearing concerning the grievance. The parties agreed to proceed to level three of the grievance procedure after DOP conducted a desk audit of Grievants' positions, with both the DOH and the DOP as Respondents.[9]

Prior to the level three hearing a subpoena was issued, at the request of the Grievants, for an employee of the Department of Health and Human Resources whose position is classified as an Investigator 3. Counsel for the Department of Health and Human Resources ("DHHR") moved to quash the subpoena based upon the fact that this

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[6] 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* 143 C.S.R. 1 § 3.70.

[7] Mr. Basford has retired from the DOP but still does consulting work for that agency.

[8] Testimony of Lowell Basford, level three hearing.

[9] The Public Employees Grievance Board did not take an active role in the settlement of the Mandamus action. The DOP was not a party to the grievance until the agreement was reached to proceed to level three of the grievance procedure.

employee's testimony would not be relevant to the grievance and therefore the subpoena was improper. A telephonic hearing was held pursuant to the motion. Heather Laick, Esquire, participated on behalf of the DHHR, Robert Miller, Esquire, participated for the DOH, Karen Thornton, Esquire, represented the DOP and Richard Monahan, Esquire, participated on behalf of Grievants. After hearing the arguments, the motion was granted based upon Grievance Board's numerous prior decisions which have routinely held that "[c]lassification 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 of Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999); *Garretson v. W. Va. Dep't of Health & Human Res. and Div. of Pers.*, Docket No. 07-HHR-397(Oct. 22, 2008)." *Hart v. Dept. of Health & Human Res. and Div. of Pers.,* Docket No. 2008-0641-DHHR (Feb. 19, 2009). The undersigned ruled that evidence related to the duties of Investigators outside of the DOH was not relevant and would not be admitted at the level three hearing.[10]

A level three hearing was conducted over three days in the Charleston office of the West Virginia Public Employees Grievance Board on December 7 and 8, 2010, and February 25, 2011. Grievants Cabell, Vasarhelyi, Blevins and Facemyer personally appeared at the hearing on all three days. Grievant Underwood indicated that he was engaged in law school examinations in Michigan and would not be able to attend. Grievant Sharps was ill and did not attend. All of these Grievants were represented by Richard A. Monahan, Esquire, from

[10] Grievants' objections were noted for the record and counsel for Grievants was given an opportunity to vouch the record on this issue prior to the start of the level three hearing.

the Masters Law Firm. Grievant Lister did not attend the hearing and is *pro se.* He communicated to the parties that he wanted to continue with the grievance but would not attend the hearings. Robert Miller, Esquire, from the DOH legal division represented the DOH and the DOP was represented by Karen Thornton, Esquire, Senior Assistant Attorney General. After the conclusion of the testimony, the parties agreed to submit proposed findings of fact and conclusions of law, the last of which was received on May 17, 2011. The consolidated grievance became mature for decision on that date.

Synopsis

Grievants contend that their positions are misclassified as Investigator 2. They believe that they should be in the Investigator 3 classification because they perform the most complex and complicated investigations conducted by the Division of Highways. Respondents do not dispute that Grievants conduct complex and complicated investigations. They note that, by and large, Grievants perform the entire gamut of investigations undertaken by the DOH Claims Section. Division of Personnel finds that the classification of Investigator 3 is reserved for positions which are assigned the most complex and complicated investigations to the exclusion of less complex and routine tasks. Because the DOH has not chosen to assign the most complex investigations to specific individuals, no employees have those tasks as their predominant duties. Grievants' positions are appropriately in the Investigator 2 classification.

Grievants argue that they have been subjected to pay discrimination because there are DOH employees who are in Investigator 1 positions who are paid more than Grievants. They also note that DOH employees in Investigator 2 positions are paid more than Grievants

even though these employees were hired after Grievants and perform similar duties.

Grievants and all of the other Investigators they point to are paid within the pay grade assigned to their particular classification. Therefore, Grievants are not being subjected to pay discrimination within the state compensation system. *See, Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievants Brett Cabell, Larry "Mike" Vasarhelyi, Randy Blevins, Harold Facemyer, Donald Underwood, Shelby Sharps and Paul Lister are all employed by the West Virginia Division of Highways in the Claims Section of the DOH Legal Division. This grievance was originally filed on February 7, 2006.

2. Grievant, Brett Cabell, has been employed by the DOH in the Investigator 2 classification since 2004. His tenure with the DOH was interrupted for three years by service with the National Guard in Iraq.

3. Prior to employment with the DOH, Grievant Cabell served in the United States Air Force for seven years and with the Kanawha County Sheriff's Department for fifteen years. He also was self-employed in a private business for a period of time.

The duties performed by Grievant Cabell include the following:

- Reimbursable claims - Tracking and collection from individuals who owe the state debts for damage to property that occurred as a result of traffic accidents.[11]

[11] The reimbursable claims are among the least complicated work done by the Investigators. For the first few years of his employment, Grievant Cabell performed mostly

- Internal Investigations - Investigating allegations against employees of the DOH regarding acts of fraud, theft or various other policy violations which may lead to discipline.
- Traffic Accidents - Investigate, photograph, take measurements and document automobile accidents which lead to property damage. These investigations help determine if the state had responsibility for the accident due to road conditions or maintenance and whether state property was damaged due to the acts of vehicle operators.[12]
- Utility Claims - Investigating allegations that damage and interruption to utilities are caused by DOH worker in the construction of highways.
- Condemnation Cases - Civil actions where the state is taking private property for public purposes and compensating the landowner at fair market value, sometimes determined by a jury.
- Occasionally assist in the training of new Investigators when they are hired by the DOH.[13]

4. Investigations of accidents may include complicated reconstructions of the accident from statements, photographs, measurements and physical evidence collected by the investigator at the accident scene. Large sums of money may be involved in litigation related to the automobile accidents and the investigations provide crucial evidence in that litigation. Investigators provide testimony, assist DOH attorneys in preparation for hearings and trials as well as prepare answers for discovery related to vehicular accidents and internal investigations.

5. Internal investigations are often very sensitive and must be conducted with discretion to avoid false accusations of wrong doing that can have an unwarranted negative

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this kind of work. Now nearly all of that work is assigned to a Paralegal who is employed in the Claims Section. None of the investigators routinely perform these tasks.

[12] The investigation of traffic accidents and claims for property damage were also referred to throughout the level three hearing as Court of Claims work.

[13] On rare occasions, more that one Investigator is assigned to a single case. In those instances, the more senior Investigator acts as the lead Investigator for the case.

impact on an employee's career and reputation. They are complicated by the fact that the persons being investigated are often employed by the same agency as the Investigators. These investigations are often routine, mostly involving the taking of statements. Occasionally they involve complicated fraud schemes and the theft of significant public funds.

6. DOH averages billing approximately seven to eight million dollars worth of reimbursable claims each year. Grievants conduct the investigations related to these claims.

7. With the exception of the assignments performed by Shelby Sharps, the DOH does not segregate the assignments given to the Investigators as to type, complexity or difficulty. All of the Grievants, except Ms. Sharps, do a variety of the investigations performed by the unit, including the most complex and complicated investigations, the least difficult investigations and all duties that may fall between those extremes. No Investigator in the DOH Claims Section is assigned all, or most, of the complex investigations conducted by the unit. There has never been an employee for the DOH in the Investigator 3 classification.

8. The majority of the investigations conducted by Grievants are routine in nature. Occasionally each Investigator in the Claims Section, with the exception of Grievant Sharps, is required to perform an investigation which is sensitive and complex.

9. At the time the grievances were filed, Benny Savilla was the supervisor for the DOH Claims Section. He supervised Grievants. Near the end of Mr. Savilla's tenure with the DOH, he became extremely ill and missed a great deal of work. During his absence a number of the Grievants filled in for him by assigning work, completing paperwork and performing general supervisory work for the section. Grievants Facemyer, Blevins and

Vasarhelyi performed most of this work. No temporary upgrade was sought by or given to any of the Grievants during this period which lasted approximately ten months.

10. None of the Grievants performed evaluations of other employees, directed other employees' work, assigned work to other employees, approved leave forms or performed any other tasks that are consistent with being lead workers or supervisors.[14] The only exception being that Grievants Blevins, Facemyer and Vasarhelyi performed some supervisory duties during Ben Savilla's illness and after his death, until his position was filled.[15]

11. Lead work must include regular, recurring and ongoing responsibility for a position to be considered a lead worker. Occasionally, training a newly hired employee or assisting in supervision during an employee's limited absence does not qualify as lead work.[16]

12. Shelby Sharps' primary duties entail working in the Claims Section office on accidents involving damage to DOH vehicles and equipment. These duties do not generally require her to leave the office and are considered to be among the less complex

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[14] *See*: Glossary of Classification Terms Grievants' Exhibit 10. "**Lead Worker** -. . . incumbent [who is] assigned the on-going responsibility of scheduling and/or reviewing the work of other co-workers and guiding and training them while performing identical or similar kinds of work." "**Supervisor** - formally delegated responsibility for planning, assigning, reviewing and approving the work of three or more full-time employees which also includes initiating disciplinary actions, approving sick and annual leave requests, conduct performance evaluations, and recommend salary increases."

[15] Grievant Vasarhelyi has been promoted to the position of the manager of the Claims Section and now performs supervisory duties. However, at all times relevant to this grievance, he was employed in the Investigator 2 classification.

[16] Level 3 testimony of Lowell Basford.

investigations required by the Claims Section. Ms. Sharps does not perform the more complex investigations required to be performed by the remaining Investigator 2s in DOH. Grievant Sharps helped Grievant Facemyer in training Grievant Cabell.

13. Grievant Randall Blevins was initially employed by the DOH as an Investigator 1 in 1996. After a period of time, Grievant Blevins began receiving assignments to a wide variety of investigations and received a promotion to Investigator 2. Prior to his employment with the DOH, Grievant Blevins had been employed by the West Virginia State Police for more than twenty-two years and retired as a First Sargent.

14. Around 2005, Earl Boyle, DOH Investigator, was transferred from the DOH Audit Section to the Claims Section and Grievant Blevins and other DOH Investigators in the Claims Section began performing internal investigations at that time.

15. Grievant Blevins performs all of the duties and investigations assigned to the DOH Investigators. While all of the Investigators perform internal investigations, Grievant Blevins is generally assigned the most difficult and sensitive tasks in this area.

16. Grievant Harold G. Facemyer, Sr. was employed as an Investigator 2 in the DOH Claims Section in 2001. Prior to his employment with the DOH, Mr. Facemyer had spent four years in the military, twenty years with the West Virginia State Police and more than seven years as an investigator for the Masters and Taylor law firm. Grievant Facemyer retired from the DOH effective February 23, 2007.

17. Grievant Facemyer performed the entire range of Investigation duties assigned in the Claims Section and was involved in some complex condemnation cases. He was only involved in a few Court of Claims cases. He helped train Investigators who were hired after him and helped perform supervisory duties during Mr. Savilla's illness.

18. Grievant Larry Michael Vasarhelyi was hired by the DOH as a temporary employee in January 1999. He was employed as a permanent employee in June 1999 and his position was classified as an Investigator 1 and he was later promoted to an Investigator 2. Prior to being employed by the DOH, Grievant Vasarhelyi served in the United States Marine Corps for four years and as a police officer for ten years. As part of his tenure as a police officer, Mr. Vasarhelyi served as the Chief of Police in Logan, West Virginia.

19. Originally, Grievant Vasarhelyi spent the vast majority of his time on Court of Claims cases after he had spent a couple of weeks with Grievant Sharps learning how to fill out accident reports.[17] After the internal investigations were assigned to the Claims Section with the transfer of Investigator Boyle, Mr. Vasarhelyi began to do a wider variety of the Investigations conducted by the Claims Section. He performed all of the types of investigations required by the Claims Section and has served as the lead investigator in cases where he has been assisted by auditors. Mr. Vasarhelyi assisted with the Claims Section supervisory tasks during Mr. Savilla's illness and after his death. The Supervisor position for the Claims Section was eventually posted and subsequently filled by Mr. Vasarhelyi.

20. Sometime after 2006, the DOH installed the Transportation Management Center ("TMC"). This center receives emergency calls regarding accidents on the State Roadways. The DOH Investigators are on call around the clock to perform investigations of incidents reported to the TMC. This system has changed and likely increased the hours the

[17] The accident report forms are referred to as AR13s.

Investigators work, but it does not affect the nature and complexity of the investigations they perform.

21. The Department of Transportation has also instituted an "Office of Investigations Hotline." This is a toll-free telephone number and e-mail address where individuals may report allegations of "fraud waste and abuse" taking place in the Department of Transportation, including the DOH. Grievants are required to perform investigations into many of the allegations made to this Hotline. This initiative has affected the number of internal investigations that Grievants must perform. It does not to require a different type of investigation that is either more complex or complicated than those Grievants performed prior to its implementation.

22. Clyde Miles was employed as DOH Investigator 2. He retired in 2008. He did not work in the Claims Section. His duties did not include the same types of investigations performed by Grievants. His work is more related to investigating and addressing public complaints regarding the state roadways and is not as complex as some of the investigations performed by Grievants. Investigator Miles' duties included interviewing witnesses, obtaining evidence, and writing reports related to his investigations. He also investigated internal personnel matters and allegations of theft by employees on the district level. The salary received by Mr. Miles as an Investigator 2 is greater than the salary paid to nearly all of the Grievants. However, Mr. Miles' salary falls within the pay grade assigned to the classification of Investigator 2.

23. The Investigator 1 classification is compensated at pay grade 12. Pay grade 12 has a minimum monthly salary of $2,180 and a maximum of $4,033. The Investigator 2

classification is compensated at pay grade 13. Pay grade 13 has a minimum monthly salary of $2,311 and a maximum of $4,276.

24. The following individuals were all Investigators employed by the DOH in November 2005, shortly before the consolidated grievance was filed. Listed beside each name is the employee's classification, pay grade, and monthly salary as of November 1, 2005.

Randall Blevins	Investigator 2	Pay Grade 13	$3189.50
Larry M. Vasarhelyi	Investigator 2	Pay Grade 13	$2968.50
Donald Underwood	Investigator 2	Pay Grade 13	$2768.50
Shelby Sharps	Investigator 2	Pay Grade 13	$3366.50
Harold Facemyer	Investigator 2	Pay Grade 13	$2644.50
Brett Cabell	Investigator 2	Pay Grade 13	$2523.50
Clyde Miles	Investigator 2	Pay Grade 13	$2643.50
Paul Lister	Investigator 1	Pay Grade 12	$3074.00
Douglas Sammons	Investigator 1	Pay Grade 12	$3509.09
John Hoover	Investigator 1	Pay Grade 12	$3061.00
Eleanor Petrigac	Investigator 1	Pay Grade 12	$3509.00 [18]

25. The monthly salary for some of the employees whose positions are classified as Investigator 1 exceeded the monthly salary paid to Grievants who were Investigator 2s. All of the monthly salaries paid to Investigators fell within the pay grade assigned to their

[18] This information was compiled in this format by the undersigned from information related to salary and classification of the identified employees provided in Grievant's Exhibit 2.

classification - pay grade 12 for Investigator 1 classification and pay grade 13 for Investigator 2 classification. *See* Grievant's Exhibit 2.

26. The monthly salary paid to Eleanor Petrigac in 2005 appears to have exceeded the maximum monthly salary for pay grade 12 as it was set out in July 1, 2002. At that time, the maximum monthly salary for pay grade 12 was $3,426.00 Respondent DOH's Exhibit 1. Ms. Petrigac's monthly salary in November 2005 was $3,509.00. Grievant's Exhibit 2. No pay grade tables were submitted for that year. The maximum monthly salary for the Investigator 1 position in pay grade 12 at the time of the hearing, December 2010, was $4,033.00 Grievants' Exhibit 11. Ms. Petrigac's monthly salary in September 2009, was $3,718.00, within pay grade 12. Given the pay data available for Ms. Petrigac, it is more likely than not that her monthly salary has remained within pay grade 12 at all times she has been employed as an Investigator 1 by the DOH.

27. Grievants prepared and presented PDFs describing their duties to the DOH after the level two hearing with Director Halkias. The PDFs were originally submitted to Human Resources Director Black who reviewed them and forwarded them to the DOP. The PDFs were identical with the exception of the one submitted by Grievant Sharps.

28. With the exception of Grievant Shelby Sharps, the remaining Grievants identified four duties that were added to their positions since they were initially classified. Those duties were the following:

- [DOP] personnel investigations which are sensitive and complex concerning violations of the rules and regulations of West Virginia and Federal Laws concerning civil and/or criminal violations of the law involving the [DOH].
- Investigations consist of gathering evidence such as surveillance, video, audio, photographs, constructing diagrams, obtaining documentation of physical evidence, conducting witness interviews, site inspection and

reporting with written and oral reports. Provide testimony and expert testimony as needed in Grievance Board, State and Federal Court hearings.

- Evaluation of data for evidence of fraud or corruption with DOH agencies.
- Use computer systems, information technology and other means to locate and track debtors to update and maintain computer files and records.

Grievant Sharps only listed the last duty related to the use of technology as a new duty. Grievant's Exhibits 20 and 21. *See also,* Respondent DOP's Exhibits 1 and 3.

29. None of the duties added to the positions held by Grievants require them to perform tasks outside of their present classification.

30. With the exception of the technology duties, the remaining three areas of responsibility relate generally to the internal investigations which were added in 2005 when that responsibility transferred from the DOH Audit Section to the DOH Claims Section.

31. The DOP Classification Specifications for the position of Investigator 1 contains the following information about that position:

INVESTIGATOR 1

Nature of Work
Under general supervision, performs entry level investigative work by obtaining evidence of violations of the rules and regulations of a state agency or of state or federal laws or involving claims for damages by or against a state agency. Involves direct public contact work as well as contact with insurance company representatives and lawyers. Work requires the use of a personal automobile for travel. Employee is subject to on-call status during non-business hours. May be required to deal with situations which are potentially dangerous. Performs related work as required.

Examples of Work
Conducts field investigations to ascertain facts and obtain evidence on reported violations; obtains statements concerning alleged violations.
Explains the law or other agency regulations to the party in violation to secure voluntary compliance.
Checks business records to determine amount of tax due to the state and collects delinquent accounts.

Keeps records and makes oral and/or written reports of all investigations.
Locates witnesses and obtains facts and evidence needed by attorneys in litigation of cases.
Interviews complainants and witnesses using prescribed procedures.

Grievant's Exhibit 7.

32. The DOP Classification Specifications for the position of Investigator 2 contains the following information about that position:

INVESTIGATOR 2

Nature of Work
Under general supervision, performs full-performance level work by obtaining evidence of reported fraud or violations of the rules and regulations of a state agency or of state or federal laws or involving claims for damages by or against a state agency. Involves direct public contact work as well as contact with insurance company representatives and lawyers. Work requires the use of a personal automobile for travel. Employee is subject to on-call status during non-business hours. May be required to deal with situations which are potentially dangerous. Performs related work as required.

Examples of Work
Conducts field investigations to ascertain facts and obtain evidence on reported violations; obtains statements concerning alleged violations.
Explains the law or other agency regulations to the party in violation to secure voluntary compliance.
Checks business records to determine amount of tax due to the state and collects delinquent accounts.
Initiates prosecution of violators and testifies in court as an expert state witness.
Investigates business and professional establishments for proper licenses and cites violations.
Keeps records and makes oral and/or written reports of all investigations.
Locates witnesses and obtains facts and evidence needed by attorneys in litigation of cases.
Conducts legal research and locates the section of the West Virginia Code that covers the complaint under investigation.
Interviews complainants and witnesses using prescribed procedures.
Reviews and scrutinizes subpoenaed financial records, documents and records for securities violations.
Performs internal audits to determine misuse of time, funds and/or equipment.
May investigate claims against the state; may prepare reports and evidence for the Grand Jury.

Grievant's Exhibit 8.

33. The DOP Classification Specifications for the position of Investigator 3 contains the following information about that position:

INVESTIGATOR 3

Nature of Work
Under limited supervision, performs advanced level work by obtaining evidence of reported fraud or violations of the rules and regulations of a state agency or of state or federal laws or involving claims for damages by or against a state agency. Involves complex direct public contact work as well as contact with insurance company representatives and lawyers. Performs the most complex and sensitive investigations undertaken by the unit and may serve as a lead worker to other unit investigators or other employees. Work requires the use of a personal automobile for travel. Employee is subject to on-call status during non business hours. May be required to deal with situations which are potentially dangerous. Performs related work as required.

Examples of Work
May lead the work of the employees; assigns and reviews work; provides direction and guidance to other employees; trains new employees.
Conducts complex field investigations to ascertain facts and obtain evidence on reported violations; obtains statements concerning alleged violations.
Explains the law or other agency regulations to the party in violation to secure voluntary compliance.
Checks business records to determine amount of tax due to the state and collects delinquent accounts.
Initiates prosecution of violators and testifies in court as an expert state witness.
Investigates business and professional establishments for proper licenses and cites violations.
Keeps records and makes oral and/or written reports of all investigations.
Locates witnesses and obtains facts and evidence needed by attorneys in litigation of cases.
Conducts legal research and locates the section of the West Virginia Code that covers the complaint under investigation.
Interviews complainants and witnesses using prescribed procedures.
Reviews and scrutinizes subpoenaed financial records, documents and records for securities violations.
Performs internal audits to determine misuse of time, funds and/or equipment.
May investigate claims against the state; may prepare reports and evidence for the Grand Jury.

Grievant's Exhibit 9.

34. With the exception of Grievant Sharps, Grievants' duties are consistent with the "Examples of Work" listed in the DOP Classification Specifications for both Investigator 2 and Investigator 3. The only real difference in the two sets of examples is the use of the

word “complex” in describing the nature of the field investigations for Investigator 3. While the majority of Grievants’ investigations are routine, they sometimes perform complex field investigations. Grievant Sharps rarely conducts field investigations.

35. The positions of Investigators for the DOH were reviewed and classified in a major State-wide reallocation project that took place in the early 1990s. Lowell Basford was the Manager of the DOP Classification and Compensation Section at that time and served in that position for more than thirty years. The Investigator positions were classified after a collaborative process that included input from the DOH and its employees. No one contested the classification of these positions before this consolidated grievance was filed in 2006.

36. When Grievants’ PDFs were originally submitted to the DOP, Mr. Basford examined them along with the historical data such as: previous PDFs, job descriptions, and job postings, to make a classification determination. He determined that while the volume of the duties may have increased, there was not a significant change in the character of the work performed by Grievants and a reallocation was not proper.

37. Barbara Jarrell is now the manager of the DOP Classification and Compensation Section. She has over thirty years of experience working with State personnel issues and has been employed by the DOP for twenty-two years.

38. When the consolidated grievance was reactivated in 2010, Ms. Jarrell and another DOP personnel specialist, Ms. Wilson, conducted job audits of the positions held by Grievants. They interviewed Grievants Cabell, Vasarhelyi, Sharp, and Lister concerning their

duties and responsibilities and examined examples of their work.[19] They also met with Directors Halkias and Black to discuss the directors' views of the Grievants' positions and the nature of their work. Ms. Jarrell and Ms. Wilson also reviewed the PDFs submitted by Grievants and discussed them in depth with Grievant Cabell who had been selected by Grievants as their spokesperson during the position audit. They also held an extended discussion with Ms. Sharp since her position differed significantly from the other Grievants.

39. During the audit, Grievant Cabell provided the following percentages for the work that he performs as a Investigator 2:

- 60% Reimbursable claims;
- 20-25% Personnel (Internal) Investigations;
- 20% Assisting Attorneys;
- 15% Paralegal Work;
- 15% Evaluation of Data;
- 5-10% Traffic Accident Investigations;
- 2-3% Deed and Title Searches;
- 2-3% Monthly Review of Drivers History.[20]

Grievants' Exhibit 20.

40. After completing the on-site audit, Manager Jarrell reviewed the material gathered as well as the typical historical data to make a reallocation determination. She issued a letter to Director Black dated September 24, 2010, in which she made the following determinations:

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[19] Grievant Vasarhelyi provided Ms. Jarrell with a banker box that was half full of reports and documents that he prepared related to investigations and discovery requests for a particular case. Ms. Jarrell examined these documents as part of her job audit and they were admitted as Grievants' Exhibit 15.

[20] Grievant Cabell noted that it was extremely difficult to allocate percentages to the duties of the Investigators. This difficulty is highlighted by the fact that the percentages provided exceed 100%.

- The primary role for the positions occupied by Brett P. Cabell, Harold G. Facemyer, Donald L. Underwood, Larry M. Vasarhelyi and Randall Blevins remained the same and does not meet the criteria that warrants a reallocation. Therefore the positions. . . are properly classified.
- The primary role for the positions occupied by Paul Lister and Shelby Sharps has changed and meets the criteria for reallocation. We have determined the position occupied by Paul Lister be reallocated to Investigator 2 and the position occupied by Shelby Sharps be reallocated to Investigator 1.

Grievants' Exhibit 12.

Discussion

As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their consolidated 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). 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 first issue in this case is whether the positions held by the Grievants are properly classified. There is no dispute as to whether the Grievants should be classified as Investigators. The question is where their positions fit in the Investigator class series. Grievant Lister was classified as an Investigator 1 when the grievance was filed and the remaining Grievants were classified as Investigator 2. Grievants contend that their positions were misclassified from the beginning, or in the alternative, they have been subjected to significant changes which require that they be reallocated to the Investigator 3 classification. The main thrust of their argument is that the "Nature of Work" section of the classification specifications for Investigator 3 contains the phrase "Performs the most complex and

sensitive investigations undertaken by the unit." Grievants claim that from time to time each of them performs the most complex, sensitive and complicated investigations performed by any Investigators in DOH.

Grievants point to the internal investigations of DOH employees as examples of sensitive investigations and note that some of those investigations involve auditing complicated schemes to defraud the agency of large sums of money. They also cite complicated traffic accidents where complex measurements and calculations need to be made to reconstruct how the accident occurred. Grievants believe the fact that they each perform the most complex investigations performed in the DOH unit, all their positions must be classified as Investigator 3.

Lowell Basford explained that the way the work is organized by an agency has a significant impact on how positions are classified. He pointed out that Grievants likely do investigations that are as complex as any performed by the DOH. However no employee, or group of employees, are routinely assigned the most complex tasks. Rather, all of the Investigators perform the entire gamut of investigation duties, from the most complicated to the least complex. Mr. Basford noted that this method of allocating duties resulted in no Investigators having the most complex investigations as their predominate duties. Since the DOP bases classifications upon the position's predominant duties, none of the Grievants' positions qualify for the Investigator 3 classification. Mr. Basford pointed out that the DOH could assign the most complex cases to a single Investigator which would probably result in that position being classified as an Investigator 3, and indeed some agencies may organize their work in that fashion. However, how an agency decides to organize sections and assign work is not controlled by DOP and there is no requirement that an agency use

one method as opposed to another.

When asked during the job audit, Grievant Cabell apportioned 60% of their work to reimbursable claims which is generally among the least complex work in the Claims Section. Twenty-twenty-five percent of their time was allocated to internal investigations which Mr. Cabell identified as the most sensitive and complex work of the Claims Section. Even when the traffic accidents are added in, because they were cited as being complex as well, they only account for an additional 5-10% of the Investigators' duties. If every internal investigation and traffic accident investigation were extremely complex, they would still only account for a maximum of 35% of the Grievants' work-day responsibilities. To the contrary, Director Black pointed out that many of the internal investigations are quite routine, only requiring the Investigator to take statements from employees and report the results to the assigned attorney. None of the Grievants has the most complex investigations for DOH as a predominate duty.

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 Division of Highways, 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). When employees believe they are performing the duties of a classification other than the one to which they are assigned, DOP must determine whether reallocation is appropriate. *Hart v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009). "The key to the analysis is to ascertain whether a grievant's current classification constitutes the 'best fit'" for his duties. *Carroll v. Dep't of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004). In ascertaining which classification constitutes the

best fit, DOP looks at the predominant duties of the position in question. These predominant duties are deemed to be "class-controlling." *Carroll , supra* (citing *Broaddus v. W. Va. Div. of Human Serv* ., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990)). *Barrett et al. v. Dept. of Health & Human Res. and Div. of Pers*., Docket No. 04-HHR-389 (Dec. 6, 2007). DOP is required to classify a position based on predominant duties, not duties that are performed on an occasional and intermittent basis. *Adkins v. Workforce W. Va. and Div. of Pers.*, Docket No. 2009-1457-DOC (Oct. 13, 2009).

DOP's interpretation and application of the classification specifications at issue are given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) *per curiam*; *See also* 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). 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. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which 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)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Marcum v. Insurance Comm'n. and Div. of Pers.,* Docket No. 2009-0463-DOR (May 24, 2010).

In the instant case, the main characteristics separating the Investigator 2 and Investigator 3 classifications are found in the "Nature of Work" section of the Classification Specifications for Investigator 3 which states the following:

> "Performs the most complex and sensitive investigations undertaken by the unit and may serve as a lead worker to other unit investigators or other employees."[21]

With the exception of Grievant Sharps, Grievants have demonstrated that they occasionally perform the most complex and sensitive investigations assigned in the DOH. But these Investigations are not their predominate duties. In order for a position to be classified as an Investigator 3, that position would have to be routinely assigned the most complex investigations in the unit so that those investigations became the predominate duties for the position. That is simply not done in the DOH Claims Section. Rather Grievant Sharps is routinely assigned investigations that keep her in the office and the remainder of the investigations are split up among the other Grievants. All of them do some complex and sensitive investigations, but the majority of their investigations are more routine. Consequently, Grievants have failed to prove that the DOP classification of their positions is clearly wrong and their grievance must be denied as to this issue.

Next Grievants argue that their positions have changed over time with the addition of significant new duties which justify a reallocation of their positions to the Investigator 3 classification. The new duties related to investigations center around the addition of the internal investigation of allegations of inappropriate actions made against DOH employees. These investigations could range from simple leave violations to complex fraud schemes.

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[21] *See* Grievants' Exhibit 9 and Finding of Fact 32 *supra.*

Grievants note that these investigations became part of their assignments when the duties were transferred from the DOH Audit Section to the DOH Claims Section. Grievants also point to the addition of the Transportation Management Center which receives emergency calls regarding accidents on the State Roadways and the Office of Investigations Hotline for the reporting of allegation of fraud and waste in the Department of Transportation. With the adoption of the TMC, Grievants are on-call around the clock to perform investigations of reported accidents. These reporting systems have changed and likely increased the hours the Investigators work, but they do not affect the nature and complexity of the investigations they perform.

A 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 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). “The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id*. *See, Smith v. Dept. of Envtl. Prot. and Div. of Pers.,* Docket No. 2009-1532-DEP (Apr. 26, 2010). Once again, 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 supra; Falquero v. Dep’t of Envtl. Prot.,* Docket No. 2008-1902-DEP (Feb. 3, 2010).

While there is no doubt that the addition of the internal investigations increased the work load of the Investigators in the DOH Claims Section, it did not change the nature of the work. These investigations fall within the Classification Specifications for Investigator 2. Additionally, the "Nature of Work" section for that classification states that an Investigator 2 may be "subject to on-call status during non-business hours."[22] The addition of the TMC and the Fraud Hotline did not move these positions to a new classification. Accordingly, Grievants did not prove that the DOP's reallocation decision was clearly wrong and their claim on that issue must be denied.

Finally, Grievants argue that they have been discriminated against because other Investigators with less experience and some who are classified as Investigator 1 are paid more than they are. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

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[22] *See* Grievants' Exhibit 8 and Finding of Fact 31, *supra.*

In *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994), the West Virginia Supreme Court of Appeals noted that WEST VIRGINIA CODE § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent, supra*., at Syl. Pts. 2, 3 & 4. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Largent, supra* at 246. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade for their classification. *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.,* Docket No. 02-HHR-366(Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Boothe et al.,* Docket No. 2009-0800-CONS (Feb. 17, 2011); *Laxton v. Dept. of Health & Human Res. and Div. of Pers.,* Docket No. 2009-0686-DHHR (Apr. 14, 2011).

In this case, the evidence demonstrated that every employee whose position was classified as an Investigator 2 was paid in pay grade 13 and every employee whose position was classified as an Investigator 1 was paid within pay grade 12. Since the pay of all the employees was appropriate to their pay grade and classification there is no pay discrimination. *Laxton, supra.* Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their consolidated 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). 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. When employees believe they are performing the duties of a classification other than the one to which they are assigned, DOP must determine whether reallocation is appropriate. *Hart v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009). "The key to the analysis is to ascertain whether a grievant's current classification constitutes the 'best fit'" for his duties. *Carroll v. Dep't of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004)).

3. In ascertaining which classification constitutes the best fit, DOP looks at the predominant duties of the position in question. These predominant duties are deemed to be "class-controlling." *Carroll , supra* (citing *Broaddus v. W. Va. Div. of Human Serv* ., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990)). *Barrett et al. v. Dept. of Health & Human Res. and Div. of Pers.*, Docket No. 04-HHR-389 (Dec, 6, 2007). Predominant duties are not duties that are performed on an occasional and intermittent basis. *Adkins v. Workforce W. Va. and Div. of Pers.*, Docket No. 2009-1457-DOC (Oct. 13, 2009).

4. DOP's interpretation and application of the classification specifications at issue are given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) *per curiam*; *See also* 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).

5. Grievances contesting a grievant's current classification are decided under rules of law which give DOP's interpretation of classification specifications great weight unless that interpretation is shown to be clearly erroneous. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which 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)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Marcum v. Insurance Comm'n. and Div. of Pers.,* Docket No. 2009-0463-DOR (May 24, 2010).

6. Grievants did not prove by a preponderance of the evidence that the classification of their positions as Investigator 2 was clearly wrong or arbitrary and capricious.

7. To receive a reallocation an employee must demonstrate "a significant change in the kind or level of duties and responsibilities." 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). "The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id*. *See, Smith v. Dept. of Envtl. Prot. and Div. of Pers.,* Docket No. 2009-1532-DEP (Apr. 26, 2010).

8. Grievant's did not prove by a preponderance of the evidence that the DOP decision that the changes in their duties were not sufficient to require a reallocation of their position, was clearly wrong or arbitrary and capricious.

9. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

10. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade for their classification. *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.,* Docket No. 02-HHR-366(Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Boothe et al.,* Docket No. 2009-0800-CONS (Feb. 17, 2011); *Laxton v. Dept. of Health & Human Res. and Div. of Pers.,* Docket No. 2009-0686-DHHR (Apr. 14, 2011).

11. Since the pay of all the employees cited by Grievants was appropriate to their pay grade and classification, Grievants did not prove by a preponderance of the evidence that they were subjected to pay discrimination. *Laxton v. Dept. of Health & Human Res. and Div. of Pers.,* Docket No. 2009-0686-DHHR (Apr. 14, 2011).

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: SEPTEMBER 16, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE