WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHELLE DAWN JAMES,
Grievant,

v. **Docket No. 2011-0441-CONS**
DIVISION OF REHABILITATION SERVICES
and DIVISION OF PERSONNEL,
Respondents.

DECISION

This grievance was filed by Grievant, Michelle Dawn James, against Respondents, Division of Rehabilitation Services (DRS) and Division of Personnel (DOP). Grievant filed two grievances. On June 9, 2010, Grievant filed grievance docket number 2010-1554-DEA, regarding reallocation to an Administrative Services Manager IV. On August 20, 2010, Grievant filed grievance docket number 2011-0203-DEA, regarding reallocation to an Administrative Services Manager IV. Grievant asserts she should be reallocated from her current classification as an Administrative Services Manager III (ASM III) to Administrative Services Manager IV (ASM IV). For relief, Grievant seeks back pay from January 1, 2007, when Grievant asserts she first began assuming the duties of an ASM IV. Grievant also seeks "for applicable taxes and retirement be paid from the back pay amount."

A level one conference was held on August 20, 2010. The level one decision, by Director Deborah Lovely for Respondent DRS, stated that Director Lovely agreed that Grievant performs the duties of an ASM IV; however, she did not have the authority to

grant Grievant's relief. The two grievances, docket numbers 2010-1554-DEA and 2011-0203-DEA, were consolidated on September 29, 2010. The consolidated grievance is docket number 2011-0441-CONS. The Division of Personnel was joined as a party respondent on September 29, 2010. A level two mediation was held on November 5, 2010. A level three hearing was held at the Grievance Board's office in Charleston, West Virginia, on February 11, 2011. Grievant appeared *pro se*. Respondent DRS was represented by Ms. Katherine A. Campbell, Assistant Attorney General. Respondent DOP was represented by Ms. Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on March 11, 2011, upon final receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant has been employed as an Administrative Services Manager III since May 1, 2006, and in that time her job duties have changed. The Division of Rehabilitation Services (DRS), Respondent, has undergone significant changes since Grievant started the position on May 1, 2006. DRS's on-site facility, the Rehabilitation Center, has closed. This closure has brought a new level of responsibility to Grievant's position by increasing the budget for which Grievant is solely responsible, to 113 million dollars. Grievant is now a member of the Director's Executive Management Team which meets weekly to provide input into all agency decisions. Grievant has the additional responsibility of the budget of the Disability Determination Section (DDS) of DRS. DDS is 100% funded by the federal government. Grievant is now responsible for supervising managerial, professional, technical and clerical employees. Grievant is solely responsible for the entire budget of DRS. Given the increasing duties of Grievant since DRS has undergone significant

changes, the predominance of her duties shifted to fall more within the Administrative Services Manager IV classification than her former classification. The grievance is granted.

Findings of Fact

1. Grievant is employed by the West Virginia Division of Rehabilitation Services (DRS) as an Administrative Services Manager III. Grievant's working title is "Chief Financial Officer."

2. Grievant holds a Bachelor's Degree in Accounting and is currently licensed as a Certified Public Accountant by the West Virginia Board of Accountancy.

3. Grievant has held her current position since May 1, 2006, but first began to work for DRS as an Internal Auditor in 2005.

4. On March 8, 2010, Grievant completed a Position Description Form[1] (PDF) requesting a reallocation of her current classification as an Administrative Services Manager III (ASM III) to Administrative Services Manager IV (ASM IV).

5. Grievant's reallocation request was denied by the West Virginia Division of Personnel (DOP) on June 4, 2010.[2]

6. DRS requested DOP to reconsider its denial via letter[3] dated July 8, 2010.

7. On August 6, 2010, DOP reaffirmed its previous denial of the reallocation

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[1]Respondent DOP's Exhibit No. 1.

[2]*See* Respondent DOP's Exhibit No. 2.

[3]Respondent DRS's Exhibit No. 1.

request.[4]

8. DOP did not conduct a desk audit to observe the functions of Grievant's position.

9. The DOP Classification Specification for Administrative Services Manager III[5] reads in part:

> **Nature of Work**
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> Under administrative direction, manages an organizational section providing administrative and support services in a division. The operations, policy, work processes, and regulatory requirements of the section are complex, varied, dynamic, and requiring substantial depth of analysis and interpretation of theory, principles, practices, and regulations of a professional or administrative field. Involves the supervision of professional, technical and clerical employees. The scope of responsibility includes planning the operations and developing employees; evaluating unit operations; developing budget needs; researching new procedures and improvements; interpreting statutes, regulations, and policies. Performs related work as required.
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> **Distinguishing Characteristics**
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> The Administrative Services Manager 3 is distinguished from the Administrative Services Manager 2 by responsibility to manage a statewide administrative support function of the department. Positions having responsibility to manage a department-wide support function involving an established professional field (i.e., accounting) including the supervision of a significantly large staff of professional, technical, and clerical employees may also be allocated to this class.

10. The DOP Classification Specification for Administrative Services Manager IV reads in part:

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[4] *See* Respondent DOP's Exhibit No. 3.

[5] Respondent DOP's Exhibit No. 6.

Nature of Work

> Under administrative direction, performs administrative work at the advanced level, managing an organizational section providing administrative and support services in a department where operations, policy, work processes, and regulatory requirements of the section are complex, varied, dynamic. Work requires substantial depth of analysis and interpretation of theory, principles, practices, and regulations of a professional or administrative field. Duties involve the supervision of managerial, professional, technical and clerical employees. The scope of responsibility includes planning the operations and procedures of the unit; directing the work of employees; developing employees; evaluating unit operations; developing budget needs; researching new procedures and improvements; interpreting statutes, regulations, and policies. Positions at this level report to the division head and have primary responsibility for the administrative support functions for a large state division. Performs related work as required.

Distinguishing Characteristics

> The Administrative Services Manager 4 is distinguished from the Administrative Services Manager 3 by responsibility to manage a statewide administrative function of the largest state divisions. Positions in this class have responsibility for managing multiple units of a diverse administrative support function (i.e., accounting, purchasing, printing, etc.) in the largest state divisions and where significant federal relationships are involved in the fiscal and administrative function. Typically, positions in this class manage the section through subordinate Administrative Services Managers.

11. The Position Description Form (PDF) contains a section wherein the employee lists their duties, in order of importance, along with the estimated percent of time spent on each duty. Grievant listed her previous duties, that she continues to perform, and new duties.

12. Grievant is now responsible for supervising an additional nine employees housed in Charleston, WV, along with the sixteen individuals she supervises at the DRS facility in Institute, WV. Grievant now supervises managerial, professional, technical and clerical employees. Their titles include Administrative Services Manager I, Administrative

Services Manager II, Accounting Auditor V and Supervisor, Accounting Technicians III and IV, Secretary, Administrative Services Assistant III, Office Assistant III and Office Assistant II.

13. Grievant oversees the management of DRS's Disability Determination Section (DDS). Grievant is responsible for DDS's budget. DDS is one-hundred percent funded by the federal government and makes determinations as to disabilities of those applying for benefits.

14. Grievant is now a member of the Director's Executive Management Team which meets weekly to provide input into all agency decisions.

15. Grievant is solely responsible for the entire budget of DRS. Due to the more than one-hundred million in federal funds that DRS receives, Grievant is responsible for numerous federal filings to account for these funds. Grievant's duties not only increased in the number of filings she must report, but in the level and complexity of the federal filings.

16. In addition to the federal filings, Grievant's interaction with federal authorities has also increased due to her new job duty of attending and participating in national conferences.

17. Grievant attends and/or participates in conferences for the following: US Department of Education, Rehabilitation Services Administration National Fiscal and Data Conference, Council of State Administrators of Vocational Rehabilitation Conference, State Auditor's Conference, Division of Rehabilitation Services State Conference, and the DRS Executive Management Group.

18. Grievant is solely responsible for all state-wide training for staff on fiscal

management issues which includes over 26 state-wide offices serving clients throughout the State of West Virginia.

19. Grievant now reports directly to the Director of DRS. Before, Grievant reported to the Assistant Director who then reported to the Deputy Director who then reported to the Director of DRS.

20. Following the closure of the Division of Rehabilitation Services' on site facility, the Rehabilitation Center, Grievant's position became solely responsible for the increased budget of 113 million dollars. Grievant did not include this additional duty on her PDF.

Discussion

In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work she is doing is a better fit in a different classification than the one in which her position is currently classified. *See Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001). DOP's Rule 3.75 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997). An increase in the type of duties contemplated in the current class specification does not require reallocation. *Id*

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)). It is fair to say that a grievant challenging her classification has an uphill battle. *Bennett v. Insurance Comm'n and Div. of Pers.* Docket No. 07-INS-299 (June 27, 2008).

Grievant and Respondent DRS assert that Grievant has been performing the duties of an Administrative Services Manager IV (ASM IV) and should be reallocated to that position. Respondent DRS and Grievant assert that Grievant's position has undergone a significant change in duties and that the new duties are predominant in the position. Respondent DOP argues Grievant is properly classified as an ASM III. DOP asserts that the new duties listed on Grievant's PDF did not constitute predominant duties nor significant changes necessary to require a reallocation of the position to a higher classification. DOP argues that Grievant's new duties are "more of the same" that the position was already performing.

When an employee requests reclassification or reallocation, DOP normally makes its classification determination based on the Position Description Form completed by the employee. Classification is a highly technical matter, based on carefully drafted class specifications and a complex pay plan, using terms of art to describe duties and job types defined by the DOP. To do this DOP fits positions into specifications based on a lengthy technical document, the aforementioned Position Description Form. DOP specifications

are to be read in pyramid fashion, i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of Work" section of a classification specification is its most critical section. *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

The PDF document is completed by a person the DOP invariably points out has no training or expertise whatsoever in the arcane field of classifying jobs. In some instances, DOP conducts a desk audit of the position. Such is not the case in the instant grievance. Therefore, while DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous, DOP's interpretation of what the employee is trying to communicate with the Position Description Form does not carry that weight. *See W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

Grievant has demonstrated that, when examining her duties compared to the "Nature of Work" and "Distinguishing Characteristics" for the relevant classifications, there exists a significant change in her job duties to warrant a reallocation. The ASM IV reports directly to the division head, whereas the ASM III position description does not require the position to report directly to the division head. Grievant previously reported to an Assistant Director who then reported to a Deputy Director who then Reported to the Director of DRS. Now, Grievant reports directly to the Director. Barbara Jarrell, Assistant Director, Classification and Compensation section of Respondent DOP, testified at the level three hearing that Grievant's position now reporting directly to the Director does not impact the classification determination. DOP asserts that an agency has the ability from a

management perspective to have positions report to whomever they deem appropriate. If the position's responsibility of reporting to the division head has no impact on classification, then why is it listed in the "Nature of Work" for the ASM IV classification? The "Nature of Work" section in class specifications is the most critical section in the "pyramid fashion" of review for consideration.

The ASM III supervises professional, technical and clerical employees. The ASM IV supervises the same categories of employees as an ASM III, plus managerial employees. Grievant supervises employees within classifications of Administrative Services Manager I, Administrative Services Manager II, Accounting Auditor V and Supervisor, Accounting Technicians III and IV, Secretary, Administrative Services Assistant III, Office Assistant III and Office Assistant II.

The ASM III manages an organizational section providing administrative and support services in a division. The ASM IV performs administrative work at the advanced level, managing an organizational section providing administrative and support services in a department where operations, policy, work processes, and regulatory requirements of the section are complex, varied and dynamic. DOP argues that the duties performed by Grievant's position does not raise to the level of complexity of the ASM IV classification. Grievant is solely responsible for all state-wide training for staff on fiscal management issues which includes over 26 state-wide offices serving clients throughout the State of West Virginia. Grievant is responsible for all financial issues including the budget of all these state-wide offices. DRS's Disability Determination Section (DDS) determines eligibility for disability benefits. Grievant manages DDS's fiscal budget. When DRS's on-site facility, the Rehabilitation Center, closed, Grievant became solely responsible for an

increased budget of 113 million dollars. Grievant manages complex and diverse sections within Respondent DRS.

A distinguishing characteristic, as noted on the class specifications of an ASM IV, is the "significant federal relationships...involved in the fiscal and administrative function."[6] Grievant's new duties involve the sole responsibility for the entire budget of DRS. Due to the more than one-hundred million in federal funds that DRS receives, Grievant is responsible for numerous federal filings to account for these funds. Grievant's duties not only increased in the number of filings she must report, but in the level and complexity of the federal filings. Grievant's interaction with federal authorities has also increased due to her new job duty of attending and participating in national conferences.

When examining the "Examples of Work", the ASM III class specification "[m]ay participate in local conferences and meetings." Whereas, the ASM IV class specification "[p]articipates in national, state and local conferences and meetings." Grievant attends and/or participates in the following national, state and local conferences: US Department of Education, Rehabilitation Services Administration National Fiscal and Data Conference, Council of State Administrators of Vocational Rehabilitation Conference, State Auditor's Conference, Division of Rehabilitation Services State Conference, and the DRS Executive Management Group.

Pursuant to the class specification of an ASM IV, "[t]he Administrative Services Manager 4 is distinguished from the Administrative Services Manager 3 by responsibility

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[6] *See* Respondent's Exhibit No. 7.

to manage a statewide administrative function of the largest state divisions."[7] Grievant is solely responsible for the entire budget of DRS. Grievant testified that under the 2010 Budget Bill, DRS is the seventeenth financially largest state agency out of one-hundred and fifty agencies in West Virginia State government.[8] DOP asserts that the West Virginia Department of Transportation (DOT) and the West Virginia Department of Health and Human Resources (DHHR) are the only state agencies that DOP views as "the largest state divisions." As such, if one is not employed by DOT or DHHR, then the ASM IV classification is not available.

Nowhere on the DOP Class Specification for ASM IV does it state that DOT and DHHR are the only two state agencies that qualify as a large state division. No policy or rule was presented as evidence to support DOP's position that only the two state agencies with the largest number of staff qualify as a large state division. Why only the two largest state agencies, instead of the three largest, or four largest, or seventeenth largest? Why is the largest state agency determined by number of staff instead of amount of financial budget?

The Grievance Board's role is not to act as an expert on matters of classification of positions. *Moore v. W.Va. Dept. of Health & Human Resources*, 94-HHR-126. Employees have a substantial obstacle to overcome when contesting their classification, as the grievance board's review is supposed to be limited to determining whether or not the agencies actions in classifying the position were arbitrary and capricious. *W. Va. Dep't of*

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[7] *Id.*

[8] *See* Grievant's Exhibit No. 2.

Health v. Blankenship, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993). Ms. Jarrell testified that the ASM III and ASM IV class specifications were written for all state agencies. Ms. Jarrell also testified that DOP only considers DOT and DHHR to be the largest state agencies for ASM IV class specification purposes. 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). Insufficient evidence was introduced to convince the undersigned that DOP's action was not arbitrary and capricious in deciding the ASM IV position is only available if employed by DOT or DHHR. The undersigned is aware that DOP is charged with classification recommendations and determinations, however, DOP failed to provide an adequate explanation for limiting the largest state divisions to the two with the largest number of employees, DOT and DHHR. Without providing any rational basis for the limitation, the undersigned finds that DOP's decision was arbitrary and capricious, and therefore, clearly wrong.

Since Grievant began employment as an ASM III in 2006, the Division of Rehabilitation Services has significantly changed and now involves an entirely different fiscal responsibility. Accordingly, Grievant's duties have evolved and changed. Given that Grievant's work has progressed to where she is solely responsible for the 113 million dollar budget of the evolved DRS, she reports directly to the Director, she is responsible for the

federal budget of the Disability Determination Section of DRS, she supervises managerial, professional, technical and clerical staff, she is responsible for complex federal filings, she attends and participates at national conferences, and she is responsible for all state-wide training for staff on fiscal management issues in over 26 state-wide offices throughout the State of West Virginia, she has met her burden of proving the ASM IV is a better fit for her position. Grievant did prove that her position should be reallocated from the ASM III classification to the ASM IV classification. Therefore, the grievance is granted.[9]

Conclusions of Law

1. In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work she is doing is a better fit in a different classification than the one in which her position is currently classified. *See Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001).

2. Grievances contesting a grievant's current classification are therefore decided under rules of law which give DOP's interpretation of classification specifications great

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[9]W.VA. CODE § 6C-2-3(c)(2) states in part, "back pay may only be granted for one year prior to the filing of a grievance", unless the grievant proves by a preponderance of the evidence that the employer acted in bad faith. If the employer acted in bad faith in concealing facts giving rise to the grievance for back pay, back pay may only be granted for eighteen months prior to the filing of the grievance. In the present matter, Grievant did not allege any action of bad faith by Respondents. Additionally, *Hedges v. WVDHHR/DOP*, Docket No. 00-HHR-203 (Sept. 25, 2000), has upheld compensating an employee back to the date she entered into her duties and responsibilities when the employer has not filed a timeliness defense or wants to compensate the employee retroactively to when the duties began. Following *Hedges* and W.VA. CODE § 6C-2-3(c)(2), Grievant will be retroactively reallocated to the ASM IV classification as of June 9, 2009.

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)).

3. 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).

4. It is fair to say that a grievant challenging her classification has an uphill battle. *Bennett v. Insurance Comm'n and Div. of Pers.* Docket No. 07-INS-299 (June 27, 2008).

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

6. Employees have a substantial obstacle to overcome when contesting their classification, as the grievance board's review is supposed to be limited to determining whether or not the agencies actions in classifying the position were arbitrary and capricious. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

7. DOP specifications are to be read in pyramid fashion, i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of Work" section of a classification specification is its most critical section. *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

8. The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997). An increase in the type of duties contemplated in the current class specification does not require reallocation. *Id*

9. DOP's application of the ASM IV class specifications to only employees of DOT and DHHR when employees of other state agencies perform these duties as well, without any rational explanation, is arbitrary and capricious.

10. Grievant proved by a preponderance of the evidence that her position should be reallocated from the ASM III classification to the ASM IV classification.

For the foregoing reasons, this grievance is **GRANTED**. The Respondents are ordered to retroactively reallocate Grievant to the ASM IV classification as of June 9, 2009, one year prior to the filing of the first grievance regarding reallocation. Grievant is entitled to all the back wages and benefits she would have earned had she been reallocated at that time.

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: July 14, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge