WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PATSY LOU ROSE,

Grievant,

v. **Docket No. 2011-0047-DEA**

DIVISION OF REHABILITATION SERVICES
and DIVISION OF PERSONNEL,

Respondents.

DECISION

_____Grievant, Patsy Rose, is employed by the West Virginia Division of Rehabilitation Services ("DRS") in a position that has been allocated to the Office Assistant 2 classification. Ms. Rose filed a level one grievance form dated July 13, 2010, in which she contests the placement of her position in the Office Assistant 2 classification. She believes her position should be classified as an Administrative Services Assistant 1. As relief Grievant seeks:

> Reclassify position to Administrative Services Assistant I retro to February 19, 2010, and back wages totaling $1,694.00. I would like applicable taxes and retirement to be paid from the back wage amount.[1]

An Order was entered on July 16, 2010, joining the West Virginia Division of Personnel ("DOP") as a party. A level one conference was held on August 30, 2010, and a decision was issued on September 2, 2010. The level one hearing examiner agreed with Grievant, but ruled that she did not have the authority to grant the relief sought. Grievant appealed to level 2 on September 9, 2010, and a mediation was held on October 25, 2010. A level 2 Mediation Order was entered the next day and Grievant appealed to level three

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[1] The statement of relief is set out herein as it was stated on the grievance form.

on October 29, 2010.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on March 29, 2011. Grievant personally appeared at the hearing and was represented by Gordon Simmons, UE Local 170, WVPWU.[2] Respondent DRS was represented by Katherine A. Campbell, Esquire, Assistant Attorney General and Respondent DOP was represented by Karen O'Sullivan Thornton, Esquire, Assistant Attorney General. All parties submitted post-hearing Proposed Findings of Fact and Conclusions of Law, the last of which was received by the West Virginia Public Employees Grievance Board on May 4, 2011. This matter became mature for decision on that date.

Synopsis

Grievant and Respondent DRS believe that Grievant's position includes duties and responsibilities that are administrative in nature. Specifically, they argue that her duties include training and the development of policy procedures. These duties, they reason, justify placement of Grievant's position in the Administrative Service Assistant 1 classification at pay grade ten, rather than the Office Assistant 2 classification at pay grade five.

Respondent DOP agrees that Grievant's duties have changed significantly and that her position needed to be reallocated. However, DOP pointed out that Grievant's predominant duties involve the registration of vendors for the DRS. These duties can be complicated but they follow established policies and procedures which make them clerical in nature. Consequently, DOP determined that the best fit for Grievant's position was the

[2] West Virginia Public Workers Union.

Office Assistant 2 classification. Grievant did not prove that DOP's classification determination was clearly wrong or arbitrary and capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant has been employed by the DRS for several years. Before the DRS hospital closed in June 2006, Grievant did accounting work for the hospital and the DRS clinic.[3] Grievant's position was classified as an Accounting Technician 2 in pay grade six.

2. In 2006, Grievant was transferred to the DRS fiscal section. She worked on finishing accounting work for the hospital and clinic, had cashier responsibilities, dispersed vehicle registration stickers and was assigned to process vendor registration for Disability Determination Services section of DRS. Grievant began processing all of the DRS vendor registration forms in February 2009.

3. When Grievant began performing all the vendor registration duties for the DRS, she improved the procedures for performing these tasks to comply with Purchasing Division policies and procedures.

4. In 2010, DRS posted the vendor registration duties and Grievant successfully applied for that position. Grievant and her DRS supervisors prepared a Position Description Form ("PDF")[4] and submitted it to the Division of Personnel so that the new

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[3] The clinic closed in the Spring of 2007.

[4] 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.

position could be allocated in the classification system. Respondent DOP's Exhibit 2.

5. The general purpose for the position was "to assure all vendors doing business with the agency [DRS] are properly registered, to act as the agency contact for agency issued warrants, and to act as the agency cashier."[5] The duties for the position, and the percentage of the employee's time allocated to each one, were listed as follows:

NEW

- 20% - Responsible for the administrative vendor registration process. Act as the liaison between the agency and the Division of Finance and the Division of Purchasing (Department of Administration) to facilitate the registration of vendors who wish to do business with the agency.
- 30% - Insure W-9s and WV-1A forms are received and properly completed before being sent to the Department of Administration.[6]
- 10% - Work with the Department of Administration and vendors to resolve any problems related to the W-9s and WV-1A forms. Maintain files in hard copy or electronic format and monitor vendor submissions to insure documents are properly recorded in the appropriate office. This also included assisting the Disability Determination Services Unit.
- 10% - Update vendor registrations as necessary by contacting vendors to collect appropriate information.
- 10% - Keep abreast of policies and procedures related to vendor registration and will update agency processes and procedures to comply with state and federal law.

OLD

- 9% - Assist DDS to acquire information from WV-1As that are incomplete.
- 10% - Act as the agency contact for warrant issues.

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[5] Respondent DOP's Exhibit 2.

[6] The W-9 is a United States Internal Revenue Service form used to obtain a Taxpayer Identification Number. The WV-1 and WV-1A are the Vendor Registration and Disclosure Statements required by the Purchasing Division and are used to collect required information regarding all vendors who sell goods or services to the State of West Virginia. Respondent DOP's Exhibits 3, 4, & 5.

- 1% - Act as the cashier and maintain agency auto inspection stickers.[7]

6. The PDF was signed by Grievant and her supervisor, Michelle James, on January 22, 2010. The PDF gave a complete and accurate description of the duties and responsibilities required by Grievant's position. Level three testimony of Grievant and Michelle James.

7. The DOP reviewed the PDF along with other relevant information related to the position and concluded that the classification which best fit the position was Office Assistant 2 ("OA-2") at pay grade five. DOP employee, Barbara Jarrell,[8] sent a memorandum dated April 26, 2010, to the DRS Human Resources Manager, Ann Kautz, informing her that Grievant's position should be reallocated from Accounting Technician 2 to OA-2 because of the substantial changes in the duties and responsibilities. Respondent DOP's Exhibit 6.

8. Grievant and DRS appealed the classification determination and provided an updated PDF dated May 25, 2010, to the DOP Director, Sara Walker. The new PDF listed the following duties in addition to those listed in the initial PDF:

- Advises and answers questions from the Division field staff and vendors who need help completing the required vendor registration forms.
- Assuring the vendors use correct criteria, such a commodity codes, to assure proper registration.
- Assist the Chief Financial Officer to develop training for the agency staff responsible for obtaining vendor registration forms. (5% of the job).

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[7] Respondent DOP's Exhibit 2.

[8] At the time, Ms. Jarrell was a senior personnel specialist for the DOP Classification and Compensation Section. She is now the manager of that section.

The duties related to acting as the agency cashier and maintaining agency auto inspection stickers were removed from this PDF. Respondent DRS's Exhibit 1. Grievant stated that the best fit for her position was the Administrative Services Assistant 1 classification at pay grade ten.

9. Grievant answers questions from other employees regarding completion of the vendor registration forms and assists in training new employees to perform these tasks. She does not assign or schedule work for co-workers, nor does she have any supervisory responsibilities with them.

10. By letter dated June 22, 2010, DOP Director Walker, denied the request for classification reconsideration. Director Walker noted that all previous material, as well as the new PDF and accompanying letter, were taken into consideration in her decision.[9] She specifically noted that:

> The Office Assistant 2 classification specification describes work as: full performance work in multi-step clerical tasks calling for interpretation and application of office procedures, rules and regulations.

Respondent DRS's Exhibit 2.

11. Even though the reallocation of Grievant's position moves it from pay grade six to pay grade five, Grievant's salary did not change because her annual salary does not exceed the maximum salary for pay grade five.[10]

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[9] DOP offered to perform a position audit in conjunction with the reconsideration but Grievant declined to have an audit performed.

[10] An agency is only required to reduce the demoted employee's pay if it exceeds the maximum rate of pay for the job classification to which he is demoted. *See,* 143 C.S.R. 1 § 5.6(a).

12. The DOP classification specifications for the Office Assistant 2 classification include the following:

OFFICE ASSISTANT 2

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

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

At this level, the predominant tasks require the understanding of the broader scope of the work function, and requires an ability to apply job knowledge or a specific skill to a variety of related tasks requiring multiple steps or decisions. Day-to-day tasks are routine, but initiative and established procedures are used to solve unusual problems. The steps of each task allow the employee to operate with a latitude of independence. Work is reviewed by the supervisor in process, randomly or upon completion. Contacts are usually informational and intergovernmental.

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

instructions to enter, access and update or manipulate data in the performance of a variety of clerical duties; may run reports from the database.

Grievant's Exhibit 2.

13. The DOP classification specifications for the Administrative Services Assistant 1 classification include the following:

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.

Grievant's Exhibit 3.

14. The predominant duties of Grievant's position consist of registering vendors to do business with the DRS by collecting information to ensure that the W-9 and WV-1A forms contain accurate and up-to-date information. Grievant processes several hundred vendor registrations each year.[11] Level three testimony of Grievant.

Discussion

Grievant alleges that the DOP erroneously allocated her position to the OA-2 classification. She argues that the predominate duties and responsibilities for this position are administrative rather than clerical. Therefore, she believes that the best classification for her position is Administrative Services Assistant 2. Respondent DRS agrees with Grievant's position.

Respondent DOP does not dispute that there has been a significant change in the duties assigned to Grievant's position and agrees that it needs to be reallocated from the Accounting Technician 2 classification since Grievant no longer does accounting work. However, DOP argues that Grievant's predominate duties are full-performance clerical duties and that the best fit for her position is the OA-2 classification.

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her 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

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[11] Grievant testified that she spends more time resolving issues related to proper information for registration forms than anything else. This information is specified on the forms and obtained from the vendors as well as staff who work in DRS field offices.

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).

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 Rehabilitation Services, 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 an employee believes she is performing the duties of a classification other than the one to which she 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). The key to the analysis is whether a grievant's current classification constitutes the "best fit" for the duties the grievant performs. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position are class-controlling. *Broaddus v. W. Va. Div. of Human Serv*., Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990). 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). Additionally, in order for Grievant to prevail upon a claim of misclassification,

she must prove by a preponderance of the evidence that her duties more closely match another Division of Personnel classification specification than the one to which she is currently assigned. *See generally, Hayes v W. Va. Dep't of Natural Res.*, 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).

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 or arbitrary and capricious. 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)). An action is considered arbitrary and capricious if the agency 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Grievant notes that when she took over the responsibility of registering the vendors for DRS she helped establish procedures for the agency to ensure that the correct

information was received to comply with the requirements of the Division of Purchasing. She also testified that she has made recommendations to the Division of Purchasing concerning changes to their forms that were adopted. Grievant argues that these instances constitute administrative work beyond the scope of Office Assistant work. She also notes that she regularly has to contact prospective vendors, answers questions from her co-workers and helps train new employees. She feels this constitutes lead work which, she argues, requires a higher classification than OA-2. Ultimately, Grievant believes that these duties make the ASA-1 classification the best fit for her position.

The DOP Glossary of Classification Terms defines lead work as follows:

> Lead Work/Lead Worker - this is a level of work at which an incumbent 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.

Grievant does not assign or schedule work for other employees and her only training obligations are to help with new employees. These occasional duties do not constitute lead work.

The Nature of Work section of the classification specifications for the ASA-1 classification states that the position requires administrative work and specifically describes the required work as follows:

> 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.

Finding of Fact 13, *supra.* Grievant does not routinely perform duties related to resolving operational problems or developing plans and procedures. She assisted in improving the procedure for vendor registration when she began those tasks for the DRS but has been

simply implementing those procedures since that time. When asked to describe her job, Grievant stated that the sole purpose for her position is to register vendors and all that is entailed with that process.[12] These are clearly her predominate duties. This process is accomplished by acquiring data necessary to complete forms W-9 for the Internal Revenue Service and forms WV-1 and WV-1A for the Purchasing Division. These are multiple step tasks which require Grievant to interpret agency rules and procedures related to vendor registration. They fit neatly into the Nature of Work described for the OA-2 classification. *See*, Finding of Fact 12, *supra.*

The Manager of the DOP Classification and Compensation Section, Barbara Jarrell, noted that while these tasks are often challenging, they are routine in nature and dictated by set policies and procedures, which make them clerical in nature. Because the tasks are sometimes complex they qualify for the full performance of the clerical range which is why the position is placed in the OA-2 classification; the "full performance" position in the OA class series. This determination was made based upon the PDF, historical data related to Grievant's position and the classification specifications for DOP positions. The DOP class determination is not clearly wrong nor arbitrary and capricious. Accordingly, the Grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her 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.*

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[12] Level three testimony of Grievant Rose.

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. The key to the analysis is whether a grievant's current classification constitutes the "best fit" for the duties the grievant performs. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position are class-controlling. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990).

3. 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).

4. 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 or arbitrary and capricious. 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)).

5. An action is considered arbitrary and capricious if the agency 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

6. Grievant failed to prove by a preponderance of the evidence that DOP's classification determination related to her position was clearly wrong or arbitrary and capricious.

Accordingly, the 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 7, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE