THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONALD L. HALL,
Grievant,

v. **Docket No. 2010-1637-DOT**

DIVISION OF HIGHWAYS
AND DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, Donald L. Hall, is employed by Respondent, Division of Highways ("DOH"). On June 30, 2010, Grievant filed this grievance grieving the Division of Personnel's denial of his request for reallocation to the position of Transportation Engineering Technologist. For relief, Grievant seeks reallocation with back pay and reimbursement of all costs and fees.

At level one of this grievance, the Division of Personnel ("DOP") was joined as an indispensable party. Following the waived level one hearing, a level two mediation was held. Grievant perfected the appeal to level three of the grievance process on January 27, 2011. Level three hearings were held on October 25, 2011 and April 19, 2012, before Administrative Law Judge Ronald L. Reece[1] at the Grievance Board's Westover, West Virginia office. Grievant was represented by James C. Paugh. Respondent DOP was represented by counsel, Karen O'Sullivan Thornton. Respondent DOH was represented by counsel, Jason C. Workman. This matter became mature for decision

[1] This case was assigned to the undersigned Administrative Law Judge on July 12, 2012 for administrative purposes.

on May 21, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law[2].

Synopsis

Grievant contends DOP acted arbitrarily and capriciously in refusing to reallocate his position. Grievant has experienced an increase in his duties, but is not performing the duties of the classification he seeks. DOP's change of opinion regarding the classification was not arbitrary and capricious because it was based on the receipt of additional information. Grievant has failed to meet his burden.

Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent DOH as a Transportation Engineering Technician – Senior ("Technician – Senior"), pay grade 17, and seeks to be reallocated to Transportation Engineering Technologist ("Technologist"), pay grade 19.[3]

2. The Technician – Senior classification reads in part as follows:

> Nature of Work
> Serves in a senior level capacity performing advanced and/or expert duties, and supervisory duties associated with either the engineering or construction areas of highway and bridge construction and maintenance. Participates in a training program requiring 180 Technician Development Hours.
> Distinguishing Characteristics

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[2] Grievant's representative did not submit Proposed Findings of Fact and Conclusions of Law. Grievant submitted a memorandum on his own behalf stating his representative could not respond due to illness. Grievant attached multiple documents to his memorandum. As these documents were not presented as evidence at the hearing, the undersigned cannot consider them in this decision.

[3] During testimony Grievant, his representative and others from DOH referred to these classifications as Level Four and Level Five respectively.

Transportation Engineering Technician - Senior (level 4) is distinguished from Engineering Technician (level 3) in that level 4 performs senior level work requiring expert technical knowledge and supervises or coordinates functions or sub-units under direction of a engineering technologist or a registered professional engineer. In the field of survey, this level is reserved for the survey party chief.

Examples of Work

Essential Job Functions (Any specific position in this class may not include all of the duties listed, nor do the examples listed cover all of the duties which may be assigned.)

-Prepares complete bid proposal for complex projects including adequate provisions for compliance with all Federal, State, Local and AASHTO requirements, cost estimates, time estimates and bidding procedures.

-Maintains project/design cost records, evaluate performance of subordinates, safeguards and assures good condition of materials and equipment and operates within requirements of agency, state, local and FHWA Technical and Administrative Programs.

-Establishes effective working relations within unit and with units employed on similar work, as well as with consultants, suppliers, government agencies and municipalities.

-Assures quality of all work performed or supervised.

-Prepares comprehensive engineering and environmental reports.

-Prepares reports, summaries and accident reports and compiles data required to permit effective management.

-Prepares schedules of priorities for recurring maintenance operations and monitors compliance with established schedules.

-Utilizes equipment and personnel effectively and assures the quality of all work supervised.

-Performs initial review of major construction plans to insure that the latest principles of highway safety are being utilized.

-Supervises and coordinates inventory and analysis of traffic control devices on all highways within area of responsibility.[4]

3. The Technologist classification reads in part as follows:

Nature of Work

Serves in a managerial or program expert capacity in either the engineering or construction field/area of highway and bridge construction and maintenance. Manages a unit in a district or division, or may manage a specific division-wide technical function requiring expert level knowledge, or may be licensed land surveyor. As a unit manager, supervises lower level supervisors, technicians and/or professional employees.

Distinguishing Characteristics

[4] Respondent DOH Exhibit 1.

Engineering Technologist (Level 5) is distinguished from Transportation Engineering Technician - Senior in that incumbents at this level are managers of operational units with significant technical characteristics as opposed to supervisors of specific projects or less technical units/functions, or they are responsible for a special division-wide technical program that requires the highest degree of expertise in that specific technical field. The State Highway Engineer of the Division of Highways will make determinations as to technical characteristics/expertise. In the field of survey, this level is reserved for the licensed land surveyor.

Examples of Work

Essential Job Functions (Any specific position in this class may not include all of the duties listed, nor do the examples listed cover all of the duties which may be assigned.)

-Provide managerial oversight for subordinate supervisors and the program/projects to which they are assigned.

-Evaluate the work of subordinate supervisors and employees.

-Review and/or calculate technical data relating to engineering and construction projects.

-Review project design and construction plans prepared by consultants. -Communicate with consultant engineers to discuss prospective or ongoing projects and plans.

-Perform field reviews of engineering and construction projects.

-Meet with various parties having an interest in projects, including representatives of state government, legislators, community leaders, regulators, and other interest groups.

-Monitor and manage budgets associated with projects.

-Read and interpret complex design and construction plans.[5]

4. Grievant has been employed with DOH for 41 years. Prior to the events of the grievance, Grievant was assigned to only District 7, and then was assigned to perform duties in both District 7 and District 4.

5. The events leading to the grievance began in 2008, when DOP approved additional duties to be posted for Districts 4 and 7. Grievant was the only employee to sign up for the posted duties.

[5] Respondent DOH Exhibit 2.

6. Most of the duties posted were duties Grievant was already performing. Grievant's District Manager had caused such duties to be posted in an attempt to get Grievant's position reallocated.[6]

7. Thereafter, Grievant completed a Position Description Form ("PDF")[7] to request his position be reallocated. The District Manager certified the PDF as both the immediate supervisor of Grievant and the appointing authority for the agency and forwarded it directly to DOP.[8]

8. The District Manager was not the appointing authority for DOH and was not authorized to sign the PDF as the appointing authority. DOH procedures required that he forward the PDF to DOH's Human Resources Division for review and signature.

9. On September 25, 2008, upon review of the improperly submitted PDF, DOP Personnel Specialist Senior, Barbara Jarrell, classified the position as Technologist.

10. The actual appointing authority for DOH, the Human Resources Director, disagreed with the proposed change to Grievant's classification. Upon notification of the proposed change, the Human Resources Director contacted the DOP to explain that the PDF had been submitted to DOP improperly and that the PDF was not an accurate depiction of Grievant's duties.[9]

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[6] Testimony of Grievant and District Manager, Greg Phillips.
[7] Pursuant to W.Va. Code St. R. § 143-1.45, the PDF is the official document utilized by the DOP to allocate a position to the proper classification with the State Classification and Compensation Plan.
[8] Grievant's Exhibit 7.
[9] Grievant's Exhibit 9.

11. Since the PDF had been submitted improperly, DOP requested Grievant complete another PDF to be reviewed by DOH's Human Resources Director prior to submission to DOP.

12. Grievant completed a second PDF on September 24, 2009. It differed from the first in that it assigned a different order and weight to Grievant's job duties. Prior to submitting the PDF to DOP on January 15, 2010, the Director of Human Resources, attached certain exceptions to the PDF. The exceptions were as follows: Grievant does not conduct traffic studies, he gathers data and provides it to the engineers; Grievant does not have supervisory responsibility as he does not authorize leave as a regular duty, evaluate performance, conduct interviews, or recommend employees for hire; consequences of Grievant's errors would not disrupt the agency's operations; Grievant does not write press releases; and Grievant does not have contacts with high level officials regarding major issues of policy.[10]

13. Ms. Jarrell then reviewed the previous PDF from 1995 and the current PDF from 2009, including the attached exceptions from DOH Human Resources Director. After this second review, she then determined Grievant was properly classified as Technician – Senior and was not acting as a Technologist.

14. Grievant appealed the classification decision to the Director of DOP, who directed that DOP staff conduct an onsite job audit of Grievant's position. After review of Grievant's appeal letter, the results of the job audit, and the 2009 PDF, DOP's Director affirmed the decision to classify the position as Technician – Senior.[11]

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[10] Respondent DOP Exhibit 2.
[11] Respondent DOP Exhibit 5.

15. There were enough differences between the information presented to DOP in 2009 and 2008 to explain why DOP changed its position on the classification.

16. In the 2009 PDF, Grievant provided the following duty statement of his job duties and the percentage of time he spends on each:

> 30% Conduct and/or coordinate traffic operation studies.
> 25% Supervise and coordinate inventory and analysis of Traffic Control devices.
> 15% To coordinate all special events in District 4 & 7 for parking and placement of all personal and traffic control devices.
> 10% Assure quality control of all work performed or supervised.
> 5% Prepare and verify cost estimates on traffic operation projects.
> 5% Establish effective working relations within the organization and with units and agencies employed on the same type of work, as well as with consultants, contractors, government agencies, utilities and municipalities.
> 5% Review preliminary and final construction plans in terms of traffic operations, constructing, staging and signing signals and pavement markings.
> 3% Conduct traffic research on new methods, materials, equipment and techniques to improve traffic operations programs.
> 2% Train new employees and work with less experienced employees on all the above items.[12]

17. Grievant had significant difficulty explaining in his testimony what the exact job duties are that he performs.

18. Grievant identified the following duties as qualifying him for the Technologist classification: performing work in both Districts, investigating accidents, handling Commissioner's orders, handling complaints, chairing the D/4 Equipment Review Board, coordinating special events, and performing duties of the traffic engineer.

19. Other than communication with the public, Grievant did not present evidence to show that he was performing duties of the traffic engineer that would fit

[12] Respondent DOP Exhibit 2.

within the Technologist classification. When questioned regarding duties he performed while filling in for the absence of a former Traffic Engineer, Grievant simply said he did "everything" and did not testify to what specific duties he may have performed.[13]

20. Grievant's District Manager obviously relies heavily on Grievant and assigns him many tasks. He has Grievant on call 24/7. Grievant is dependable and can be relied upon to respond in emergency situations. He calls Grievant for issues not within his classification because "he's the only one that'll come out when I call."[14] He has recognized and utilized Grievant's 40 years of experience in traffic control and his extensive contacts and goodwill within the community.

21. There are some Technologists in the DOH who do not have managerial responsibility.

22. Grievant does not fully perform the duties outlined in the Technologist classification "Nature of Work" section. He does not serve in a managerial capacity. He does not manage a unit or division-wide technical function. While he performs some supervisory duties over the sign shop employees and the Transportation Services Supervisor, he does not function as their actual supervisor since he does not evaluate or discipline them, nor does he manage the sign shop. His limited supervisory duties more closely fit the "Nature of Work" of the Technician – Senior. He does not serve in a program expert capacity. His expert technical knowledge in the field of traffic control is actually used to perform expert duties as per the "Nature of Work" section of the Technician- Senior.

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[13] Grievant's testimony.
[14] District Manager, Greg Phillips', testimony.

23. Of the nine “Essential Job Functions” of the Technologist, Grievant performs only one; he meets with parties having an interest in projects.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. §156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. Of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "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).

DOP has wide discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. *See Bonnett v. West Virginia Dep’t of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff’d* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). The role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab*., Docket No. VR-88-006 (Mar. 28, 1989). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). Grievant argues DOP’s refusal to reallocate his position was arbitrary

and capricious because his current duties fit that of Technologist and because DOP previously approved his reallocation request and because his responsibilities fit the classification sought.

In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work he is doing is a better fit in a different classification than the one in which his 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). This case involves a request for reallocation from Technician – Senior to the higher classification of Technologist. "Reallocation" is defined as "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." W.VA. CODE ST. R. § 143-1-3.75. While Grievant has shown he is an exemplary employee who has dedicated 40 years of his life to serving the State of West Virginia, he has failed to prove there has been either a significant change in the kind or level of his duties or that the work he is doing is a better fit in the classification he seeks.

Grievant has clearly experienced a significant increase in his duties. There is no question that Grievant is a very experienced and dedicated employee. Testimony shows his District Manager relies heavily on him in assigning job duties. However, an increase in the type of duties contemplated in the current class specification does not require reallocation. *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997). The question is not how much work Grievant performs, but whether the duties he performs are those of a Technologist.

Grievant is simply not performing the duties of a Technologist. 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). Grievant does not perform the duties outlined in the Technologist classification "Nature of Work" section. He does not serve in a managerial capacity. He does not manage a unit or division-wide technical function. While he performs some supervisory duties over the sign shop employees and the Transportation Services Supervisor, he does not function as their actual supervisor since he does not evaluate or discipline them, nor does he manage the sign shop. His limited supervisory duties more closely fit the "Nature of Work" of the Technician – Senior. He does not serve in a program expert capacity. His expert technical knowledge in the field of traffic control is actually used to perform expert duties as per the "Nature of Work" section of the Technician - Senior. Of the nine "Essential Job Functions" of the Technologist, Grievant performs only one; he meets with parties having an interest in projects.

Testimony seems to indicate that there may be multiple employees performing some duties not within their classification or who are not performing the duties of their classification. It is understandable why Grievant, believing he is performing the same type of work as others higher classified than he and doing more work, would be frustrated. Specifically, Grievant points to other employees holding the Technologist

classification who do not manage. However, even if true, that argument cannot be considered. "When a grievant compares himself to others who are employed in a higher classification and are performing similar work, but the others are misclassified, the remedy is not to similarly misclassify the grievant." *Weaver v. Preston County Bd. of Educ.,* Docket No. 03-39-129 (Aug. 28, 2003) (*citing Akers v. W. Va. Dep't of Tax and Revenue*, 194 W. Va. 456, 460 S.E.2d 702 (1995) and *Kunzler v. Dep't of Health and Human Serv., Docket* No. 97-HHR-287 (Jan. 8, 1998)). The Technologist position description clearly shows the most important duties of that position are managerial in nature. That other employees holding the Technologist position are not performing in a managerial capacity simply is not relevant.

Grievant also argues that DOP acted arbitrarily and capriciously because the same DOP employee classified the position as Technologist in 2008 and then classified the position as Technician after review of the 2009 PDF. This change of opinion on the classification was not arbitrary and capricious. The 2008 PDF was submitted improperly and without the opportunity for DOH's Human Resources Division to review and comment. The 2009 PDF contained different information as both the job duty order and weight had changed and it included the DOH's Direct of Human Resources' exceptions. In addition, upon the appeal to the DOP's Director, DOP then conducted a job audit that further confirmed the classification of Technician – Senior. DOP's change of opinion was reasonable based upon the change in information presented to it and is supported by the ultimate conclusion that Grievant is not performing the duties of Technologist.

Grievant has failed to meet his burden as he has not shown his duties have changed significantly, are a better fit for the position sought, or that DOP otherwise acted in an arbitrary or capricious manner.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. §156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. Of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "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. DOP has wide discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. *See Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff'd* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). The role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab*., Docket No. VR-88-006 (Mar. 28, 1989). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W.

Va. 604 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work he is doing is a better fit in a different classification than the one in which his 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).

4. "Reallocation" is defined as "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." W.VA. CODE ST. R. § 143-1-3.75.

5. An increase in the type of duties contemplated in the current class specification does not require reallocation. *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997).

6. 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).

7. "When a grievant compares himself to others who are employed in a higher classification and are performing similar work, but the others are misclassified,

the remedy is not to similarly misclassify the grievant." *Weaver v. Preston County Bd. of Educ.,* Docket No. 03-39-129 (Aug. 28, 2003) (*citing Akers v. W. Va. Dep't of Tax and Revenue*, 194 W. Va. 456, 460 S.E.2d 702 (1995) and *Kunzler v. Dep't of Health and Human Serv., Docket* No. 97-HHR-287 (Jan. 8, 1998)).

8. Grievant has failed to meet his burden as he has not shown his duties have changed significantly, are a better fit for the position sought, or that DOP otherwise acted in an arbitrary or capricious manner.

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* W. VA. CODE ST. R. § 156-1-6.20 (2007).

DATE: August 15, 2012

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Billie Thacker Catlett
Administrative Law Judge