THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHERRY WILKINS,
Grievant,

v. **Docket No. 2011-1333-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, Sherry Wilkins, is employed by Respondent, Department of Environmental Protection ("DEP"). On March 22, 2011, Grievant filed this grievance against Respondent stating, "Informed 3/8/11 that a posted position applied for would not be filled. Grievant currently performs a portion of the duties." For relief, Grievant seeks "reallocation to Environmental Resource Analyst with backpay and interest."

By order entered April 21, 2011, the Division of Personnel ("DOP") was joined as a party. By the agreement of the parties, level one was waived and the case proceeded directly to level two mediation on June 16, 2011. Grievant perfected the appeal to level three of the grievance process on June 16, 2011. A level three hearing was held on April 10, 2012 before ALJ Landon R. Brown. Grievant was represented by Steve Thompson. Respondent DOP was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. Respondent DEP was represented by counsel, Gregory Skinner, Assistant Attorney General. In the hearing, ALJ Brown denied Grievant's motion to compel additional discovery and also denied the admission of certain documents. Following a full day of hearing, Grievant rested her case and the matter was to be rescheduled for further hearing to allow Respondents to present their cases. On September 28, 2012, Grievant filed a Motion to Recuse ALJ Brown. ALJ Brown

recused himself voluntarily by order entered October 24, 2012, and the undersigned was assigned by the Grievance Board to conduct additional hearing and render a decision in this matter. On June 25, 2012, Andrew J. Katz, Esq. filed a notice of appearance and on June 28, 2012, filed a Motion to Permit Grievant to Present Additional Evidence in Her Case in Chief. A second day of hearing was held on November 5, 2012. The parties were represented as above, with the addition of Andrew J. Katz as counsel for Grievant. The undersigned heard argument on Grievant's motion and ruled that Grievant would be allowed to reopen her case to present witnesses that were not previously called, that additional documents could be moved for admission subject to pertinent objections, but that witnesses already called could only be called again for rebuttal. A final day of hearing was held January 24, 2013, with the same representation as the previous hearing. All three hearings were conducted at the Grievance Board's Charleston, West Virginia office. This matter became mature for decision on March 15, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by DEP as an Environmental Resources Specialist 3 as the Coordinator of a small program. Grievant seeks for her position to be classified as an Environmental Resource Analyst. DEP asserts that the position is properly classified. DOP's interpretation of the critical distinction between the two class specifications is not clearly wrong as it is supported by substantial evidence. While some tasks Grievant performs may fit specific statements within the sought class specification, the class specifications must be read as a whole, and Grievant's duties do not fit that class

specification as a whole. Grievant failed to prove by a preponderance of the evidence that the sought classification is the best fit for the position she occupies. 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 DEP as an Environmental Resources Specialist 3 ("ERS 3"). Grievant was previously employed by DEP in an unspecified capacity from 1989 to 2000, when she resigned to accept employment in the private sector. In 2004, Grievant was rehired by DEP as an Environmental Resource Specialist 2.

2. Grievant's working title is West Virginia MS4 Coordinator. She is the lead worker of the Municipal Separate Storm Sewer Systems ("MS4") Permit[1], which is one of four permits on the Permitting Team of the Stormwater Program. The Stormwater Program is one of numerous programs under the Division of Water and Waste Management. The Division of Water and Waste Management is one of four divisions within DEP. The MS4 Permit is a small program in that Grievant was the only worker in the program until recently, when a person was assigned to assist Grievant part time. Therefore, Grievant has been responsible for all activity relating to the program.

3. The MS4 Permit was mandated by the National Pollutant Discharge Elimination System ("NPDES") established by the federal Clean Water Act. Stormwater is a pollutant, and the NPDES requires regulated entities to manage and control their stormwater discharges to improve the water quality of state and national waters. The

[1] Grievant's Exhibit No. 10.

DEP issues the MS4 Permit for the entire state and regulated entities are required to register under the permit and abide by its requirements. While other environmental quality standards have numeric discharge limits, the MS4 Permit has a narrative standard to reduce discharge of pollutants to the Maximum Extent Practicable.[2]

4. The MS4 Permit is relatively new to West Virginia. The first permit was issued in 2003 and will be redrafted approximately every five years. The permit is expected to evolve as the regulated entities become more familiar with the requirements under the permit and as advances are made in the science of stormwater management. Stormwater management is a complex science. Within her role as MS4 Coordinator, in order to draft new permits and provide required guidance to the regulated entities, Grievant has performed significant research relating to stormwater management. In addition, because the Maximum Extent Practicable standard mandated by the federal legislation is a narrative standard, Grievant was also required to perform additional research and work closely with the federal Environmental Protection Agency to create more meaningful and enforceable requirements for the regulated entities under the specific West Virginia permit she drafted and issued in 2009.

5. In 2006, Grievant's position was reallocated to ERS 3. Grievant did not grieve DOP's classification determination. In her 2005 PDF, which lead to the reallocation, Grievant summarizes the general function and purpose of her job as follows:

> Performs complex professional work at the advanced performance level. As lead worker, this work includes management, administration and implementation of the storm water municipal separate storm sewer (MS4)

[2] Grievant's Exhibit No. 3.

> statewide program. Works (sic) involves the application of complex laws and regulations and extensive program planning techniques in this specialty area. This includes development and administration of statewide program, policies and permit criteria. Responsible for coordination of activities at a multi agency level. Multi level coordination of the implementation of the statewide MS4 program. Perform technical reviews of permit application and the associated MS4 storm water management programs. Provide technical information and education to municipalities concerning implementation of their MS4 program. Provide educational information on the MS4 program to the public, other agencies and interested environmental groups. Facilitate discussion between affected groups, watershed organization and municipalities as to the implementation of the MS4 program. Act as liaison to other State and National agencies, as well a private organizations.

Grievant states the majority of her tasks within her job were program development and general permit registration. Within program development, Grievant was required to "[r]esearch similar programs, [best management practices], and innovative advances to facilitate implementation of the MS4 permit." Grievant's supervisor described the function of Grievant's position to be to "manage and administer" the MS4 Permit.

6. Since that reallocation, Grievant has twice more sought review of her position's classification, seeking for the position to be classified as Environmental Resource Analyst ("ERA").

7. On August 28, 2008, Grievant submitted a PDF, describing the general purpose of her job as follows:

> Serve as the lead agency expert on [MS4] program and permit. Develop procedures for implementation of the new federal and state MS4 program. Duties include writing a new MS4 permit, associated permitting activity, program waiver development and administration, MS4 program development, technical review of stormwater management programs and associated activities for 43 urbanized jurisdictions and transportation agencies in the State of West Virginia. The MS4, [sic] municipal/urban stormwater program contains six complex and distinct program components that MS4 stormwater managers must implement.

> In order to provide guidance to the regulated MS4 community, information and data on the six program components [must] be gathered, researched, developed and disseminated. This requires keeping abreast of trends and developments in the MS4 program, Low Impact Development and Smart Growth issues across the United States. Information and data is used to provide program guidance for West Virginia DEP MS4 program and to provide guidance to local governments in implementation of their stormwater management program. Program guidance also extends to non[-]regulated governments, consulting engineers, and the public. Serve on intrastate task force, and multi-state and national workgroups and committees. Presentations and guidance documents are generated for use in WV MS4 program development, training and for use by MS4 governments.

Grievant listed her duties in order of importance as: developing the MS4 General Permit program development, providing programmatic guidance and support to MS4s, researching and receiving training on Low Impact Development and Smart Growth practices, serving on State, Federal, and multi-state organizations, and performing outreach to the public and MS4s. Grievant's supervisor stated that Grievant's primary role in her position was "lead agency expert on [MS4] program and permit." He further stated that the following duties had been added to Grievant's position: "Serve on intrastate task force and multi-state and national workgroups and committees. Gather and develop information on Low Impact Development stormwater practices and data to develop new stormwater management techniques. Manage grant projects."

8. On November 24, 2008, DOP determined Grievant's position was properly classified as an ERS 3, finding that "the primary responsibility of the position is to oversee the [MS4] program and permit" and citing the Disguising Characteristics section of the ERS 3 class specification.

9. On December 17, 2008, DEP requested reconsideration of DOP's determination, asserting that Grievant's position should be classified as an ERA. The

letter simply pulls individual statements from the ERA class specification and provides examples of Grievant's work that purportedly fit each statement.

10. On April 17, 2009, DOP affirmed the decision to classify Grievant's position as ERS 3, stating, "the duties cited on the position description form are not more difficult and complex than the primary duties of the [ERS 3] position." Grievant did not grieve DOP's classification determination.

11. On June 2, 2011, Grievant submitted her most recent PDF, describing the general purpose of her job as follows:

> Administer West Virginia's new NPDES [MS4] Program. Advance, support and build capacity with WV MS4s. Provide guidance in all areas of MS4 stormwater management programs. Promote stormwater management practices that protect water quality and restore the hydrologic balance of State waters. Keep abreast of new trends and developments in the area of MS4 program management, stormwater management techniques and guidance for such programs. Recommend development of new stormwater management techniques and guidance materials, tools and resources to build and effective and exemplary MS4 program in West Virginia.

Grievant listed her duties in order of importance as: permitting and program development, capacity building, and new and innovative stormwater management development and deployment. Grievant's supervisor stated that the primary role of Grievant's position was "[t]o draft the MS4 general permit once every five years and to draft technical evaluations of stormwater management programs for completeness, accuracy and compliance with permit provisions." He futher stated that no duties had been added or deleted from the position since the 2008 PDF.

12. Due to a backlog of cases, DOP had requested assistance from Lowell D. Basford, the former Acting Director of DOP and longtime Director of the Classification

and Compensation section, who had previously retired. For a short period, Mr. Basford conducted reviews of waiting PDFs, including that of Grievant. He relayed his findings regarding Grievant's position in an undated, unsigned written report.[3] This document reveals that Mr. Basford reviewed the wrong PDF. Mr. Basford's report directly quotes from Grievant's 2008 PDF under the heading Primary Duties/Responsibilities. The text of Grievant's description in the 2008 and 2011 PDFs is completely different, so it is obvious that the quotation is from Grievant's 2008 PDF. In addition, later in the report, Mr. Basford refers specifically to the August 28, 2008 PDF as the "most recent" PDF. However, prior to his level three testimony, Mr. Basford had reviewed the 2011 PDF and his opinion on the proper classification was unchanged.

13. Following Mr. Basford's assessment, Debbie Anderson, Senior Personnel Specialist, then conducted a desk audit, whereby Ms. Anderson traveled to Grievant's worksite to observe her work and gain clarification of information contained in the PDF. The DOP is not required to conduct a desk audit, but does so when the reviewer believes clarification of the PDF is necessary. There is no indication that Ms. Anderson consulted the incorrect PDF in her review. However, it appears from handwritten notes on Mr. Basford's report that Ms. Anderson had pre-judged the classification of Grievant's position before conducting the desk audit. At the bottom of the report, Ms. Anderson writes, "I agree. I will be scheduling an audit soon – (at mediation recommend . . . conduct an audit." A portion of Ms. Anderson's statement is cut off of the exhibit. The portion of the statement that is legible indicates the audit was only being conducted because of something within the mediation process. The sum of Mr.

[3] Grievant's Exhibit No. 13.

Basford's report was that Grievant's position was properly classified as ERS 3, so Ms. Anderson's agreement can only refer to his ultimate conclusion and would reflect her agreement with him despite that fact that Mr. Basford clearly reviewed the wrong PDF. Regardless, Ms. Anderson's documentation of the desk audit shows she did perform a complete job audit including speaking with Grievant's first and second level supervisors.

14. Grievant's request received a third level of review by Barbara J. Jarrell, Assistant Director of the Classification and Compensation Section. Ms. Jarrell explained her review in a Position Review Determination Memorandum dated November 29, 2011. Ms. Jarrell did review the correct PDF. She specifically identifies the June 2, 2011 PDF and correctly summarizes information provided on the 2011 PDF that is different than that provided in the 2008 PDF. She found that the job audit substantiated the correct classification of ERS 3.

15. DEP does not now support Grievant's contention that her position should be classified as an ERA. Although Grievant's supervisor previously supported Grievant's attempt to have the position classified as ERA, he now states that his support was due to his inexperience with the classification system. Now that he has more experience in his management position and with the classification system, he no longer believes Grievant's position should be classified as an ERA.

16. Grievant provided numerous examples of her work product, which were reviewed by the undersigned.

17. The ERS 3 classification reads in pertinent part:

> <u>Nature of Work</u>
> At the advanced level performs complex professional work in a state-wide specialty area in the acquisition, preservation, management and enhancement of the state's environmental/natural resources. Work involves the application of

complex scientific principles, complex laws and regulations and extensive program planning techniques in the specialty area. May supervise subordinate Environmental Resources Specialist and support positions; performs as a lead worker in complex program assignments with responsibility for multi-agency and multi-level coordination of program activities. Responsible for planning, organizing and implementing a state-wide program in the area of assignment. Performs related work as required.

Distinguishing Characteristics

This class differs from the Environmental Resources Specialist 2 by performing at the advanced level as a lead worker in complex program assignment with responsibility for multiagency and multi-level coordination of program activities. Responsible for planning, organizing and implementing a statewide program in the areas of assignment.

Examples of Work

-Develops policies in relation to state and regional resources.
-Conducts meetings of local, statewide, public and/or private agencies relating to planning programs or policies dealing with environmental concerns.
-Conducts field reviews of projects proposed, under construction, or completed, to assure environmental safeguards are being implemented.
-Collects and researches data such as air, soil and water quality from reports of federal or state agencies, permits or through field reviews of proposed or existing sites.
-Coordinates environmental analysis activity with federal and state or local agencies and recommends modifications or mitigations to reduce or alleviate aspects of the impacts.
-Consults with public officials regarding planning programs and policies.
-Acts as a liaison between agency and others involved in the process.
-May supervise subordinates and clerical support staff.
-Reviews progress of subordinate staff and provides technical guidance.
-Evaluates plans, proposals, grants, permits, policies and other documents submitted for accuracy, completeness and compliance with rules and regulations.
-May prepare annual budget requests.

Knowledge, Skills and Abilities

-Knowledge of the environmental/natural resources laws and regulations.
-Knowledge of the principles, practices and objectives involved in the planning of environmental resources.
-Knowledge of the socio-economic factors involved in planning.
-Knowledge of the various legal requirements relating to state and regional planning.
-Knowledge of the theory, innovations and advanced techniques in federal, state and local planning.
-Ability to formulate and administer comprehensive state and local plans.
-Ability to analyze problems accurately and to adopt an effective course of action.
-Ability to plan, organize and direct the work or others.

18. The ERA class specification reads in pertinent part:

Nature of Work

Under administrative direction performs professional work at the expert level in a team environment using complex scientific principles in researching technical issues relative to physical, chemical and biological parameters which may include, but are not limited to, the following environmental areas: air quality, land restoration, mining and reclamation, water quality and waste management. Predominant duties involve at least one of the following functions: gathering and development of information and data to be utilized in developing new or modified environmental quality standards; developing policy and procedures for implementation of new federal or state initiatives necessary for protection of the area of concern; or executing high priority projects at the programmatic level in order to fulfill the department's mission. Employee will work in conjunction with boards on task groups and make presentations relative to research work performed. This classification is distinguished by the expert level of work in a specialized role of considerable difficulty involving responsibility for researching multiple complex issues. Typically, incumbents in this classification do not act as supervisors. Performs related work as required.

Examples of Work

-Serves as a technical expert in a specific profession and as a resource to agency leadership in the area of expertise.

-Conducts research on critical matters which may require statutory or regulatory policy modifications. Prepares reports and advises management on findings and recommendations.

-Develops internal program policies and procedures and establishes strategic standards, goals and objectives for incorporation in the agency's strategic plan.

-Develops new Department of Environmental Protection rules, as required.

-Performs research, analyzes, and summarizes data to make specific recommendations.

-Conducts special projects at management's request; prepares and presents reports.

-Keeps abreast of trends and developments in assigned programs and those in other states; provides recommendations for adapting new methods and techniques when desirable; and recommends solutions to problems.

-Attends legislative, public, and advocacy group hearings; presents information for discussion and/or decision-making purposes.

-Serves on state or interstate agency committees or represents agency in other organized groups in developing new technical standards, rules, guidance and procedures.

-Coordinates with local, state, and federal agencies on specific projects.

-Provides training to employees in statutes, rules, guidelines and technical procedures.

-Advises higher level management on problems and policies related to environmental standards (programmatic and operational issues).

Knowledge, Skills and Abilities

-Knowledge of the department's mission, programs and objectives.

-Knowledge of the department's organizational structure.

-Knowledge of environmental laws and regulations.
-Skill in oral and written communications and public speaking.
-Ability to collect, evaluate, analyze and interpret scientific or technical data.
-Ability to establish and maintain effective working relationships with others.
-Ability to conduct fact finding research and organize data into logical format for presentation in reports, documents and other written materials.

19. The ERS 3 and ERA classifications are not within the same classification series, meaning that the ERA classification is not the next step in difficulty to the Environmental Resources Specialist series, but is a completely distinct classification. ERS 3 is the highest level of the Environmental Resources Specialist series. The ERA classification was created at the request of DEP in order "to recruit individuals at the expert level for researching technical environmental issues."[4]

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *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). 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

[4] Grievant's Exhibit No. 1.

classification than the one in which her position is currently classified.[5] *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).

Grievant is obviously a very valuable employee. The MS4 Permit she drafted has been held up as a national model and she has been asked to participate in an expert panel of an interstate workgroup. There is no doubt her work on the MS4 Permit is complex and challenging. Grievant obviously excels in her position. However, how well a particular person performs in a position has absolutely no bearing on the proper classification of a position. Changing the classification of a position is not about rewarding employees or recognizing work an employee is doing above and beyond what is required; it is about properly classifying positions. Much of Grievant's case was an attempt to prove she is an excellent and valuable employee, but her individual excellence is completely irrelevant to this determination. If the merit pay system were functioning, doubtless Grievant would be rewarded for her efforts in her position, but

[5] The parties argued at length regarding the nature of this grievance. Grievant asserts she has been "misclassified," by which she means she has been incorrectly classified from the start of her employment in the position. Respondent DOP asserts that there is no such thing as "misclassification" because the DOP has no definition of "misclassification." Respondent DOP asserts that this Board has incorrectly used the term and concept of "misclassification" and that the existing West Virginia Supreme Court cases are outdated. Respondent DOP does not address Grievant's assertion, or the possibility at large, of a position that has been classified incorrectly from the beginning. It does appear from a review of the caselaw that the term "misclassification" has been used both to describe the situation in which an employee claims the position was classified incorrectly from the start, as well as the situation in which an employee is seeking reallocation for a change in the position as defined by DOP. The standard this Board has applied regardless of the situation has been that of "best fit." Therefore, although whether a change has occurred will be discussed, the most important analysis is whether the classification sought is the best fit for the position.

seeking a change in the classification of her position is not a shortcut to receiving more pay for a deserving employee.

Grievant also points to several past job postings for ERA and alleges that they describe the same duties she is already performing in her position. This too, is not relevant to the current determination. "Classification determinations are not made based upon comparison to other employees, but upon which classification specification is the best fit for the employee's duties." *Harmon v. W. Va. Dept. of Health and Human Resources*, Docket No. 99-HHR-432 (May 15, 2000) (citing *Baldwin v. Dept. of Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 2999).

Grievant is correct that there were procedural errors made by DOP in its review of Grievant's position. There is no question Mr. Basford prepared his written report from the incorrect PDF. His initial determination is therefore fatally flawed. In addition, it does appear the second level review by Ms. Anderson was also flawed by her pre-judgment of the case. However, DOP's review of a PDF is a multi-level review, and the final reviewer, Ms. Jarrell, just as clearly reviewed the correct PDF. She both names and quotes directly from the 2011 PDF in her Position Review Determination Memorandum dated November 29, 2011. Moreover, by the time of his level three testimony, Mr. Basford had reviewed the 2011 PDF, and his testimony was based on the 2011 PDF submitted by Grievant and his knowledge of the class specifications. Regardless, just because errors were made in the beginning of the process does not automatically make the final determination incorrect or mean that Grievant can be automatically instated into the ERA classification. Grievant argues that the grievance should be granted based on these errors alone. However, Grievant provides no law in

support of this contention, and the standard requires Grievant to prove the ERA classification is the best fit for her position by a preponderance of the evidence. Grievant's classification cannot be changed simply because the DOP made a mistake in reviewing her request, the classification decision itself must be proved incorrect.

In order to determine the best fit, the class specifications at issue must be analyzed. "In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole." W. VA. CODE ST. R. § 143-1-4.4(b). Further. "[t]he fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class." W. VA. CODE ST. R. § 143-1-4.4(d). DOP class 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). Further, the West Virginia Supreme Court of Appeals, in applying previous cases regarding rules of construction and interpretation of statutes by bodies charged by their administrations, found that DOP's "interpretation and explanation of the classifications should [be] 'given great weight unless clearly erroneous.'" *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) (per curiam). The

clearly wrong standard is a deferential standard that requires the administrative law judge to presume that DOP's interpretation and explanation of the classifications is valid as long as it is supported by substantial evidence or by a rational basis. Syl. pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W.Va. 105, 556 S.E.2d 72 (2001) (citing Syl. pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)).

DOP asserted consistently throughout its multiple reviews of Grievant's position, as well as in this proceeding, that the critical distinction between an ERA and an ERS 3 is that an ERS 3 is a line position and an ERA is a staff position. A line position is one that is involved in a day-to-day operational activity to directly accomplish the mission of an agency. A staff position has no involvement in day-to-day operational activity, but serves in a support role. Mr. Basford, as a previous section Director and Acting Director of DOP, actually supervised the creation, development, drafting and implementation of both the ERA and ERS 3 classifications. Mr. Basford explained the critical line versus staff distinction between the ERS 3 and ERA classifications. He testified that an ERS 3 is responsible for the ongoing and regular operations of a particular program. Conversely, an ERA is not intended to be involved in the administration of a specific program, but is intended to provide high level counsel to senior staff of the DEP, moving from project to project performing scientific research, specialized studies, and projects.

There is significant evidence to support Mr. Basford's interpretation of the class specifications. The DEP's original request for the creation of the ERA classification shows the DEP wanted the classification created in order "to recruit individuals at the expert level for researching technical environmental issues."[6] Further, the ERS 3 and

[6] Grievant's Exhibit No. 1.

ERA classifications are not within the same classification series, meaning that the ERA classification is not the next step in difficulty to the Environmental Resources Specialist series, but is a completely distinct classification. ERS 3 is the highest level of the Environmental Resources Specialist series. ERA is something else entirely. Most importantly, a close reading of both class specifications as a whole shows the ERS 3 position to be a line position and the ERA to be a staff position.

The distinguishing characteristics of the ERS 3 are that "[t]his class differs from the ERS 2 by performing at the advanced level as a lead worker in complex program assignment with responsibility for multiagency and multi-level coordination of program activities. Responsible for planning, organizing and implementing a statewide program in the areas of assignment." The distinguishing characteristic of the ERS 3 is "the expert level of work in a specialized role of considerable difficulty involving responsibility for researching multiple complex issues." Further review of the Nature of Work and Examples of work clearly reveal the ERA's role as a staff position for research. The ERA is to perform work "at the expert level . . . in researching technical issues." The ERA will serve "as a technical expert in a specific *profession* and as a resource to agency leadership in the area of expertise." (emphasis added). The ERA "[c]onducts research . . [and] [p]repares reports and advises management on findings and recommendations." A reading of each class specification as a whole reveals that the purpose of an ERS 3 is to serve as the lead worker plan, organize, and implement a state-wide program. The purpose of an ERA is to perform expert level research for agency leadership. DOP's interpretation of the class specifications is not clearly erroneous because there is substantial evidence supporting that interpretation.

Therefore, to show ERA to be the best fit, Grievant must show her position fell within the interpretation of the ERA by DOP.

Grievant's work product examples and much of her testimony were geared to show the difficulty and complexity of her job, and that she is an "expert." Grievant goes so far as to contend her job is so complicated that nobody can understand it. She testified, "I don't see how anyone could because it is a very difficult program to wrap your brain around. There is a lot of science behind what we do." She contends that if DOP does not understand the science involved in her job then it cannot understand the amount of research and training required for Grievant to perform her duties. This assertion misses the point. The most important difference between the ERS 3 and ERA classifications is not the complexity of the job, but the role within the agency, and that distinction is simple. This position's function is to run a program and an ERA has nothing to do with running a program. The ERA's purpose is to research at an expert level. Grievant may be considered an expert in her program, and she may even be an expert in certain concepts within her program that might have benefits agency-wide, but that is not the purpose of the position. The research she has performed has been solely to plan, organize, or implement her program. The expertise she has gained is simply an offshoot of the effort she has put forth to make her program excellent and her tenure within the position. Any expertise she has alleged certainly does not rise to the level of an expert in her profession as contemplated in the ERA class specification, and any "expert" service she provides to the agency appears limited to her program.

There are duties within Grievant's position that do seem to fit the ERA class specification if one looks at individual statements contained within the class

specification. Grievant has worked closely with the federal Environmental Protection Agency and has served on an interstate committee and expert panel. That fits examples of work in the ERA class specification and is not contained in the ERS 3 class specification. However, "simply because one is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render [one] misclassified *per se*." *Hatfield v. Mingo County Bd. of Educ*., Docket No. 91-29-077 (April 15, 1996). Grievant points to excerpts from the ERA class specification such as "professional" and "complex scientific principles," but ignores that those terms also appear in the ERS 3 class specification. Regardless, even if not specifically listed within the ERS 3 class specification, Grievant's examples still fit within the running of the MS4 Permit program.

While the way Grievant presented information on her PDFs changed, that appears more to be an effort on Grievant's part to relate her duties to the ERA classification rather than a true reflection of changes in the position. Grievant's testimony and exhibits, as well as the testimony of her management, reflect that the primary duty of the position has remained unchanged: Grievant runs the MS4 Permit program. However, Grievant did prove there was some increase in her duties as her tenure in the position progressed. Grievant demonstrated the MS4 Permit is an evolving program, and that her responsibilities under the program did increase. However, this increase was more of the same types of duties and not different duties as would encompass another classification. An increase in the type of duties contemplated in the current class specification does not require a change in classification. *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26,

1997). It is assumed that as an incumbent in a position gains experience, the level of performance of the position will increase. While the science and requirements behind the permit have evolved, and will presumably continue to evolve, that evolution is still contained within the ERS 3 classification. Again, the ERS 3 position is the pinnacle of the ERS class series and is expected to perform high level work.

Classification of the position as an ERS 3 does not belittle the importance and complexity of the MS4 Permit program. It simply recognizes that the position's expertise is focused on one small part of the DEP's mission. The MS4 Permit is only one of four permits within the Stormwater Program, which is one of numerous programs under the Division, which is part of four divisions within DEP. Grievant serves in the most extended part of the DEP in a limited role running one small program. Until recently, Grievant was the only worker in the program, and so handled all the tasks associated with the program. In a larger program, these tasks would be split between other workers. However, that she is required to do all the tasks associated with the program does not change that her main function is to run the program.

Grievant's own evidence clearly shows that she performs the work of the ERS 3. The purpose of the ERS 3 is to be "[r]esponsible for planning, organizing and implementing a statewide program in the areas of assignment." That is exactly what Grievant does. Grievant runs the MS4 Permit program. She writes the permit, she reviews the registrations, and provides education and training on the Permit. Everything else she does is simply in support of the running the program. While some tasks Grievant performs may fit specific statements within the ERA class specification, Grievant's duties do not fit the ERA class specification as a whole.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *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. 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).

3. "Classification determinations are not made based upon comparison to other employees, but upon which classification specification is the best fit for the employee's duties." *Harmon v. W. Va. Dept. of Health and Human Resources*, Docket No. 99-HHR-432 (May 15, 2000) (citing *Baldwin v. Dept. of Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999)).

4. "In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole." W. VA. CODE ST. R. § 143-1-4.4(b). Further. "[t]he fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class." W. VA. CODE ST. R. § 143-1-4.4(d). DOP class 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).

5. The West Virginia Supreme Court of Appeals, in applying previous cases regarding rules of construction and interpretation of statutes by bodies charged by their administrations, found that DOP's "interpretation and explanation of the classifications should [be] 'given great weight unless clearly erroneous.'" *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) (per curiam). The clearly wrong standard is a deferential standard that requires the administrative law judge to presume that DOP's interpretation and explanation of the classifications is valid as long as it is supported by substantial evidence or by a rational basis. Syl. pt. 1, *Adkins v. W.*

Va. Dep't of Educ., 210 W.Va. 105, 556 S.E.2d 72 (2001) (citing Syl. pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)).

6. DOP's determination that the critical distinction between an ERA and an ERS 3 is that an ERS 3 is a line position and an ERA is a staff position is not clearly erroneous as it is supported by substantial evidence

7. "[S]imply because one is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render [one] misclassified *per se*." *Hatfield v. Mingo County Bd. of Educ*., Docket No. 91-29-077 (April 15, 1996).

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

9. Grievant has failed to prove by a preponderance of the evidence that the ERA classification is the best fit for her position.

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 (2008).

DATE: August 2, 2013

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Billie Thacker Catlett
Administrative Law Judge