

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMBERLY ELLEN GIBSON,

Grievant,

v.

Docket No. 2022-0306-DOC

**DIVISION OF REHABILITATION SERVICES
and DIVISION OF PERSONNEL,**

Respondents.

DECISION

Kimberly Ellen Gibson, Grievant, filed this grievance against her employer the Division of Rehabilitation Services (“DRS”), Respondent, on October 1, 2021 protesting her job classification. Grievant seeks to have the position she occupies reallocated from the classification of Human Resources Generalist 2 (HR Generalist 2) to the classification of Administrative Services Manager 1 (“ASM 1”).

A hearing was held at level one on October 13, 2021, and the grievance was denied at that level. Grievant appealed to level two on October 20, 2021. The West Virginia Division of Personnel (“DOP”) was joined as a necessary party by *Order of Joinder* entered by the Public Employees Grievance Board on October 26, 2021. A mediation session was held via Zoom on January 31, 2022. Grievant appealed to level three on February 7, 2022. A level three hearing was held before the undersigned Administrative Law Judge on July 20, 2022 at the Grievance Board’s Charleston office. Grievant appeared *pro se*.¹ Respondent DRS appeared by Josh McAtee and was represented by Adriana Marshall, Assistant Attorney General. Respondent DOP

¹ “*Pro se*” is translated from Latin as “for oneself” and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

appeared by Wendy Mays, Assistant Director of the Classification and Compensation (“Class and Comp”) section and was represented by Karen O’Sullivan Thornton, Assistant Attorney General. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision upon receipt of the last of the parties’ proposed findings of fact and conclusions of law on or about August 19, 2022.

Synopsis

Grievant is employed by the Division of Rehabilitation Services in a position classified as a Human Resources Generalist 2. Grievant believes the position she occupies should be classified as an Administrative Services Manager 1. Grievant trained under the former manager of the HR section who was in a position classified as an ASM 2 and she now contends to have taken on all his duties after his retirement. While Grievant may have additional responsibilities not previously performed, the position occupied by Grievant does not possess the requisite level of duties and responsibilities of a manager to meet the DOP’s definition. The West Virginia Division of Personnel reviewed the position no less than four times and each time came to the same conclusion with regard to the appropriate classification of the position as an HR Generalist 2. Grievant was unable to demonstrate that the position she occupies engages in the kind and/or level of work necessary to reallocate the position. Grievant failed to prove the DOP’s classification determination was arbitrary and capricious. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by the Division of Rehabilitation Services (“DRS”), Respondent, in a position that is classified as a Human Resources Generalist 2.

2. Grievant seeks a reallocation² of the position she occupies from the classification of Human Resources Generalist 2 (“HR Generalist 2”) to Administrative Services Manager 1 (“ASM 1”).

3. In 2018, the West Virginia Division of Personnel (“DOP”) created a new human resources generalist class series to be utilized for human resources positions in agencies outside of DOP. This new class series was approved by the West Virginia State Personnel Board (“SPB”).

4. As a result of the creation of the class series and the action of the SPB, agencies with any and all positions having HR functions were required to submit Position Description Forms (PDFs) for those positions to DOP so they could review them and properly allocate them to classifications within the new class series.

5. The PDF is identified in the DOP Administrative Rule, W. Va. Code R. § 143-1-4.5, as the official document detailing the duties and responsibilities of a position and it is used by DOP to properly allocate positions within the classified service. PDFs are submitted to DOP on a daily basis, thousands over the course of any given year.

6. Class and Comp Section Assistant Director, Wendy Mays has reviewed and made classification determinations on thousands of PDFs during her tenure with

² “Reallocation” is defined as reassignment 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 and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and duties. W. Va. Code R. § 143-1-3.72

Respondent, DOP. Assistant Director Mays testified at the instant level three hearing. Assistant Director Mays' section of DOP is responsible for ensuring that all positions in the classified service in State government are classified appropriately and that employees are paid within the range of the pay grade assigned to the classification of the position they occupy.

7. Respondent DOP's review process for a PDF involves a specialist within the Class and Comp section initially reading the PDF, determining the predominant duties of the position, comparing those to the class specifications contained in the Classification Plan, reviewing any other historical documents related to the position, and then making a recommendation to the supervisor who completes a second full review of the position before making a recommendation to Asst. Dir. Mays who conducts a third and final review of the position before making the final classification determination. L3 Testimony Mays

8. A PDF for the position occupied by Grievant was submitted to DOP on July 9, 2018. Based upon a review of the PDF, on August 7, 2018, Respondent DOP made the determination that the position should be allocated to the HR Generalist 2 classification. DOP Ex 1 and L3 Testimony Mays

9. The classification determination was communicated to Respondent DRS and Grievant by letter dated August 13, 2018. In the letter, Assistant Director Mays explained that the position should be allocated to the HR Generalist 2 based on the duties identified by Grievant on the PDF. See DOP Ex 2. This classification determination was not appealed. L3 Testimony Mays

10. Grievant submitted a second PDF in June of 2021. After a review of the position, DOP determined the position should remain allocated to the HR Generalist 2 classification. DOP Ex 3

11. A job audit was conducted on July 16, 2021.

12. Definitions relative to the Classification Plan can be found in the DOP *Pay Plan Policy* (“DOP-P12”). A job audit is defined³ as:

A detailed examination/review of the duties and responsibilities assigned to a position to include reviewing current and previous position description forms, organizational charts, reporting relationships and organizational setting. Audits may include a field audit where the personnel analyst interviews the employee and the supervisor at the work site where the position is located.

DOP Ex 6

13. The classification determination for the position occupied by Grievant was communicated to Respondent DRS and Grievant by letter dated July 23, 2021. DOP Ex 4 In the letter, Assistant Director Mays explained that the position should remain allocated to the HR Generalist 2 classification as there had not been a significant change in duties and responsibilities of the position and the predominant duties remained the same.

14. The Division of Rehabilitation Services appealed DOP’s classification determination. The DOP process for an appeal consists of a specialist (different from the one who did the initial review of the PDF) reviewing the appeal and any attached documents submitted with it, as well as all the other information about the position. The

³ The *Pay Plan Policy* has been revised effective July 1, 2022. The definition of job audit was updated to clarify that audits may be conducted virtually. Virtual job audits have been conducted throughout the pandemic.

specialist makes a classification recommendation to the supervisor who reviews the appeal and all documentation about the position and then makes a recommendation to Assistant Director Mays who reviews the appeal and documentation about the position and makes a recommendation to the Director of DOP who reviews the appeal and all the documentation relative to the position before making a final determination about the appropriate classification of the position. L3 Testimony Mays

15. By letter dated September 21, 2021, DOP Director Sheryl Webb notified DRS that the decision to classify the position as an HR Generalist 2 was affirmed. DOP Ex 5

16. Grievant provided level three testimony in regard to the duties and responsibilities of the position she occupies. Grievant signed each PDF certifying that they were accurate and complete. When asked to confirm this in testimony, she stated that both PDFs were indeed fair and accurate descriptions of the job duties and responsibilities of the position she occupies. DOP Exs 1 and 3; Grievant Testimony The 2018 and 2021 PDFs both reflect that Grievant serves as back up to the manager in his absence.⁴ DOP Exs 1 and 3

17. Grievant is not an expert regarding classification and like many, if not most workers, is not familiar with the proper DOP definition. Grievant did not know the correct terminology for class specifications referring to them only as “the job duties.”

⁴ Grievant states that ninety-five to one hundred percent of her time is spent managing the day-to-day HR Department, which includes: EEO, payroll, benefits and retirement, job postings, position updates, and employee assistance program. Grievant contends that while she originally worked for the manager in his absence that is no longer the case, and she now single-handedly manages the day-to-day operation of the section even when the manager is at work. L3 Grievant Testimony and PFOF.

18. A “class specification” is:

The official description of a class of positions for the purpose of describing the nature of work, providing examples of work performed and identifying the knowledge, skills and abilities required while stating the generally accepted minimum qualifications required for employment.

W. Va. Code R. § 143-1-3.9 and *Pay Plan Policy* II.H. Class specifications are drafted broadly to cover an entire range of positions in state government. The Class and Comp section of the DOP is responsible for, among other things, drafting the class specifications and ensuring that all classified positions that fall under the DOP’s Classification Plan are classified appropriately. L3 Testimony Mays

19. The class specifications for the HR Generalist 2 and ASM 1 read in pertinent part as follows:

HR Generalist 2

Nature of Work:

Under limited supervision, performs advanced level, professional human resources work in one or more areas such as recruitment, employment, employee relations, classification, compensation, benefits, payroll, time keeping, personnel records or other human resources functions. Requires analytical skills and the ability to organize complex work in a project or team setting where accountability is assigned for meeting timetables for major projects in the functional area. The work involves the completion of more difficult, sensitive or controversial assignments in the functional area. Performs related work as required.

Distinguishing Characteristics:

Work at this level is characterized by project and team leader responsibility or by personnel generalist responsibility in a liaison role for a department with outside agencies. The work is usually of considerable difficulty and complexity. These positions may report to a manager, supervisor or office administrator, and perform duties related to multiple areas of human resources. Work is performed with greater independence than previous levels in the series. These positions may supervise administrative support staff or act as lead worker over paraprofessional and/or support staff within the series.

Examples of Work:

Reviews proposed human resources documents and transactions for conformity to

budget amounts, Division of Personnel policies and merit system rules and regulations; ensures timely processing of human resources transactions.

Trains subordinates and newly appointed human resources staff in all aspects of successful completion of work assignments.

Acts as team leader in successful completion of projects.

Prepares and approves, within delegated levels of authority, human resources related documents and transactions in multiple human resources areas.

Prepares and/or reviews forms for human resources, payroll and related areas.

Maintains accurate human resources records.

Prepares recruitment announcements and advertisements and provides guidance to supervisors and managers on the recruitment process.

Provides guidance to employees, managers and supervisors regarding benefits.

Conducts human resources related training.

Recommends changes to human resources procedures.

Serves as a point of contact and liaison for agency human resources staff on one or more matters related to recruitment, employment, employee relations, classification, compensation, benefits, payroll, time keeping, and personnel records.

Inputs data into and maintains statewide human resource information systems.

Prepares reports at an agency or statewide level that can be used by managers and the Division of Personnel for the purposes of managing human resources.

Ensures that data and records are maintained in a manner which can be readily accessed and utilized.

Ensures work done is in compliance with relevant federal and state laws.

May supervise administrative support staff and/or lead para-professional and/or support staff.

ASM 1

Nature of Work:

Under administrative direction, manages an organizational unit providing administrative and support services (i.e., budgeting, purchasing, personnel, business operations, etc.) in a division where operations, policy, work processes, and regulatory requirements of the unit are predictable and stable. Involves the supervision of professional, technical, and clerical employees. The scope of responsibility includes planning the operations and procedures; directing the work of employees; developing employees; evaluating unit operation; developing budget needs; researching new procedures and improvements; interpreting statutes, regulations and policies. Performs related work as required.

Distinguishing Characteristics:

The Administrative Services Manager I is distinguished from the Administrative Services Manager II by the responsibility to manage a department-wide administrative support function or a secondary mission, or unit of a primary statewide mission of the department.

Examples of Work:

Plans, develops, and executes through professional, technical, and clerical staff, a

secondary mission of a statewide program or a primary department-wide program. Directs the daily operations of the staff and may direct regional or other field staff. Develops and implements operating procedures within regulatory and statutory guidelines; develops and approves forms and procedures. Renders decisions in unusual or priority situations; consults with supervisors and other state managers in reviewing same.

Evaluates the operations and procedures of the unit for efficiency and effectiveness. Recommends the selection and assignment of staff to supervisors; conducts interviews and background evaluations for prospective employees.

Determines need for training and staff development and provides training or searches out training opportunities.

Assists in the development of the division and/or agency budget for personnel services, supplies, and equipment.

Researches professional journals, regulations, and other sources for improvements to agency and unit programs and procedures.

Compiles a variety of data related to the operation of the unit and/or the agency. Interprets statutes, regulations and policies to staff, other managers, and the public.

May serve as a witness in grievance hearings or other administrative hearings.

Prepares reports reflecting the operational status of the unit and or agency programs.

DOP Exs 7-8

20. The *Pay Plan Policy* defines “Manager” as:

Manager/Managerial. - Oversees a formally designated organization unit or program that requires extensive planning, organizing and work activities of subordinate staff, controlling resources including staff, budget, equipment, and all the means used to accomplish work within the assigned area of responsibility. The employee is held accountable for establishing and meeting the objectives and goals of the unit or program.

DOP Ex 6

21. “Appointing Authority” is defined in the *Pay Plan Policy* as:

The executive or head of a department or agency who is authorized by statute to appoint employees in the classified or classified-exempt service. By written notification to the Director of Personnel, the appointing authority may delegate specific powers authorized by this rule to persons who satisfy the definition of employee.

DOP Ex 6

22. Grievant is not an appointing authority pursuant to Class and Comp Section.

Assistant Director Mays Testimony and DOP Ex 6 Grievant has limited signature

authority for the agency. Grievant has the type of authority delegated by the appointing authority. *Id.*

23. Grievant is mistaken regarding her level of responsibility and the budget for her section. The budget for Grievant's section is created and set by the Chief Financial Officer (CFO) for the agency and Administrative Service Manager, Joshua McAtee is charged with the ultimate authority over the budget for the HR section. L3 Testimony

24. DOP uses the job content methodology for classifying positions. Looking at the predominant duties of the position and comparing those to the class specifications looking to see where the duties best fit within the class specifications contained in the Classification Plan. Based upon the testimony and evidence provided, Respondent DOP is of the steadfast position that the classification of HR Generalist 2 is the "best fit" for the position occupied by Grievant. The duties of the position occupied by Grievant does not have the level of authority recognized as necessary for the ASM 1 class specification. It is reasonably determined that the position is best fitted for the HR Generalist 2 classification because: 1) the position deals exclusively with human resources, and 2) everything the position does flows up to the manager of the section who possesses the ultimate authority for the section. While the position may fill in for the manager in his absence, that is not a predominant duty of the position according to the PDF and the job audit. L3 Testimony Mays

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "A preponderance of the

evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, [t]he 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

The Division of Personnel is the entity in state government charged by law with classifying positions in the classified service. See W. VA. CODE § 29-6-1 *et seq.* In a classification grievance, the focus is upon the grievant's duties for the relevant period, and whether they more closely match those of another cited classification specification than the classification to which he/she is currently assigned. See generally, *Hayes v. W.Va. Dep't of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989). On a regular basis, year in and year out, DOP reviews PDFs for positions statewide to determine appropriate classification. Grievant believes the position she occupies should be classified as an ASM 1. However, Respondent DOP firmly believes the position is properly allocated to the HR Generalist 2 classification. DOP has the responsibility for ensuring that all positions in the classified and classified-exempt service are appropriately classified based primarily upon a review of the duties and responsibilities of each position as compared to the class specifications. W. Va. Code R. § 143-1-4 *et seq.*

Grievant believes that because she supervises the staff beneath her on the organizational chart and that her predominant duties are to handle the day-to-day

operations of the “HR Department” that this makes her the manager of the section.^{5 6} W. Va. Code R. § 143-1-3.29 defines “Department” as “[t]he departments of the executive branch of state government provided in W. Va. Code § 5F-1-2”. W. Va. Code R. § 143-1-3.5 defines “Agency” as “[a]ny authority, board, bureau, commission, division, or other entity of state government, however designated, transferred to or incorporated in one of the departments created in W. Va. Code § 5F-1-2, as well as any affiliated county or municipal agencies. Provided, that individual districts, offices, regions, sections and units within the same agency, however designated, shall not be considered a separate agency.” Grievant does not manage a department or an agency; rather, Grievant supervises the HR section of the agency for which she works and her supervisor, Josh McAtee (working title “Senior Manager”), is responsible for the management of the section. While Mr. McAtee may perform other duties outside of the HR section, such does not alleviate him of his responsibility to oversee the management of the HR section, nor does it eliminate Grievant’s responsibility to serve as the supervisor reporting to the manager of the section.

Wendy Mays, Assistant Director of the Classification and Compensation (Class and Comp) section, testified as the classification expert for Respondent DOP’s civil service merit system. Assistant Director Mays explained how class specifications are written and interpreted. DOP’s class specifications generally contain five sections as

⁵ Grievant supervises three employees. (Grievant’s 2021 PDF actually says she supervises two). There are six total employees and two temporary employees in the entire HR section, including the positions occupied by Grievant and her supervisor.

⁶ Grievant referred to her section as the HR Department. As to her employment, the Department she works for is actually the Department of Commerce. The agency she works for is DRS, and then within the DRS, she works in the HR section.

follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics" section; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These 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 class specification is its most critical section. *See generally, Dollison v. W. Va. Dep't of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

The key to the analysis is to ascertain whether the grievant's current classification constitutes the "best fit" for his/her required duties. *Simmons v. W. Va. Dep't of Health and Human Resources*, Docket No. 90-H-433 (Mar. 28, 1991). Ms. Mays also explained that the predominant duties of the position in question are class-controlling. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). *Carroll v. Dep't of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004), *citing Broaddus, supra*; *Barrett et al v. Dep't of Health & Human Res. & Div. of Personnel*, Docket No. 04-HHR389 (Dec. 6, 2007). Grievance Board case law is clear and long standing as it relates to the issue of predominant duties. *Broaddus, supra*. The DOP is required to classify a position based on predominant duties, not duties that are performed on an occasional and intermittent basis. *Adkins v. Workforce W. Va. and Div. of Pers.*, Docket No. 2009-1457-DOC (Oct. 13, 2009).

In her review of the position occupied by Grievant, Assistant Director Mays does not see the management component, nor the level of authority necessary, by DOP

definition, for the position to be classified in a managerial role. In other words, to be properly classified as a managerial position, DOP is of the opinion that the position needed more decision making authority. Classification definitions can be found in the DOP *Pay Plan Policy* (DOP-P12). Of relevance to this grievance, the DOP defines “Manager” as:

Manager/Managerial. - Oversees a formally designated organization unit or program that requires extensive planning, organizing and work activities of subordinate staff, controlling resources including staff, budget, equipment, and all the means used to accomplish work within the assigned area of responsibility. The employee is held accountable for establishing and meeting the objectives and goals of the unit or program.

The DOP’s interpretations of the class specifications should be given great weight unless clearly erroneous, and an agency’s determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *Blankenship, supra; Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). Based upon a review of two PDFs for the position, DOP determined the position should be classified as a HR Generalist 2. A job audit and an appeal both confirmed this determination. Grievant failed to prove that such determination was arbitrary or capricious on the part of DOP.

Furthermore, a “[r]eallocation” is defined as reassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and duties. W. Va. Code R. §143-1-3.72. The key in seeking reallocation is to demonstrate “a significant change in the kind or level of duties and responsibilities.” *Stihler v. Div. of Natural Res.*, Docket No. 07-DNR-360D (Feb. 6, 2009)

citing, Keys v. Dep't of Environmental Protection, Docket No. 06-DEP-307 (April 20, 2007); *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (March 26, 1997); *See Siler v. Div. of Juvenile Serv.*, Docket No. 06-DJS-331 (May 29, 2007).

DOP did not find the requirements necessary for a reallocation to have been met at any step in the process of reviewing the position. From the first PDF submitted in 2018, through the second PDF review, the appeal and the job audit, the duties of the position remained consistent and a substantial or significant change in duties was not persuasively identified.

The position occupied by Grievant does not fit within the ASM 1 classification because the position is not the manager of the organizational unit. That particular job belongs to Grievant's supervisor, Joshua McAtee, the "senior manager." The position Grievant occupies, consistent with the HR Generalist 2 classification, works under limited supervision, performing advanced level human resources work in multiple areas, but lacks the management component that is performed by the senior manager. Grievant only performs higher level duties in the absence of the senior manager. Intermittent duties have little to no weight for purposes of classifying positions. The occasional and intermittent management duties of the position are not predominant duties of the position. DOP is required to classify a position based on predominant duties, not duties that are performed on an occasional and intermittent basis. *Adkins v. Workforce W. Va. and Div. of Pers.*, Docket No. 2009-1457-DOC (Oct. 13, 2009). Employees who simply perform some duties normally associated with a higher classification may not be considered misclassified per se. *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (April 15, 1996). Furthermore, incidental duties which require an inconsequential amount of

employees' time will not warrant a higher classification, if the remainder of their duties are accurately described by their current classification. *Graham v. Nicholas County Bd. of Educ.*, Docket No. 93-34-224 (Jan. 6, 1994).

Grievant believes the position she occupies should be classified as an ASM 1 "because I manage the Department", "I take care of the budget", "I believe I am a very good manager with our Department" and "my director of our agency relies on me quite a bit." While Grievant does appear to be the second highest level HR person in her section, Grievant and DOP do not agree which duties are inherent with authority pursuant to the position and/or are just derivative tasks. Grievant is in conflict with how reallocation is accomplished. Grievant tends to confuse or co-mingle class specifications and "job duties." Grievant is not an expert regarding classification and is not familiar with proper DOP definition. E.g., Grievant believed incorrectly that she was an appointing authority for her agency; further, DOP does not consider temporary duties and/or temporary employees when looking at supervisory responsibilities of a position.

"Appointing Authority" is defined in the *Pay Plan Policy* as:

The executive or head of a department or agency who is authorized by statute to appoint employees in the classified or classified-exempt service. By written notification to the Director of Personnel, the appointing authority may delegate specific powers authorized by this rule to persons who satisfy the definition of employee.

Respondent DOP highlights that Grievant clearly is not an appointing authority; rather, she has been designated by the appointing authority to sign for certain documents within the agency.

Grievant contends that ninety-five to one hundred percent of her time is spent managing the day-to-day human resources section, which includes EEO, payroll, benefits

and retirement, job postings, position updates, and employee assistance program. Respondent DOP highlights that ultimate responsibilities related to the office belong to Grievant's supervisor, not Grievant. Grievant intimated that while she originally worked for the manager in his absence that is no longer true, and she now contends that she is in fact the manager. However, the PDF submitted in 2021, as well as the PDF from 2018, both of which she testified fairly and accurately represent her duties and responsibilities, clearly state that the position she occupies serves as back up to the manager in his absence not that she serves as the actual manager. This debate can be summed up, in a sense, to the difference between who does the work vs who is responsible for the work done. Grievant contends she performs certain duties; thus, she is the agent responsible for the activity. DOP the entity in state government charged by law with classifying positions, has a different interpretation.

Assistant Director Mays clarified that if new duties are assigned to a position, but they are not higher level duties, are not predominate or permanent duties, or still fall within the expected and anticipated duties of the current classification those are not considered to be a substantial or significant changes in duties that necessitate a reallocation. The parties disagree regarding whether there is an identifiable substantial or significant change in the duties of the position from the 2018 PDF to present. The position has been reviewed on no less than four separate occasions. These reviews involved no less than thirteen separate and distinct reviews by DOP staff since 2018. Each and every review has resulted in the same classification determination. At no time did anyone in DOP believe that position should be classified as anything other than an HR Generalist 2. It is important to note that the DOP has responsibility for ensuring that all positions in

the classified and classified-exempt service are appropriately classified. W. Va. Code R. § 143-1-1 *et seq.* and W. Va. Code § 29-6-10. This serious responsibility often causes DOP to be unpopular with employees and other agencies, but it is essential to the equitable operation of the classification system and the fair treatment of all employees. *See McGraw v. Div. of Corr. and Rehab/Div. of Juv. Serv./Sam Perdue Juvenile Center and Div. of Personnel*, Docket No. 2021-2005-MAPS (Aug. 3, 2022).

The duties “added” to the position since the last review (but also contained in the 2018 PDF) included the addition of payroll duties, working at a higher level in absence of the senior manager, ability to approve purchase requests and to attend grievance matters as a representative for the agency. It is clear the position is performing human resources functions. While the position does have latitude, the senior manager has the ultimate authority for all matters of the section. Respondent DOP persuasively avers that the position is an HR Generalist 2 for two main reasons: 1) the position deals exclusively with human resources, and 2) everything the position does flows up to the manager who possesses the ultimate authority for the section. The position may fill in for the manager in his absence; however, that is not a predominant duty of the position and is not considered when making a classification determination. Based upon the testimony and evidence provided by Grievant, as well as all other information available, Respondent DOP continues to believe the classification of HR Generalist 2 is the “best fit” for the position occupied by Grievant. *“The duties of the position occupied by Grievant do not fit within the ASM 1 class specification and are a best fit for the HR Generalist 2 classification because the position does not have the level of authority necessary for the higher-level classification.”* (Emphasis added) Grievant failed to meet her burden, failed to show

that the position she occupies should be reallocated, and failed to show that the classification determination made by the DOP was arbitrary and capricious, as such this grievance must be denied.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving her grievance by a preponderance of the evidence. See W. VA. CODE R §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id*

2. WEST VIRGINIA CODE § 29-6-10 authorizes the W. Va. Division of Personnel (DOP) to establish and maintain a position classification plan for all positions in the classified and classified exempt service. State agencies that utilize such positions, as a general rule, must adhere to the plan in making assignments to their employees.

3. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983).

4. The Division of Personnel is the entity of West Virginia State government primarily charged with making classification determinations. W. VA. CODE ST. R. § 143-1-6.4.a.1

5. In order to prevail upon a claim of misclassification, a Grievant must prove by a preponderance of the evidence that his/her duties for the relevant period of time more closely match those of another cited class specification than the classification to which he is currently assigned. See generally, *Hayes v. W. Va. Department of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989).

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

7. The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of DOP. *Moore v. W. Va. Dep't of Health & Human Resources*, Docket No. 94-HHR-126 (Aug. 26, 1994); *Celestine v. State Police*, Docket No. 2009-0256-MAPS (May 4, 2009); *Logsdon v. Div. of Highways*, Docket No. 2008-1159-DOT (Feb. 23, 2009). Rather, 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); *Logsdon, supra*.

8. The State Personnel Board and the Director of DOP have wide discretion in performing their duties although they cannot exercise their 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. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

9. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). 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)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

10. "Reallocation" is defined as reassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and duties. W. Va. Code R. §143-1-3.72. The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." *Stihler v. Div. of Natural Res.*, Docket No. 07-DNR-360D (Feb. 6, 2009) *citing*, *Keys v.*

Dep't of Environmental Protection, Docket No. 06-DEP-307 (April 20, 2007); *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (March 26, 1997); *See Siler v. Div. of Juvenile Serv.*, Docket No. 06-DJS-331 (May 29, 2007).

11. Personnel class specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics" section; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These 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 class specification is its most critical section. *Atchison v. W. Va. Div. of Health*, Docket No. 90-H-444 (Apr. 22, 1991); *See generally, Dollison v. W. Va. Dep't of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

12. The key to the analysis is to ascertain whether Grievant's current classification constitutes the "best fit" for their required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991); *Propst v. Dep't of Health and Human Resources and Div. of Personnel*, Docket No. 93-HHR-351 (Dec. 3, 1993).

13. In ascertaining which classification constitutes the best fit, DOP looks at the predominant duties of the position in question. These predominant duties are deemed to be "class-controlling." *Carroll v. Dep't of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004), *citing Broaddus v. W. Va. Div. of Human Services*, Docket Nos. 89-

DHS-606, 607, 609 (Aug. 31, 1990); *Barrett et al v. Dep't of Health & Human Res. & Div. of Personnel*, Docket No. 04-HHR389 (Dec. 6, 2007). Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one quality or requirement does not exclude others. W. Va. Code R. §134-1-4.04(a). Even though a job description does not include all the actual tasks performed by a grievant it does not make that job classification invalid. *Id* at §4.04(d). *Lee v. Dep't of Administration and Div. of Personnel*, Docket No. 02-ADMN-014 (May 30, 2002).

14. DOP is required to classify a position based on predominant duties, not duties that are performed on an occasional and intermittent basis. *Adkins v. Workforce W. Va. and Div. of Pers.*, Docket No. 2009-1457-DOC (Oct. 13, 2009). Employees who simply perform some duties normally associated with a higher classification may not be considered misclassified per se. *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (April 15, 1996). Furthermore, incidental duties which require an inconsequential amount of employees' time will not warrant a higher classification, if the remainder of their duties are accurately described by their current classification. *Graham v. Nicholas County Bd. of Educ.*, Docket No. 93-34-224 (Jan. 6, 1994).

15. Grievant has not shown by a preponderance of the evidence that the duties and responsibilities of the position she occupies fall within the ASM 1 classification to which she seeks to have the position assigned or that the DOP acted in an arbitrary or capricious manner as relates to the classification determination of the position.

16. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered, explained or reached the decision in a

manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). 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)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

17. Based on the duties and responsibilities performed by Grievant, as detailed on the two PDFs Grievant submitted (2018 and 2021), in the job audit, and in the appeal, the DOP has determined the "best fit" for the position to be the HR Generalist 2 classification. Grievant has not shown by a preponderance of the evidence that DOP acted in an arbitrary or capricious manner as it relates to the classification of Grievant's position.

18. Grievant failed to prove that DOP's interpretation of the HR Generalist 2 classification is clearly erroneous. Grievant has not shown by a preponderance of the evidence that her duties fell more closely within the Administrative Services Manager 1 than the HR Generalist 2 classification to which her position is assigned.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.⁷ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: September 29, 2022

Landon R. Brown
Administrative Law Judge

⁷ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.