

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**LISA ADAMS MCGRAW,
Grievant,**

v.

Docket No. 2021-2005-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
DIVISION OF JUVENILE SERVICES/
SAM PERDUE JUVENILE CENTER AND
DIVISION OF PERSONNEL,**

Respondent.

DECISION

Lisa Adams McGraw, Grievant, is employed by Respondent, Department of Homeland Security, in the Division of Juvenile Services and assigned to the Sam Perdue Juvenile Center. Ms. Adams filed a level one grievance form dated December 10, 2020, alleging that her position was improperly reallocated by Respondent, Division of Personnel ("DOP"), from the Supervisor 3 classification at paygrade 13 to the Administrative Services Assistant 2 classification at paygrade 11. As relief, Grievant seeks her position to remain in the Supervisor 3 classification.¹

Level one was waived by the parties on December 21, 2020. The DOP was joined as a necessary party by Order of Joinder entered on January 12, 2021. A level two mediation was set for June 16, 2021; however, prior to the mediation the parties agreed to hold the mediation in abeyance to allow the DOP to conduct a job audit in an effort to resolve the matter. An order placing the grievance in abeyance was entered on June 9, 2021. Following a virtual job audit, the parties were unable to reach an

¹ Notwithstanding DOP's action, Respondent, DJS had not effectuated the reallocation of Grievant's position by the date of the level three hearing.

agreement. An Order of Unsuccessful Mediation was entered on August 25, 2021. Grievant's appeal to level three was dated August 30, 2021.

A level three hearing was conducted on April 12, 2022, in Beckley, West Virginia. Grievant personally appeared and was represented by Elaine Harris, Communications Workers of America. Respondent DJS was represented by Mark Weiler, Assistant Attorney General, and Respondent DOP was represented by Karen O'Sullivan Thornton, Assistant Attorney General. The matter became mature for decision on June 30, 2022, upon receipt of the last of the parties Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was requested by the DOP to provide a Position Description Form for her Supervisor 3 position so DOP could conduct a classification review. DOP determined that the initial approval of the position in the Supervisor 3 classification granted in November of 2014 was incorrect. DOP determined that the Supervisor 3 position should be reallocated to the Administrative Services Assistant 2 (ASA 2) classification. Grievant contested the reallocation of her position and argues that the best fit for her position remains the Supervisor 3 classification. Grievant did not prove by a preponderance of the evidence that the ASA 2 classification was not the best fit for her position. The Grievance is denied.

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

Findings of Fact

1. Grievant, Lisa McGraw, is employed by Respondent, Department of Homeland Security ("Homeland"), in the Juvenile Services Division ("DJS"), and assigned to Sam Perdue Juvenile Center ("Perdue Center").

2. Grievant started work at the Perdue Center on December 1, 2010, in the Office Assistant 2 classification. She was promoted to an Account Technician 2 three years later.

3. In 2014, DJS sought to post a position at the Perdue Center in the Supervisor 3 classification. DJS submitted the proposed job description and duties, as well as the posting to DOP for approval. The position was approved and posted on November 20, 2014. (Grievant Exhibit 1)

4. Grievant applied for the position and was assigned to the Supervisor 3 position. She started working in the Supervisor 3 position on May 1, 2015.

5. Grievant's position reports directly to the Perdue Center Superintendent, the overall administrator for the Center. Grievant supervises a Procurement Associate, Accounting Tech 2, Human Resource Associate, Custodian, three Kitchen Staff, and two Maintenance Workers.²

6. During her tenure as a Supervisor 3, Grievant's performance was evaluated in 2015 and 2020, by the Perdue Center Superintendent, Gary Patton. Superintendent Patton noted in these evaluations that Grievant supervises five departments in the Center, and works with outside agencies such as BRIM, DHHR, and the State Fire Marshal's office who perform inspections of the facility. Superintendent

² Grievant Exhibit 7, Perdue Center Organizational Chart.

Patton also noted that Grievant performs scheduling, timesheets, leave requests, overtime assignments and EPAs³ for employees at the Perdue Center. Finally, Superintendent Patton notes on Grievant's EPAs that Grievant ensures that contracts between the facility and vendors are current, and initiates renewal processes for such contracts. Superintendent Patton rates Grievant as a good leader and "an important contributor to the success of the facility."⁴

7. Wendy Mays has been Assistant Director of the DOP Classification and Compensation section (Class and Comp) since October of 2015. Soon after her taking that position, Ms. Mays realized there were issues with the Supervisor 3 positions found throughout State government. Based upon the definitions included in the DOP's *Pay Plan Policy*, the positions appeared to be misclassified. As such, positions assigned to the Supervisor 3 classification came to DOP's attention, regardless of whether the duties of the positions had changed. DOP reviewed the Supervisor 3 positions to determine the appropriate classification.

8. As part of the reorganization of Homeland, the DOP reviewed Position Description Forms (PDF)⁵ for all the agency's Human Resources (HR) and Procurement positions. During this review process, DOP discovered the Supervisor 3 positions at Homeland, including the one occupied by the Grievant, and requested a PDF for each of those positions as well.⁶

³ Employee Performance Appraisals.

⁴ Grievant Exhibit 2a, 2b, & 2c. EPAs rating Grievant's job performance.

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.

⁶ Testimony of Assistant Director Mays.

9. Consistent with DOP's review of Supervisor 3 positions, the PDF for the position occupied by the Grievant was requested by the DOP in to facilitate conducting a classification review to ensure the position was appropriately classified. Based upon a review of the PDF, DOP determined that the approval of the position in the Supervisor 3 granted in November of 2014 was incorrect. DOP determined that the Supervisor 3 position should be reallocated to the Administrative Services Assistant 2 (ASA 2) classification. The classification determination was communicated to the Grievant and Homeland by letter dated September 17, 2020. (Grievant Exhibits 1 & 4, and Respondent DOP Exhibits 1-3).

10. Grievant and Homeland both appealed the DOP's classification determination. Homeland sought a job audit of the position to ensure that it was properly allocated.

11. DOP again reviewed the position, conducted a virtual job audit,⁷ and concluded that the original classification determination of ASA 2 was appropriate. This determination was communicated to the Grievant and Respondent DHS by letter dated November 25, 2020. See Grievant's Exhibit 10 and Testimony Grievant, Testimony Mays and Testimony Lori Lynch.

12 Reallocation is defined as "the 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.*" (Emphasis added) W. Va. Code R. §143-1-3.72. DOP determined

⁷ During the height of the COVID-19 pandemic, job audits were conducted by telephone or video conferencing to avoid close contact between employees.

that the title and duties in Grievant's position were misalignment in the Supervisor 3 classification which required a reallocation to occur. (Respondent DOP Exhibit 1)

13. DOP classification determinations are made based on the current, permanently assigned, predominant duties of the position as compared to the current class specifications. The Classification and Compensation section of the DOP is responsible for, among other things, drafting, applying and interpreting the class specifications, establishing the pay ranges and ensuring that all classified positions in state government are classified and paid appropriately within the State's Classification and Compensation Plans.⁸

14. The DOP *Administrative Rule* defines Classification Specifications (Class Specs) as follows:

Class Specification. -- 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 St. R. § 143-1-3.19

15. The class specifications for the Supervisor 3 and ASA 2 read in pertinent part as follows:

SUPERVISOR 3

Nature of Work:

Under general supervision, performs advanced level supervisory work overseeing the activities of high-level technical or administrative staff. Completes annual performance appraisals, approves sick and annual leave, makes recommendations and is held responsible for the performance of the employees supervised. Work is reviewed by supervisors through results produced and through

⁸ Testimony of Assistant Director Mays

meetings to evaluate output. Provides information on the units' accomplishments for the agency's annual report. Represents the agency before committees and the general public. Performs related work as required.

Distinguishing Characteristics:

The Supervisor 3 is distinguished from the Supervisor 2 by the nature of the work supervised, the degree of external contacts, the number of units supervised and by the level of collateral work assigned to the position. The work supervised is typically of a technical or administrative nature as opposed to clerical. Contacts are often with other public officials at the state and federal level. Supervises two or more related units. The level of related work assigned is often administrative and technical in nature.

ADMINISTRATIVE SERVICES ASSISTANT 2

Nature of Work:

Under limited supervision, performs administrative and supervisory work in providing support services such as fiscal, personnel, payroll or procurement in a state agency or facility or serves as the assistant supervisor in a major administrative support unit of a large state agency. Develops policies and procedures for resolving operational problems and for improving administrative services. Supervises the work of office support staff in rendering required services. Work is typically varied and includes extensive inter- and intragovernmental and public contact. Has some authority to vary work methods and policy applications and to commit the agency to alternative course of action. Performs related work as required.

Distinguishing Characteristics:

Positions in this class are distinguished from the Administrative Services Assistant 1 by the supervisory nature of the work performed, by the size of the unit served and by the independence of action granted. Positions in this class are responsible for a significant administrative component in a medium size agency or state facility or serves as an Assistant Director of a major administrative support component of a large state agency. Authority to vary work methods and to commit the agency to alternative course of action is granted.

(Grievant Exhibit 6 & 8)⁹

16. As set out in the “Nature of Work” section of each class spec, both positions perform supervisory work directing the schedule and performance of subordinate’s duties to meet organizational goals. Both are high functioning positions with significant responsibilities. Because of these similarities, it is not surprising that Grievant is performing examples of duties listed in both classifications related to directing and supervising employees.

17. The difference in the positions is the nature of the work being performed and the level of technical and administrative skills and duties of the subordinated. The ASA 2 position “performs *administrative and supervisory work in providing support services* such as fiscal, personnel, payroll or procurement in a state agency or facility or serves as the assistant supervisor in a major administrative support unit of a large state agency.” (Emphasis added) While the Supervisor 3 position “performs *advanced level* supervisory work overseeing the activities of *high-level technical or administrative staff*.” (Emphasis added) (FOF 13 *supra*)

18. Terms used in classification documents often have specialized definitions that help specifically define the nature of work in classifications. DOP provides such definitions in both the *DOP Administrative Rule* and the *DOP Pay Plan Policy* (DOP PPP). The following definitions for terms used in the class specs for the ASA 2 and Supervisor 3 are provided in the DOP PPP.

“Technical” - Work requiring the practical application of scientific, engineering, mathematical, or design principles.

⁹ While pay grade is typically not a consideration in classification determination, it is noted that the ASA 2 classification is in pay grade 11 (\$26,406 to \$48,851 annually) and the Supervisor 3 classification is in pay grade 13 (\$29,396 to \$54,382 annually).

“Administrative” - Work activities relating to a principal mission or program of an agency or subcomponent thereof that supports that agency’s mission or program. This involves analyzing, evaluating, modifying, and/or developing programs, policies, and procedures that facilitate the work of agencies’ objectives while applying relevant analysis, theory, and principles.

“Administrative support” - Support services such as personnel, budget, purchasing, data processing which support or facilitate the service programs of the agency, also means work assisting an administrator through office management, clerical supervision, data collection and reporting, workflow/project tracking, etc.

Id.

19. In the “Distinguishing Characteristics” section of the Supervisor 3 classification the work is further described as “*The work supervised is typically of a technical or administrative nature as opposed to clerical.* Contacts are often with other public officials at the state and federal level. Supervises two or more related units. *The level of related work assigned is often administrative and technical in nature.*” (Emphasis added) (FOF 13 *supra*)

20. In the “Distinguishing Characteristics” section of the ASA 2 classification the work is further described as: “responsible for a significant administrative component in a medium size agency or state facility or serves as an Assistant Director of a *major administrative support component* of a large state agency. Authority to vary work methods and to commit the agency to alternative course of action is granted.” (Emphasis added) (FOF 13 *supra*)

21. The position occupied by the Grievant is responsible for supervision of multifaceted, diverse areas of administrative support, i.e., fiscal, HR, procurement, etc., Grievant presented numerous policies as examples of the type of work she performed.

She believed these duties showed the position should remain in the Supervisor 3 classification.

22. The duties of the position performed relating to these policies are indicative of basic data entry, including spread sheets, that are sent by the facility to the Division of Administrative Services within the DHS for processing.¹⁰

23. Notwithstanding the reallocation by DOP of the Grievant's position from Supervisor 3 to ASA 2, Respondent Homeland has not taken any steps to effectuate the reallocation. Grievant's present salary fits within the pay range for both positions and would not need to change because of the reallocation. (Grievant Exhibits 6 & 8)

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See, W. VA. CODE R §156-1-3. Burden of Proof.* "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 and 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.*

To prevail upon a claim of misclassification or misallocation, a Grievant must prove by a preponderance of the evidence that her duties 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).

¹⁰ Testimony of Director DCR of Staffing Services, Lynch.

In this case, the DOP has reallocated Grievant's position in the ASA 2 classification. Grievant is arguing that her duties more closely fit the Supervisor 3 classification to which her position has been allocated since May 1, 2015. Grievant first points out that Respondent DJS sought approval to post the position in the Supervisor 3 classification in November 2014. DOP approved the posting for the Supervisor 3 classification, yet the duties were virtually the same as those performed now. Grievant argues that DOP already allocated the position to the Supervisor 3 classification so there is no need to change that classification now.

Respondent DOP does not deny that the initial posting was approved by the DOP. Rather, the DOP argues that the approval was mistaken and not an appropriate interpretation of the classification specifications. DOP argues that it is not bound by prior errors and has an obligation to correct such errors to ensure that the classification system is applied fairly and equitably.

Respondent DOP is charged with establishing and applying a system of classification and compensation for all positions in the classified and classified-exempt service. W. VA. CODE § 29-6-5(b). Respondent DOP is authorized to promulgate rules and issue policies to administer its classification and compensation system. W. VA. CODE § 29-6-10. Pursuant to the DOP's administrative rule, the DOP's Director "has the sole authority for the classification process." W. VA. CODE ST. R. § 143-1-4.4.

The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*,

Docket No. 96-15-512 (Dec. 31, 1997). *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008).

Additionally, it has been established that prior mistakes do not create an entitlement to continuing incorrect compensation. See *Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995). *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006).” *Mullins v. McDowell County Bd. of Educ.*, Docket No. 07-33-076 (Oct. 20, 2008); *Dinger v. Mercer County Bd. of Educ.*, Docket No. 2013-1047-MerED (Sept. 19, 2013). *Bailey, et al. v. Mingo County Bd. of Educ.*, Docket No. 2015-1551-CONS (Jan 8, 2016).

“The Grievance Board has consistently refused to grant the type of relief Grievant seeks because of a mistake or a violation of a policy, because such actions constitute *ultra vires* acts. See *Guthrie v. W.Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-277 (Jan. 31, 1996); *Earnest and Hatfield v. Southern W.Va. Community College*, Docket Nos. 91-BOD-352/290 (Sept. 30, 1992), *rev'd*, Circuit Court of Kanawha County, Civil Action No. 92-AA-296 (Apr. 23, 1993); (See footnote 8) *Froats v. Hancock County Bd. of Educ.*, Docket No. 89-15-414 (Dec 18, 1989). See also *Roberts v. W.Va. Dept. of Transp.*, Docket No. 96-DOH-017 (May 2, 1996), *aff'd*, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (May 25, 1997); *Gilliam v. W.Va. Dept. of Transp.*, Docket No. 96-DOH-511 (Apr. 24, 1997).” *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-HHR-181 (May 30, 1997).

The Grievance Board has discussed the issue of *ultra vires* acts at some length. *Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a

policy or statute, are considered non-binding and cannot be used to force an agency to perform such violative acts. *Guthrie v. Dep't of Health and Human Serv.*, Docket No. 95-HHR-297 (Jan. 31, 1996). See *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998). The rule is clear. Neither the state nor one of its political subdivisions may be bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-224 (January 31, 2007). “Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.” *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

If DOP is correct that the initial approval of the allocation of Grievant's position was an erroneous interpretation of the classification specifications the agency is not bound by that prior mistake. Rather, like boards of education, DOP and other State agencies should be encouraged to correct their errors as early as possible. See *Conners, Barrett, and Toney supra*.

We start with the recognition that both classifications describe high functioning positions with significant authority to supervise employees and programs which are valuable to their agency. Neither of the Respondents, are arguing that this reallocation is a result of Grievant's work being any less important to the Perdue Center. All agree

that the groups who Grievant supervises provided valuable administrative support to the successful operation of the facility.

The DOP argues that the difference in the positions is the nature of the work being performed and the level of technical and administrative skills and duties of the subordinated. The ASA 2 position “performs *administrative and supervisory work in providing support services* such as fiscal, personnel, payroll or procurement in a state agency or facility or serves as the assistant supervisor in a major administrative support unit of a large state agency.” (Emphasis added) While the Supervisor 3 position “performs *advanced level* supervisory work overseeing the activities of *high-level technical or administrative staff*.” (Emphasis added) (FOF 13 *supra*)

In support of this position DOP first points to the class specs of the two positions. The Supervisor 3 classification “performs advanced level supervisory work overseeing the *activities of high-level technical or administrative staff*.” The ASA 2 classification “performs administrative and supervisory work in providing support services such as fiscal, personnel, payroll or procurement in a state agency or facility or serves as the assistant supervisor in a major administrative support unit of a large state agency.”¹¹ For the position to be allocated to the Supervisor 3 position the work performed by Grievant’s subordinates must be work which meets the definition of “technical” or “administrative” found in the DOP PPP. (Emphasis added)

None of the employees Grievant supervises perform work which meets the definition of “technical”, which is defined as “[w]ork requiring the practical application of scientific, engineering, mathematical, or design principles.” The issue is whether the

¹¹ Classification Specifications for Supervisor 3 and ASA 2.

work perform by Grievant's subordinated meets the definition of "administrative" which would allow Grievant's position to be allocated as Supervisor 3 or the definition of "administrative support" which would require Grievant's position to be allocated as ASA 2.

The employees Grievant supervises are, a Procurement Associate, an Accounting Tech 2, a Human Resource Associate, a Custodian, three Kitchen Staff, and two Maintenance Workers.¹² To meet the definition of "administrative" the employees must perform duties which "involve analyzing, evaluating, modifying, and/or developing programs, policies, and procedures that facilitate the work of agencies' objectives while applying relevant analysis, theory, and principles."¹³ While kitchen staff, custodians, and maintenance workers must possess certain skill to perform their jobs, their work certainly does not require duties set out in the "administrative" definition.

The classification specifications for the positions of Procurement Associate, Accounting Technician 2, and Human Resource Associate, describe these positions as follows:

- **Procurement Associate:** Paraprofessional and clerical work
- These positions work under general supervision performing paraprofessional work reviewing purchase requisitions for accuracy and completeness. These positions are responsible for purchasing contracts, inventory, and records management.
- **Accounting Technician 2:** Entry level accounting support services -. performs entry level accounting support duties. beginning level paraprofessional accounting/auditing work. Duties are distinguished by the recording and balancing of routine financial and numerical data in accordance with agency standards and work procedures.

¹² Grievant Exhibit 7, Perdue Center Organizational Chart.

¹³ DOP PPP.

- **Human Resource Associate:** Performs 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. Characterized by limited authority and moderate complexity and includes the application of established standards, guidelines, rules and regulations, with little latitude to vary methods and procedures.

Work activities in these positions are performed by following specific policies and procedures and do not involve “analyzing, evaluating, modifying, and/or developing programs, policies, and procedures that facilitate the work of agencies’ objectives while applying relevant analysis, theory, and principles.” See definition of “Administrative” duties, FOF 16, *supra*. Rather these duties fit firmly withing the definition of “administrative support” work which include:

Support services such as personnel, budget, purchasing, data processing which support or facilitate the service programs of the agency, also means work assisting an administrator through office management, clerical supervision, data collection and reporting, workflow/project tracking, etc.¹⁴

The key to the analysis of allocation cases 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). 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.*

¹⁴ DOP PPP.

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). Because Grievant does not “perform advanced level supervisory work overseeing the activities of high-level technical or administrative staff”¹⁵ the Supervisor 3 classification is not the best fit for her position. Instead Grievant’s subordinates perform administrative support work and Grievant “performs administrative and supervisory work in providing support services such as fiscal, personnel, payroll or procurement in a state agency or facility or serves as the assistant supervisor.”¹⁶ Clearly the best fit for Grievant’s position is the ASA 2 classification.

Grievant is understandably disappointed by the reallocation of her position and believes that it is unfair after the years she has served it the Supervisor 3 classification. As mentioned above, both classifications are high functioning positions with significant responsibilities. No one is attempting to diminish the importance of Grievant’s contribution to effective operation of the Perdue Center. But ultimately, DOP is responsible for ensuring that all positions in State government are properly classified. This serious responsibility often caused 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.

Grievant did not prove by a preponderance of the evidence that her duties more closely match those of the Supervisor 3 classification to which she is currently assigned. Accordingly, the grievance is DENIED.

¹⁵ Class Spec “Nature of Work” for Supervisor 3 classification.

¹⁶ Class Spec “Nature of Work” for ASA 2.

Conclusions of Law

1. To prevail upon a claim of misclassification or misallocation, a Grievant must prove by a preponderance of the evidence that her duties 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). "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 and 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. The DOP is charged with establishing and applying a system of classification and compensation for all positions in the classified and classified-exempt service. W. VA. CODE § 29-6-5(b). Respondent DOP is authorized to promulgate rules and issue policies to administer its classification and compensation system. W. VA. CODE § 29-6-10. Pursuant to the DOP's administrative rule, the DOP's Director "has the sole authority for the classification process." W. VA. CODE ST. R. § 143-1-4.4.

3. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997). *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008).

4. *Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force

an agency to perform such violative acts. *Guthrie v. Dep't of Health and Human Serv.*, Docket No. 95-HHR-297 (Jan. 31, 1996). See *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998).

5. Neither the state nor one of its political subdivisions may be bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-224 (January 31, 2007).

6. The initial DOP approval of the allocation of Grievant's position in the Supervisor 3 classification was an erroneous interpretation of the classification specifications the DOP is not bound by that prior mistake. Rather, like boards of education, DOP and other state agencies should be encouraged to correct their errors as early as possible. See *Conners, Barrett, and Toney supra*.

7. The key to the analysis of allocation cases 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). 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 *Broadbuss 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).

8. Grievant did not prove by a preponderance of the evidence that her duties more closely match those of the Supervisor 3 classification to which she is currently assigned.¹⁷

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Intermediate Court of Appeals.¹⁸ 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, August 3, 2022

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE

¹⁷ In fact, DOP proved by a preponderance of the evidence that the predominate duties of Grievant's position most closely match the ASA 2 classification

¹⁸ 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.