

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BRENDA S. EVERETT,**

**Grievant,**

**v.**

**Docket No. 2021-2004-MAPS**

**DEPARTMENT OF HOMELAND SECURITY/  
DIVISION OF CORRECTIONS AND REHABILITATION/  
BUREAU OF JUVENILE SERVICES/  
J.M. "CHICK" BUCKBEE JUVENILE CENTER  
and DIVISION OF PERSONNEL,**

**Respondents.**

**DECISION**

Grievant, Brenda Everett, is employed by Respondent, the Department of Homeland Security (DHS), with the Division of Corrections and Rehabilitation/Bureau of Juvenile Services at the Chick Buckbee Juvenile Center. The Division of Personnel (DOP) ensures that all DHS positions are properly classified. On December 15, 2020, Grievant filed this grievance stating:

On November 25, 2020, I was advised via determination letter from Sheryl R. Webb, Director of the WV Division of Personnel, that my job classification was being reallocated from the current Supervisor 3 (Class 9422 pay grade 13) to an Administrative Services Assistant 2 (Class 9405 pay grade 11). I disagree and dispute this decision.

For relief, Grievant states, "As a remedy, I wish to be made whole, including but not limited to, retaining my current job classification of Supervisor 3, a position that I have performed since January 1, 2015, and be made whole for any and all losses."<sup>1</sup>

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<sup>1</sup>During the hearing, Grievant requested that, as an alternative to Supervisor 3, her position be reallocated to either a Superintendent 1 or a Corrections Business Manager.

Respondent DHS waived the matter from level one to level two of the grievance process on December 21, 2020, citing lack of authority to grant the relief requested. On January 12, 2021, Respondent DOP was joined as a necessary party by the Grievance Board through an Order of Joinder. Level two mediation occurred on June 10, 2021. Grievant appealed to level three on September 14, 2021. A level three hearing was held on June 28, 2023, before the undersigned at the Grievance Board's Westover office. Grievant appeared in person and was represented by Elaine Harris, CWA International. Respondent DHS appeared by Lori Lynch, Director of Staffing Services, and was represented by Jodi Tyler, Assistant Attorney General. DOP appeared by Wendy Mays, Assistant Director, and was represented by Karen O'Sullivan Thornton, Assistant Attorney General. Grievant and DOP submitted Proposed Findings of Fact and Conclusions of Law (PFFCL). This matter became mature for decision on August 21, 2023.

### **Synopsis**

Grievant was employed by Respondent DHS in a position classified as Supervisor 3. After a classification review, Respondent DOP reallocated Grievant's position downward to an Administrative Services Assistant 2 (ASA 2). Grievant asserts improper demotion. Grievant contends her position is best suited to either Supervisor 3, Superintendent 1, or Corrections Business Manager. Respondent determined that Grievant does not supervise high-level technical or administrative positions as required for the Supervisor 3 classification and concluded that ASA 2 is the best fit for her position. Grievant failed to prove that the position reallocation was unreasonable, that another classification was a better fit, or that she was demoted. Accordingly, this 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 has been employed by Respondent DHS since 2003. On January 1, 2015, Grievant was promoted to a position classified as a Supervisor 3.

2. Respondent DOP has a statutory obligation to ensure that positions within the DOP civil service merit system are properly allocated within the DOP's Classification Plan and to correct any errors in the improper classification of a position. When DOP determines that a position is improperly allocated, it reallocates the position to the classification it sees as the best fit.

3. Pursuant DOP's Administrative Rule, "reallocation" is defined as "[r]eassignment 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.

4. Wendy Mays was hired as the Assistant Director of the Classification and Compensation section (Class and Comp) of the DOP in October 2015. The Class and Comp section is responsible for, among other things, drafting, applying, and interpreting class specifications, establishing pay ranges, and ensuring that all classified positions are appropriately classified and paid within the Class and Comp Plans. Soon after starting, Ms. Mays found that the Supervisor 3 positions throughout State government appeared to be misclassified under DOP's Pay Plan Policy. Consequently, each time it became

aware of a Supervisor 3 position, DOP would evaluate the classification for accuracy. (Assistant Director Mays' testimony, DOP Exhibit 3).

5. As part of DOP's undertaking to review and revise the HR and Procurement class series, DOP elicited and reviewed Position Description Forms (PDF) for all HR and Procurement positions.

6. A Position Description Form (PDF) is the official document setting forth the duties and responsibilities of a position and is used by DOP to properly allocate positions within the classified service. W. VA. CODE R. § 143-1-4.5.

7. During this process, Supervisor 3 positions were discovered at Respondent DHS, including the one occupied by Grievant. Respondent DOP requested a PDF for each of these positions.

8. In reviewing a PDF for position reallocation, DOP considers only permanent predominant duties.

9. Grievant completed a PDF for her position describing her essential duties with a percentage time allotment as follows:

- 45% - Supervise procurement, HR, laundry, maintenance and kitchen staff in their daily routine and assigned duties. This includes training new personnel; prepare, conduct and review performance evaluations; determine and conduct any disciplinary actions; resolving support staff issues as they pertain to providing facility services; approval of hours/timecards, creating schedules and granting leave; assisting with staff's assigned duties whenever necessary (i.e. staff shortages); assisting staff in prioritizing work load and/or assignments, etc; and assist facility staff members in conflict resolution between staff and/or residents.
- 30% - Advisor to Facility Superintendent regarding support staff services as well as assisting Facility Superintendent in gathering data and preparing special reports and preparing for audits and/or inspections. Assist and provide

input in the development and implementation of facility policies and procedures. Assist, provide input and participate in special programs or incentives for staff and/or residents. Assist in the oversight of facility compliance with statutes, regulations, policies and procedures.

- 10% - Provide specific guidance and assistance to HR staff in completing all facility-level tasks. Attend and participate in interviews for hiring facility staff, making recommendations for hiring or promotional transactions.
- 10% - Provide specific guidance and assistance to procurement staff in acquiring commodities and services for the facility.
- 5% - Track and apply for all applicable permits (food establishment, permit to operate), monitor and schedule all building/equipment inspections and establish corrective action plans for any finding. Assist outside contractors/state agencies in their performance of facility audits.

(Respondent DOP's Exhibit 1).

10. After reviewing Grievant's PDF, Respondent DOP determined the position should be reallocated to the ASA 2 classification. (Grievant's Exhibit 6).

11. Respondent DOP determined that the duties and responsibilities of the position occupied by Grievant are as follows:

- \* Supervise assigned staff, which includes training of new staff, conducting EPAs, creating schedules, and reviewing and approving leave requests.
- \* Assist with gathering data and preparing special reports as well as preparing for audits and/or inspections.
- \* Provide guidance and assistance to human resources and procurement staff.

(Grievant's Exhibit 2).

12. Grievant appealed Respondent DOP's classification determination and her reallocation to the ASA 2 classification, stating in part:

As Supervisor III, I am in a position of authority, supervising the facility support staff, and am defined as a member of the management team of the facility. I was/am designated as Acting/Interim Superintendent in the Facility Superintendent's absences for business and/or sick/annual leave. Specifically, in my Superintendent's extended medical leave of absence during January/February 2020, I was required to apply for a temporary classification upgrade to Interim Superintendent and was approved and deemed qualified to fill the temporary position based on my application and performance.

During the past, and in future instances as Acting/Interim Superintendent, I will be expected to carry out most, if not all, of the duties as the Facility Superintendent. The probability of my interaction with state agencies on a daily basis is high, and interacting with federal agencies is also a possibility. Currently, as Supervisor III, I am the designated Facility Grievance Coordinator; liaison with the Child Nutrition Program; and facility interview committee member. I assist and facilitate programming with the treatment staff for the residents and was responsible for developing and implementing the Dog Rescue Program. ...

In addition to those duties itemized on my original PDF, in supervising facility support staff, focus is directed not only to training new staff, but also in developing staff and assigning work flow in each area of supervision so that services can be provided efficiently and effectively to the staff and residents of this facility.

In addition to the supervisory function of the above-listed staff, and in the inevitable absences of the Superintendent, as Interim Superintendent or Acting Superintendent, I become supervisor to all facility staff including security and treatment staff.

(Grievant's Exhibit 7)

13. DOP again reviewed the position and affirmed its decision to classify Grievant's position as ASA 2, again finding that the duties and responsibilities of the position are as follows:

- Supervise procurement, Human Resources, laundry, maintenance and kitchen staff in their daily routine to

include train new personnel, prepare, conduct and review performance evaluations, resolve support staff issues, create schedules, prioritize workload, and approve timecards.

- Assist in gathering data and prepare special reports and prepare audits and/or inspections.
- Reconcile P-card purchases and train new employees regarding P-card rules and regulations.

(Grievant's Exhibit 8).

14. Respondent DOP compared the duties and responsibilities of Grievant's position to the class specification for Corrections Business Manager (CBM) and ASA 2, as follows:

The Corrections Business Manager class specification describes work in part as:

"Under administrative direction, performs administrative and professional accounting work in directing the financial, accounting, purchasing, payroll, employee benefits, inmate trustee accounting, fixed asset, and GAAP reporting activities. Responsibility includes management of all fiscal related responsibilities and other business-related activities for the assigned institution. Supervision is exercised over a staff of professional accounting and clerical employees. This individual is involved in the hiring, training, and employee performance reviews of all individuals in unit. All activities and processes must be in accordance with established policies and procedures as well as rules and regulations of the Agency, State Auditor's Office, State Department of Administration, IRS, Legislative Auditor's Office and any other entity as applicable."

Our review found the duties and responsibilities do not meet the level of responsibility of the Corrections Business Manager classification as the position does not perform "administrative and professional accounting work", "GAAP reporting activities", "management of all fiscal related responsibilities," nor supervises over "a staff of professional accounting and clerical employees."

On the other hand, the Administrative Services Assistant 2 class specification describes work in part as:

“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.”

This description is the best fit with the duties and responsibilities of the position as detailed on the PDF, and in the additional information provided.

(Grievant's Exhibit 8).

15. Grievant thereafter sent a letter to DOP Director Sheryl Webb urging reallocation of her position to a CBM and stating that she herself should have listed in her PDF all the duties she performs under the CBM classification. Grievant specified that she does the annual GAAP reporting and supervises a combination of nine clerical and accounting employees. (Grievant's Exhibit 9).

16. Director Webb sent Grievant a letter stating that “there is no mechanism in law, rule, or policy to allow for additional consideration once an appeal determination has been completed.” (Grievant's Exhibit 10).

17. Meanwhile, Grievant initiated this grievance.

18. Thereafter, Respondent DOP conducted and Grievant participated in a job audit.



19. Respondent DOP issued a position review determination upholding its determination that Grievant's position is correctly classified as an ASA 2. (Grievant's Exhibit 12).

20. A "class specification" is "[t]he 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. § 143-1-3.19.

21. Class specifications are written broadly to encompass a wide range of positions in state government. Once drafted, they are reviewed and approved by the State Personnel Board before being effectuated. They are read and interpreted in pyramid fashion with the "Nature of Work" being the most important. Simply performing the "Examples of Work" listed in a class specification does not mean that a position must be allocated to that classification. The "Nature of Work" provides the foundation for the kind, nature, authority, and level of work that the examples of work must fall into. The definitions contained in the Pay Plan Policy guide DOP's development and interpretation of the class specification. (Respondent DOP's Exhibit 3, Ms. May's testimony).

22. The class specifications for the Supervisor 3 classification are as follows:

**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 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.

#### Examples of Work:

- \*Performs work in an administrative capacity compiling management reports, representing the agency before committees and the public and attending meetings with limited authority to commit the agency to a cause of action.
- \*Interprets and applies departmental policies and regulations for employees and others in state government; may interpret policies and regulations for employees and others in state government; may interpret policies for the general public.
- \*Advises subordinates of changes in policy and procedure.
- \*Plans, assigns, and coordinates the work of subordinates.
- \*Assists subordinates in the overall operation of programs and projects.
- \*Trains new employees and implements policies, procedures, and regulations of the department.
- \*Reviews and monitors the programs and projects of subordinates; assists in compiling federally and state-mandated reports.
- \*Designs and carries out management studies for agency management; composes correspondence for agency administrators' signatures; advises superiors on matters relating projects and programs to the agency or department.
- \*Answers questions and solves problems for and with subordinates; revises work procedures to align with changes in State or Federal laws or programs.
- \*Prepares and maintains records and reports for superiors to document activities, evaluates the performance of the unit, documents expenditures and projects trends in the program; uses facts and figures to set management goals for improved performance.
- \*Complete employees' performance evaluations, approves annual and sick leave, and recommends hiring, disciplinary actions, and other personnel actions.

\*Discusses personnel issues with employees; answers grievance issues within mandated time frames in an effort to solve problems.

(Respondent DOP's Exhibit 5).

23. The class specifications for the CBM classification are as follows:

**Nature of Work:**

Under administrative direction, performs administrative and professional accounting work in directing the financial, accounting, purchasing, payroll, employee benefits, inmate trustee accounting, fixed asset, and GAAP reporting activities. Responsibility includes management of all fiscal related responsibilities and other business related activities for the assigned institution. Supervision is exercised over a staff of professional accounting and clerical employees. This individual is involved in the hiring, training and employee performance reviews of all individuals in unit. All activities and processes must be in accordance with established policies and procedures as well as rules and regulations of the Agency, State Auditor's Office, State Department of Administration, IRS, Legislative Auditor's Office and any other entity as applicable. The position has wide latitude for the exercise of independent judgment. Performs related work as required.

**Examples of Work:**

\*Plans, organizes, directs and supervises the financial, accounting, purchasing payroll, employee benefits, inmate trustee accounting, and fixed asset reporting of the facility.

\*Coordinates budget requests and oversees adherence to budgetary limits for compliance with established procedures and proper reporting functions.

\*Monitors and prepares payroll, equipment rental, inventory transactions, expenses accounting, journal vouchers, authorizations, maintenance expenditure reports, budget forecasting, benefit reporting, monthly reconciliation of inmate banking account, discharge and travel accounts, commissary accounting function and prepares contracts and other major purchasing requests for bid.

\*Reviews and approves financial records, documents and reports; prepares and maintains reports and records.

\*Schedules, reviews and approves the work of subordinates; trains subordinate staff.

\*Maintains and monitors inventories of furniture, office and computer equipment and supplies.

\*Confers with vendors, utility companies, state agencies and local governments to resolve billing, service and payment problems, purchase equipment, establish new services and administer contracts.

(Respondent DOP's Exhibit 6).

24. The class specifications for the ASA2 classification are as follows:

**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

**Examples of Work:**

\*Confers with inter- and intra-agency personnel to transact business, gather information, or discuss information; may be in a position with public or federal government contact.

\*Conducts performance surveys and reviews agency methods of operation; devises flowcharts and graphs; may conduct cost analysis studies.

\*Gathers and compiles information for state records; writes reports, balances tally sheets, and monitors inventories, purchases, and sales.

\*Updates records and contacts employees to gather information; represents the agency in the area of assignment in both internal and external meetings.

\*Maintains files of information in hard copy files or electronic format; run reports for regular or intermittent review.

\*Determines the need for changes in procedures, guidelines and formats; devises a solution; monitors the success of solutions by devising quantitative/qualitative measures to document the improvement of services.

(Respondent DOP's Exhibit 4)

25. DOP's Pay Plan Policy provides the following relevant definitions:

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

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.

(Respondent DOP's Exhibit 3).

26. DOP determined that, unlike the Supervisor 3 class specification, the position occupied by Grievant does not perform "advanced level supervisory work overseeing the activities of high-level technical or administrative staff." (Ms. Mays' testimony, Respondent DOP's Exhibit 5).

27. DOP determined that, unlike the CBM class specification, the position occupied by Grievant does not perform administrative and professional accounting work and does not oversee professional accounting staff. (Ms. Mays' testimony).

28. The position occupied by Grievant is responsible for supervision of various support staff including laundry workers, cooks, maintenance workers, and HR and procurement staff. These are not high-level technical or administrative positions. (Ms. Mays' testimony).

29. No evidence was entered into the record regarding class specifications for Superintendent 1.

30. Although Respondent DOP directed Respondent DHS to reallocate the position occupied by Grievant to the ASA 2 classification in October 2020, Respondent has not complied. HR functions are part of Grievant's responsibilities. This includes personnel transactions for reallocations at Chick Buckbee where Grievant is stationed.

31. Respondent DHS is not required to reduce Grievant's pay in conjunction with a reallocation to ASA 2 since Grievant's current pay is within the paygrade range for the ASA 2.

32. DOP's Administrative Rule defines "demotion" as follows:

3.28. Demotion. -- A change in the status of an employee from a position in one class to a position in a lower job class as measured by compensation range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower rate in the compensation range assigned to the class. There are two (2) types of demotion:

3.28.a. Demotion with Prejudice. -- A disciplinary action resulting in the reduction in pay and a change in job class to a lower job class.

3.28.b. Demotion without Prejudice. -- A reduction in pay and/or a change in job class to a lower job class due to business necessity or as a result of an employee being selected for a vacant, posted position for which he or she applied.

W. VA. CODE ST. R. § 143-1-3.28.

### **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 (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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Respondent DOP contends that it properly reallocated Grievant’s position from Supervisor 3 to Administrative Services Assistant 2 (ASA 2) based on the permanent predominant duties of the position rather than sporadic examples of work that fall under other classifications. Grievant counters that the position she occupies should be classified as either Supervisor 3, Superintendent 1, or Corrections Business Manager (CBM). Grievant asserts her duties are encompassed by the CBM classification since she is responsible for complying with annual GAAP reporting and managing inmate trust accounts. Grievant asserts she has and could again be called at a moment’s notice to become the acting Superintendent and thus qualifies as a Superintendent 1. DOP asserts that Grievant’s predominant duties do not entail “advanced level supervisory work overseeing the activities of high-level technical or administrative staff” necessary for a

Supervisor 3 and that Grievant does not perform administrative and professional accounting work or oversee professional accounting staff necessary for a CBM.

First, the action which is the source of this grievance should be properly characterized. Grievant asserts that it was a demotion. However, the change in Grievant's position classification was not a result of disciplinary action or a business necessity of her employer, Respondent DHS. Nor did Grievant apply for a vacant position in the lower classification. Accordingly, the action does not fit the definition of "demotion" in DOP's Administrative Rule. W. VA. CODE ST. R. § 143-1-3.28, *See FOF 32 supra*. Further, a demotion is generally initiated by the employer agency. In this instance, Respondent DHS did not initiate the change, as it was satisfied with Grievant's Supervisor 3 classification. Rather, the action was initiated by Respondent DOP.

Pursuant to the Administrative Rule, the action being grieved is a "reallocation." The action had nothing to do with Grievant's performance or her qualifications. Instead, the change in the classification resulted from a comparison by DOP of the duties and responsibilities for Grievant's position with class specifications of the Supervisor 3, CBM, and ASA 2 classifications. DOP reallocated Grievant's position to an ASA 2 after finding a misalignment between Grievant's classification title of Supervisor 3 and the nature of the duties for that position in its class specifications. Thus, DOP's action falls under the Administrative Rule definition for "reallocation." W. VA. CODE ST. R. § 143-1-3.72, *See FOF 3, supra*. In a classification grievance, the focus is on the grievant's position duties and whether they more closely match those of another cited class specification over the one to which her position is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989).



"Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt. 1, *Dillon v. Bd. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). See, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) (applying this principal to DOP classification determinations). 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). 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).

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*. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his or her judgment for that of DOP. See generally, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

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 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was 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)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"[T]he '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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)." Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210

W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

DOP is responsible 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. W. VA. CODE R. § 143-1-4 *et seq.* Respondent DOP’s class specifications generally contain the following five sections: “Nature of Work,” “Distinguishing Characteristics,” “Examples of Work,” “Knowledge, Skills and Abilities,” and “Minimum Qualifications.” These specifications are to be read in pyramid-fashion, from top to bottom, 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 the most critical section. *See generally, Dollison v. W. Va. Dep’t of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989). This section sets out the predominant or essential duties of the position.

Respondent DOP based its reallocation of Grievant’s position to ASA 2 on her PDF and job audit. DOP determined that the daily and predominant duties of Grievant’s position are encompassed under the “Nature of Work” section of the ASA 2 class specification, which states, “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.” DOP found that the duties outlined under the “Nature of Work” section for Supervisor 3 and CBM were not the predominant and daily duties of Grievant’s position and not the best fit. The “Nature of Work” for Supervisor 3 and CBM state, respectively, “performs advanced level supervisory work overseeing the activities of high-level technical or administrative staff” and “performs administrative and professional accounting work in directing the financial, accounting, purchasing, payroll, employee benefits, inmate trustee accounting, fixed asset, and GAAP reporting activities.”

DOP determined that the predominant duties of Grievant’s position do not entail supervision of high-level “technical or “administrative” staff, as defined in the Pay Plan Policy. DOP also determined that the predominant duties of Grievant’s position do not entail “administrative and professional accounting work”, “GAAP reporting activities”, or “management of all fiscal related responsibilities,” nor does the position supervise “a staff of professional accounting and clerical employees.” Rather, DOP found that the position is responsible for supervision of support staff, only two of which would even be considered “administrative support,” and that this is the sort of supervision assigned to the ASA 2 classification.

The key to the analysis of DOP’s classification determination is to ascertain whether the position classification constitutes the “best fit” for the grievant’s required duties. *Simmons v. W. Va. Dep’t of Health and Human Resources*, Docket No. 90-H-433 (Mar. 28, 1991). 9. 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 ST. 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). 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). 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). DOP determined that the ASA 2 classification was the best fit for the predominant duties of Grievant’s position. Grievant failed to prove by a preponderance of the evidence that this determination was arbitrary and capricious.

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 (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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. 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).

3. 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*.

4. 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. C. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

5. "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt. 1, *Dillon v. Bd. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). See, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) (applying this principal to DOP classification determinations).

6. "[T]he '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. Syllabus Point 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)." Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*).

7. Personnel class specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; 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).

8. 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 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).

9. 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). 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 ST. 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).

10. 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).

11. Grievant did not prove by a preponderance of the evidence that DOP acted in an arbitrary and capricious manner in determining that the permanent predominant duties of Grievant's position were best suited to the ASA 2 classification, that another classification was a better fit, or that she was demoted.

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 (2018).

**DATE: September 29, 2023**

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**Joshua S. Fraenkel**  
**Administrative Law Judge**