

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMIE F. FOLTZ,
Grievant,

v.

Docket No. 2022-0586-DOC

DIVISION OF NATURAL RESOURCES and
DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, Jamie F. Foltz, filed this action on or about January 27, 2022, seeking to have the position she occupies reallocated from the classification of Tourism Program Specialist 2 to the classification of Administrative Services Manager 2. The grievance was waived by the Division of Natural Resources at level one. The Division of Personnel was joined as a necessary party by order entered on February 18, 2022. A level two mediation was conducted on April 22, 2022. The case was placed in abeyance pending a conference call by the parties on October 17, 2022, to discuss the status of the matter.

The parties were unable to resolve the matter and the case was set for an evidentiary hearing by Zoom for March 28, 2023. A level three hearing was held before the undersigned on that date by Zoom originating at the Grievance Board's Westover office. Grievant appeared in person and by her attorney, J.A. Curia. The Division of Natural Resources appeared by Andrea Fout Tinsley, Human Resources Director and by Katie Franklin, Assistant Attorney General. The Division of Personnel appeared by Wendy Mays, Assistant Director, and by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' Findings of Fact and Conclusions of Law on May 4, 2023.

Synopsis

Grievant was hired into a Tourism Program Specialist 2 position by the Division of Natural Resources on March 3, 2018. The duties of the position occupied by Grievant all involve spa management. Grievant took on responsibility for a second spa shortly after being hired. Grievant argues that the position she occupies should be classified as Administrative Services Manager 2. Grievant seeks an increase in her salary by 10%. Grievant initially asserted that the Administrative Services Manager 2 classification was more appropriate because Grievant performs her job at two state parks, instead of only one state park. The Division of Personnel concluded that the Tourism Program Specialist 2 classification was the “best fit” for the position occupied by Grievant. Grievant failed to establish that the Division of Personnel’s classification determination was arbitrary and capricious. In addition, Grievant failed to produce any law, rule or policy that requires the Division of Natural Resources to increase her salary by 10%.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant was hired in March 2018 by the Division of Natural Resources in a position that is classified as Tourism Program Specialist 2. Her position included oversight of operations in Berkeley Springs State Park, including the spa, pool, maintenance, and special events.
2. Grievant was advised that Cacapon Resort State Park was likely going to be opening a spa on premises, and that Grievant would be required to manage it as well. Cacapon Resort State Park is approximately a ten-minute drive from Berkeley Springs State Park.

3. In September 2018, Grievant began providing feedback about the proposed spa, supplies, including blueprints, product lines, staffing, services and general advice on what would be necessary to develop the spa at Cacapon.

4. In 2020, Grievant began providing advice relating to a planned spa at Pipestem Resort State Park located in Pipestem, West Virginia.

5. It was not until February 2021 that the work relating to Cacapon started to come into development. From approximately this time forward, Grievant regularly worked at both Berkeley Springs State Park and Cacapon.

6. Grievant spends approximately sixty percent of her time at Berkeley Springs State Park, and approximately forty percent of her time at Cacapon. Her involvement with Pipestem was for a short time and does not constitute a regular part of her job. Grievant has expressed interest in continuing to advise other State Parks about opening new spas at their facilities.

7. In June 2021, Grievant requested a salary adjustment. The request was made to Paul Redford, at the time, District Administrator for both Berkeley Springs and Cacapon, and Scott Fortney, Park Superintendent for both Berkeley Springs and Cacapon.

8. Mr. Redford submitted a Position Description Form on behalf of Grievant. It was submitted without being reviewed by Grievant. The Position Description Form (PDF) is identified as the official document detailing the duties and responsibilities of a position and it is used by the Division of Personnel to properly allocate positions within the classification service.

9. The predominant duties of the position were identified as the supervision of a combination of full-time and seasonal employees; manage the spa operation of both Berkeley Springs State Park and Cacapon Healing Waters Spa; and work with vendors and suppliers to ensure that adequate inventories of supplies and merchandise are available.

10. The Division of Personnel determined that the position had not seen a significant change in duties warranting a reallocation and made a classification determination that the position should remain classified as a Tourism Program Specialist 2.

11. Grievant appealed the classification determination on December 2, 2021.

12. The Division of Personnel reviewed the appeal, along with an amended PDF and affirmed the original classification determination of Tourism Program Specialist 2.

13. The Division of Personnel also conducted a job audit of the position on May 23, 2022. During this same period the Division of Personnel had been working collaboratively with the Division of Natural Resources on State Personnel Board proposal 3028. The proposal requested the creation of a new classification specification titled Park Hospitality Manager and assignment of the new title to a pay grade.

14. As the creation of a new classification triggered a reclassification, the Division of Natural Resources requested a Special Plan of Implementation with the proposal that provided for salary increases.

15. The Division of Personnel Pay Plan Policy provides that:

An appointing authority may request a special plan of implementation on a statewide reclassification. Any special plan of implementation request

cannot exceed the maximum an employee would receive on reallocation, and discretionary incremental increases for experience or training above the minimum qualifications of the class specification are not available. Any such request is subject to approval by the Board. Provided that the Board may authorize a special plan of implementation without regard to the above limitations for agency specific reclassifications.

16. The Division of Natural Resources requested a 28% salary increase by a Special Plan of Implementation for affected positions assigned to the classification of Tourism Program Specialist 2. This included the position occupied by Grievant.

17. In reliance on the State Personnel Board proposal, utilizing the job audit, the PDF, and all other information provided in Grievant's appeal, the Division of Personnel reclassified the position occupied by the Grievant to the classification of Park Hospitality Manager. The reclassification was effective on October 8, 2022, and Grievant received the 28% salary increase approved by the State Personnel Board.

18. The class specifications at issue read in pertinent part as follows:

Tourism Program Specialist 2

Nature of Work:

Under general supervision at the full-performance level, these positions perform work in the planning, organization and operation of statewide programs in tourism promotion, product marketing and parks facilities management. Specialty areas may include: tourism marketing; recreational, interpretative and naturalist program planning; regional tourism consultation services; fairs and festivals promotions; parks management; arts/crafts product marketing; golf operations management; management and/or lead work in a restaurant or spa management. They are responsible for the development of guidelines and policies in the area of employment; develop and implement marketing plans on a national and international basis; research and develop statewide programs in recreation and interpretive and naturalist activities; conduct complex studies in travel and tourism areas for program planning. They function as the golf pro shop supervisor at a state-

owned golf course. Typically, these positions serve in a staff capacity in the central office or executive offices; or as a field level manager of a complex and specialized park recreational facility, and may supervise professional, clerical or support personnel. Perform related work as required.

Distinguishing Characteristics

These positions are distinguished from the Tourism Program Specialist 1 by the full-performance level of work performed and serving in a staff capacity in the central office or executive offices, or as a field level manager of a complex and specialized park recreational facility.

Examples of Work:

Establish and develop contacts with travel agents, tour brokers and travel associations on a national and international basis to market the state tourism industry.

Attend national travel shows and conventions to market and promote the state tourism industry; prepare graphic display materials for transport.

Coordinate motor coach tours of tourist attractions in the state including pricing, scheduling, drive times and distance stops and problem resolution throughout tour.

Assist owners and managers of travel facilities, accommodations and tourist attractions in the state in promotion and marketing of their facilities.

Conduct studies of the travel industry through analysis of the volume of visitations and reservations made through state Visitor Information Centers; chart growth trends and recommend development of potential areas.

Conduct familiarization tours of related areas for travel wholesalers, brokers and operators to increase their awareness of and interest in the state tourist attractions and facilities.

Conduct facility development programs for expanding and developing travel facilities including feasibility studies, cash flow projections and financing.

Prepare training material for, teach, oversee and coordinate the activities of seasonal naturalists within the region.

Lead organized activities and special events; conduct interpretative walks and talks, give demonstrations, show films and perform trail maintenance and repair.

Plan, organize, and conduct interpretive naturalist and recreation programs such as: slide talks, nature rambles, wildlife demonstrations, outdoor skills and folklore events.

Responsible for the play of golf, including the timely starting of golfers and that rules and regulations controlling the golf course are followed.

Manage the operation of a golf pro shop at a state-owned golf course.

Manage restaurant operations.

Manage spa services operations.

Plan and conduct golf events; conduct lessons and clinics; repair golf clubs.

Administrative Services Manager 2

Nature of Work:

Under administrative direction, manages an organizational unit providing administrative and support services (i.e., budgeting, accounting, purchasing, personnel, business operations, etc.) in a division. The operations, policy, work processes, and regulatory requirements of the unit are moderately complex, varied and dynamic, requiring some depth of analysis and interpretation of theory, principles, practices, and regulations of a professional or administrative field. Involves the supervision of professional, technical, and clerical employees. The scope of responsibility includes planning the operations and procedures of the unit; directing the work of employees; developing employees; evaluating unit operations; developing budget needs; researching new procedures and improvements; interpreting statutes, regulations, and policies. Performs related work as required.

Distinguishing Characteristics:

The Administrative Services Manager 2 is distinguished from the Administrative Services Manager 1 by the responsibility to manage a complex secondary mission or unit of a primary statewide mission of the department. The allocations of positions to this class is determined by the higher complexity of the work performed relative to that assigned to the Administrative Services Manager 1 class.

Examples of Work:

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

May participate in local conferences and meetings.

See DOP Ex. 5-6.

19. Class specifications 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” and “Distinguishing Characteristics” provide the foundation for the kind, nature, authority, and level of work into which the examples of work must fall.

20. The Division of Personnel did not consider Grievant’s responsibility for two separate spa locations to be an oversight of a “secondary mission” of the agency. This is a requirement of the Administrative Services Manager 2 classification specification. Secondary means as opposed to primary, it does not mean two.

21. Tourism Program Specialist 2 classification was the “best fit’ for the position up and until the creation of the new Park Hospitality Manager classification became effective in October of 2022, well after Grievant filed her grievance. This conclusion was based on a reasonable assessment of the overall assigned, predominant duties and responsibilities of the position occupied by Grievant.

22. The record is absent of any law, rule or policy that would allow Grievant to receive the requested 10% increase in her salary.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See *W. Va. Code* § 29-6A-6. See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

At the time of filing this grievance, Grievant asserted that the position she occupied should have been reallocated to the classification of Administrative Services Manager 2. The Division of Personnel determined that a reallocation was inappropriate and that the position was properly allocated to the Tourism Program Specialist 2 classification. It should be noted that the Division of Personnel classifies positions not persons. In addition, 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." WEST VIRGINIA CODE R. § 143-1-3.72. Reclassification is defined as the "revision by the Board of the specifications of a class or class series which results in the redefinition of the work performed and a reassignment of positions based on the new definition and may include a change in title, compensation range, or minimum qualifications

fo the classes involved. WEST VIRGINIA CODE R. § 143-1-3.74. The Division of Personnel does not classify based on the volume of work assigned to the position; rather, in ascertaining which classification constitutes the best fit, the Division of Personnel looks at the predominant duties of the position.

For Grievant to prevail upon a claim seeking reallocation and a back pay award, she must prove by a preponderance of the evidence that her duties for the relevant time period more closely match another cited Division of Personnel classification specification than that under which she is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001). Division of Personnel specifications are to be read in “pyramid fashion,” i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the “Nature of Work” section of a classification specification is its most critical section. *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

Grievant’s contention with her classification of Tourism Program Specialist 2 is that it incorporates the language “field level manager of a complex and specialized park recreational facility.” Grievant argues that the phrasing is in the singular, and since she works at two parks, then that excludes this classification. By design, the Division of Personnel writes class specifications very broadly. The class specifications are not meant to be a verbatim recitation of each, and every task performed by each employee. Grievant

employs a narrow view of how a classification is read, an approach which is inconsistent with applicable law.

Personnel class specifications contain five sections; “Nature of Work”, “Distinguishing Characteristics”, “Examples of Work”, “Knowledge, Skills and Abilities”, and “Minimum Qualifications.” As noted about, Division of Personnel specifications are to be read in “pyramid fashion,” i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the “Nature of Work” section of a classification specification is its most critical section. See generally, *Dollison v. W. Va. Dep’t of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

The record supports a finding that prior to the creation of Park Hospitality Manager, the predominant duties of Grievant best fit the classification of Tourism Program Specialist 2. Grievant argues that her allocation was not sufficient to reflect the volume of her work, and that she received insufficient pay and acknowledgement. It is apparent that the Division of Natural Resources agreed with this to an extent, which led the Respondents to come together to create a new classification which would better fit Grievant’s position. Nevertheless, Tourism Program Specialist 2 appears to be the best fit at the time the grievance was filed. In an odd turn of events, Grievant specifically stated during the level three hearing that she was no longer seeking the Administrative Services Manager 2 classification for the position she occupies. Following leave of the undersigned and over objection, Grievant changed her grievance from one of classification to a request for a 10% increase in her salary.

The above discussion concerning the classification of Tourism Program Specialist 2 is supported by Grievant's involvement in the State Park system, the primary purpose of the position, and her predominant duties. The fact that Grievant had to travel ten minutes between two different Parks to meet the obligations of her employment does not negate the determination of the Division of Personnel. Grievant's primary argument claimed that the Administrative Services Manager 2 was the best fit because it references "a complex secondary mission", which they interpret to mean a second location. This argument is not supported by the record. Secondary does not mean two, it is meant and interpreted by the Division of Personnel as "secondary mission." The Administrative Services Manager 2 classification anticipates that a position will have responsibility for management of an organizational unit providing administrative and support services, that it will supervise professional positions, and that it will have responsibility for a complex secondary mission or unit of the Division of Natural Resources. The Division of Personnel does not identify having responsibility for a second spa as equating to a secondary mission of the Division of Natural Resources. Additionally, taking on a second spa is not considered a significant change in duties; it is considered as an addition to the volume of duties as opposed to a change in the kind or level of duties and responsibilities assigned to the position.

Grievant failed to show that either of the Respondents violated any law, rule or policy or that their actions were in any way arbitrary or capricious. The position occupied by Grievant was reclassified from the classification of Tourism Program Specialist 2 to Park Hospitality Manager and Grievant received a 28% increase in salary. Grievant failed to offer any authority on which the undersigned could base an award of an additional 10%

increase in her salary. Grievant failed to demonstrate by a preponderance of the evidence that the Respondents acted in an arbitrary and capricious manner as it related to the classification of the position or as it relates to the compensation she was receiving.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. In order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely match another cited Division of Personnel classification specification than that under which she is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR- 88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001).

3. Division of Personnel specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of Work" section of a classification specification is its most critical section. *Atchison v. W. Va. Dep't of Health*, Docket No. 90-H-444 (Apr. 22, 1991); *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

4. The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in the number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997). "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id.*

5. The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. *Moore v. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994).

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. "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 Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and

capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

8. 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*, 431 S.E.2d 681 (W. Va. 1993); *Princeton Community Hosp. v. State Health Planning*, 328 S.E.2d 164 (W. Va. 1985); *Dillon v. Bd. of Ed. of County of Mingo*, 301 S.E.2d 588 (1983).

9. Grievant failed to demonstrate by a preponderance of the evidence that the Respondents acted in an arbitrary and capricious manner as it relates to the classification of the position or as it relates to the compensation she was receiving at the time.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of

¹On 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 W. VA. 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.

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: June 14, 2023

Ronald L. Reece
Administrative Law Judge