

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHERRY L. ROCKWELL,

Grievant,

v.

Docket No. 2021-2345-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH AND
DIVISION OF PERSONNEL,**

Respondent.

DECISION

Grievant, Sherry L. Rockwell, is employed by Respondent, Department of Health and Human Resources (“DHHR”), within the Bureau for Public Health. On April 12, 2021, Grievant filed this grievance against Respondent protesting the denial of the request to reallocate the position she occupied. For relief, Grievant seeks reallocation of her position with retroactive pay to the date of initial filing.

The grievance was waived to level two of the grievance procedure on April 16, 2021. The Division of Personnel (“DOP”) was joined as a necessary party by order entered April 23, 2021. Following mediation, Grievant appealed to level three of the grievance process on August 31, 2021. A significant delay occurred before the level three hearing was convened due to requests for several periods of agreed abeyance and multiple good cause requests for continuance by Grievant and Respondent DOP.

A level three hearing was held on May 2, 2023, before the undersigned at the Grievance Board’s Charleston, West Virginia office via videoconferencing. Grievant appeared *pro se*.¹ Respondent DHHR appeared by Bunny Harper, Human Resources

¹ For one’s own behalf. BLACK’S LAW DICTIONARY 1221 (6th ed. 1990).

Director, and was represented by counsel, James “Jake” Wegman, Assistant Attorney General. Respondent DOP appeared by Wendy Mays, Assistant Director, and was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on June 5, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law (“PFFCL”).²

Synopsis

Grievant was employed by Respondent Department of Health and Human Resources, within the Bureau for Public Health, in the Office of Emergency Medical Services, as the Director of the Trauma, Designation and Categorization Division. The position was classified as a Health and Human Resources Program Manager 1. Grievant protests the Division of Personnel's decision not to reallocate the position to Health and Human Resources Program Manager 2. Grievant failed to prove that the Health and Human Resources Program Manager 2 classification was the best fit for the position or that the Division of Personnel's determination that the position was properly allocated as a Health and Human Resources Program Manager 1 was arbitrary and capricious. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

² PFFCL were to be submitted by the parties by June 1, 2023. By e-mail of the same date, Grievant requested an extension of time to file PFFCL, to which Respondent DOP objected. Respondent DOP asserted the request was untimely and would be prejudicial as its PFFCL had already been placed in the mail. The undersigned permitted Grievant a one-day extension of the time to file; requiring the PFFCL be postmarked by June 2, 2023, to prevent any unfair advantage from Grievant's review of Respondent DOP 's timely-filed PFFCL. Grievant filed her PFFCL postmarked June 2, 2023, which was received by the Grievance Board on June 5, 2023. Respondent DHHR elected not to file PFFCL.

Findings of Fact

1. Grievant was employed by Respondent DHHR, within the Bureau for Public Health, in the Office of Emergency Medical Services, as the Director of the Trauma, Designation, and Categorization Division. Grievant retired October 24, 2022.

2. Respondent DOP initially classified the position as a Health and Human Resources Program Manager ("HHRPM") 1 in 2005. Respondent DOP reviewed the position in 2012 and determined the position was properly allocated.

3. Grievant was promoted into the position sometime in late 2014 or early 2015.

4. The posting listed among the duties the requirement to "develop, implement, and monitor the trauma system, emergency medical services for children, [and] stroke program...." Other duties included serving as a liaison or representee for multiple boards and committees; "anyliz[ing] review[ing], and set[ting] benchmarks for the designation, [and] registries" for several programs; coordination and planning of meetings; education; and legislative research, review, monitoring, and response.

5. In late 2020, Grievant sought the DOP's review of the position, asserting there had been a change in the duties of the position that would warrant a change in the classification of the position. Although Grievant termed this "reclassification," the correct term is "reallocation."

6. "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." W. VA. CODE R. § 143-1-3.72

7. In the PDF, Grievant explained the position “provides leadership...in the promotion of a statewide trauma and emergency care system.” The position was responsible for six program components: “Trauma Designations; Trauma and Emergency Care System Medical Review and Quality Assurance; Data Management; Research; Stroke; and the Emergency Medical Service for Children program.” Grievant listed ten essential duties, with the predominant duties being three areas of responsibility: to supervise staff; provide administrative and program direction; and to provide expertise, assistance, and guidance to the West Virginia Trauma Registrars.

8. The Trauma, Designation, and Categorization Division is a very small division within the larger Office of Emergency Medical Services within the Bureau for Public Health. The division contained only three permanent staff members, apart from the position at issue, and a few more contract/temporary workers.

9. The DOP makes classification determinations based on the current, permanently assigned, predominant duties of a position as compared to the current class specifications. The process is begun by the completion of a Position Description Form (“PDF”).

10. The PDF is 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. W. VA. CODE R. § 143-1-4.5.b.

11. Grievant completed a PDF for the position she occupied on August 11, 2020, which was certified by Grievant’s supervisor the same day. The appointing authority approved the PDF on October 22, 2020, and forwarded it to the DOP for review.

12. The DOP's review process for a PDF entails a Specialist initially inspecting the PDF, determining the predominant duties of the position, and comparing those duties to the class specifications contained in the Classification Plan and any other historical documents related to the position to determine if a significant change in the permanently assigned predominant duties of the position has occurred. Once the first review is complete, a recommendation is submitted to the manager who conducts a second full review of the position before making a recommendation to Assistant Director Mays who undertakes a third and final review of the position before making the final classification determination.

13. Classification specifications are "[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 ST. R. § 143-1-3.19.

14. The HHRPM 1 classification is part of a class series. In a class series, the duties and responsibilities are similar and have some overlap, with those duties and responsibilities becoming greater as a position moves up through the series. Of most importance to distinguishing classifications within a class series, is the "Distinguishing Characteristics" section the classification specification.

15. Regarding the HHRPM class series, in particular, the two classifications are distinguished by the size, scope, and complexity of the work performed.

16. The HHRPM 1 classification specification is as follows:

Nature Of Work:

Under general direction, performs complex administrative and professional work at the advanced level in managing a major program component within an office or organizational unit in the Department of Health and Human Resources. Programs are managed over a specified geographic region of the state, or statewide, and are of equivalent size and complexity. Responsibilities include planning, policy development, direction, coordination and administration of the operation of a major program component in the area of health or human services. Complexity level is evidenced by the variety of problem-solving demands and decisions for the assigned area. Issues may be controversial in nature and work requires the ability to persuade or dissuade others on major policy and program matters. Performs related work as required.

Distinguishing Characteristics:

Positions representative of the kind and level of work intended for the class include program areas such as Health Statistics, Health Promotion, Mental Retardation/Developmental Disabilities, Alcohol and Drug Abuse, Government Donated Foods, and other organizational units with similar size, scope and complexity.

Example Of Work:

- Supervises professional, technical and clerical staff; make assignments and reviews and approves plans of operation.
- Provides administrative and program direction; enforces agency objectives, policies and procedures.
- Responsible for management of recruitment/selection process, staff development, disciplinary matters, and other related actions in assigned area.
- Responsible for developing collaborative efforts among health or human services agencies.
- Performs research and analysis of legislation, work activities or other issues to develop policies, standards and procedures.
- Monitors and evaluates program administration, and the delivery to services to clients.
- Provides technical consultation and policy interpretation to staff, supervisor, public officials, and advocacy groups.
- Plans and implements programs for the training of professional, technical and clerical staff.

Knowledge, Skills and Abilities:

Knowledge of the theories, principles and techniques of the area of assignment. Knowledge of federal and state statutes, regulations and program standards in the area of assignment. Knowledge of the objectives of the program area, its procedures, policies and guidelines and their relationship to the rest of the department and other entities. Ability to plan and coordinate work, plan and project budgetary needs, and organize work and projects. Ability to direct and supervise the work of others. Ability to present ideas effectively, both orally and in writing. Ability to analyze facts and apply them to the management of the area of assignment. Ability to work effectively with co-workers, the public, advocacy groups, and federal and state agencies in the area of assignment.

17. The HHRPM 2 classification specification is as follows:

Nature Of Work:

Under general direction, performs complex administrative and professional work at the advanced level in managing a major program component within an office or organizational unit in the Department of Health and Human Resources. Programs are managed over a specified geographic region of the state, or statewide, and are of equivalent size and complexity. Responsibilities include planning, policy development, direction, coordination and administration of the operation of a major program component in the area of health or human services. Complexity level is evidenced by the variety of problem-solving demands and decisions for the assigned area. Issues may be controversial in nature and work requires the ability to persuade or dissuade others on major policy and program matters. Performs related work as required.

Distinguishing Characteristics:

Positions representative of the kind and level of work intended for the class include program areas such as Surveillance and Disease Control, Family and Children Services, Quality Control, and other organizational units with similar size, scope and complexity.

Example Of Work:

- Supervises professional, technical and clerical staff; make assignments and reviews and approves plans of operation.
- Provides administrative and program direction; enforces agency objectives, policies and procedures.

- Responsible for management of recruitment/selection process, staff development, disciplinary matters, and other related actions in assigned area.
- Responsible for developing collaborative efforts among health or human services agencies.
- Performs research and analysis of legislation, work activities or other issues to develop policies, standards and procedures.
- Monitors and evaluates program administration, and the delivery to services to clients.
- Provides technical consultation and policy interpretation to staff, supervisor, public officials, and advocacy groups.
- Plans and implements programs for the training of professional, technical and clerical staff.

Knowledge, Skills and Abilities:

Knowledge of the theories, principles and techniques of the area of assignment. Knowledge of federal and state statutes, regulations and program standards in the area of assignment. Knowledge of the objectives of the program area, its procedures, policies and guidelines and their relationship to the rest of the department and other entities. Ability to plan and coordinate work, plan and project budgetary needs, and organize work and projects. Ability to direct and supervise the work of others. Ability to present ideas effectively, both orally and in writing. Ability to analyze facts and apply them to the management of the area of assignment. Ability to work effectively with co-workers, the public, advocacy groups, and federal and state agencies in the area of assignment.

18. After review of the history of the position and the PDF, in accordance with the above stated standard process, the DOP identified the permanently assigned, predominant duties of the position as: 1) supervise staff to ensure orderly and efficient operation; 2) provide administrative and program direction through enforcement of objectives, policies, and procedures; and 3) provide expertise, assistance, and guidance to West Virginia Trauma Registrars.

19. The DOP determined that the predominant duties of the position had not significantly changed and that the position was properly allocated as an HHRPM 1. The DOP notified the DHHR of its determination by letter dated November 30, 2020.

20. On January 4, 2021, the grievant appealed the classification determination, including an amended PDF.

21. When the DOP receives an appeal, the position undergoes another classification review in its totality with a final review by the Director of the DOP. The DOP process for review of an appeal consists of a Specialist (different from the one who did the initial review of the PDF) reviewing the appeal and any attached documents submitted with it, as well as all the other information available to the DOP about the position. The Specialist submits a classification recommendation to the Classification and Compensation Division manager who reviews the appeal and all other documentation about the position before making a recommendation to Assistant Director Mays. Assistant Director Mays then reviews the appeal and all other documentation before presenting a recommendation to the Director of the DOP, who reviews the appeal and all other the documentation relative to the position before making a final determination about the appropriate classification.

22. As part of its appeal review in this case, the DOP also conducted a job audit on February 18, 2021.

23. After completing the appeal review, including consideration of the job audit, the DOP concluded that the predominant duties of the position were essentially the same as the duties identified on the first PDF submitted by the DHHR. The DOP again determined that there had been no significant change to the predominant duties of the position and that it should remain classified as and HHRPM 1.

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.*

Grievant asserts the position she occupied, an HHRPM 1, should have been classified as an HHRPM 2 due to the size, scope, and complexity of the work of the position. Respondent DOP asserts that the HRPM 1 classification is the best fit for the position and that Grievant failed to prove Respondent DOP acted in an arbitrary or capricious manner in its classification determination.

Respondent DOP has the responsibility for ensuring that all positions in the classified and classified-exempt service are appropriately classified. W. VA. CODE R. § 143-1-1 *et seq.* and W. VA. CODE § 29-6-10. Respondent DOP has discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. *See Bonnett v. West Virginia Dep’t of Tax and Revenue and Div. of Pers.*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff’d* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). The Division of Personnel’s “interpretation and explanation of the classifications should [be] ‘given great weight unless clearly erroneous.’” *W. Va. Dep’t of Health & Human Res. v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993) (*per curiam*).

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). 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 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

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 order to determine the best fit, the class specifications at issue must be analyzed. "In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole." W. VA. CODE ST. R. § 143-1-4.4(b). Further. "[t]he fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class." W. VA. CODE ST. R. § 143-1-4.4(d). Class specifications "are to be read in pyramid fashion, i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of Work"

section of a classification specification is its most critical section. *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).” *Clark v. Ins. Comm’n & Div. of Pers.*, Docket No. 2016-1442-DOR (Dec. 13, 2016), *aff’d*, Kanawha Cnty. Cir. Ct., Docket No. 17-AA-4 (June 5, 2017).

The two positions at issue are part of a classification series. In a classification series, the duties and responsibilities are similar and have some overlap, with those duties and responsibilities becoming greater as a position moves up through the series. Of most importance in distinguishing classifications within a class series is the “Distinguishing Characteristics” of the classification specification. Regarding this classification series, the two classifications are distinguished by the size, scope, and complexity of the organizational unit the position manages.

Grievant asserts, and Respondent DOP agrees, that the duties of the position are complex. Complexity of work is a requirement of both the HHRPM 1 and the HHRPM 2 classifications. The distinguishing characteristics between the two classifications are the size, scope, and complexity of the organizational unit that the position manages. Regarding size, the position at issue managed only a very small division within the larger Office of Emergency Medical Services within the Bureau for Public Health. The division contained only three permanent staff members, apart from the position at issue, and a few more contract/temporary workers.

As to scope and complexity of the unit, the position’s predominant duties were to supervise staff, provide administrative and program direction, and to provide expertise, assistance, and guidance to the West Virginia Trauma Registrars. At the time of Respondent DOP’s review, the division included six program components, all of which fit

within the original scope of the position to “develop, implement, and monitor the trauma system, emergency medical services for children, and [the] stroke program....” Although the workload of the position did increase due to the number of participants and initiatives and changes in national and state standards of care, all those changes fall under the original scope of the position. An increase in the type of duties contemplated in the current class specification does not require a change in classification. *Kuntz/Wilford v. Dep’t of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997), *aff’d*, Kanawha Cnty. Cir. Ct., Docket No. 97-AA-51 (Apr. 23, 1999). Likewise, the complexity of the of the duties has increased somewhat with the addition of certain initiatives and the changes in the state and national standards of care. However, the DOP determined that the level of complexity was not enough to rise to the level of the size, scope, and complexity as a whole that are necessary for classification as an HHRPM 2. Given the evidence presented, Respondent DOP’s conclusion is reasonable. Grievant failed to prove that the HHRPM 2 classification was the best fit for the position or that Respondent DOP’s 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. The Division of Personnel has the responsibility for ensuring that all positions in the classified and classified-exempt service are appropriately classified. W. VA. CODE R. § 143-1-1 *et seq.* and W. VA. CODE § 29-6-10.

3. The Division of Personnel has discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. *See Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Pers.*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff'd* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

4. The Division of Personnel's "interpretation and explanation of the classifications should [be] 'given great weight unless clearly erroneous.'" *W. Va. Dep't of Health & Human Res. v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993) (*per curiam*).

5. 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).

6. 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 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

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).

8. “In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole.” W. VA. CODE ST. R. § 143-1-4.4(b).

9. “The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.” W. VA. CODE ST. R. § 143-1-4.4(d).

10. Class specifications “are to be read in pyramid fashion, i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the “Nature of Work” section of a classification specification is its most critical section. *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).” *Clark v. Ins. Comm'n & Div. of Pers.*, Docket No. 2016-1442-DOR (Dec. 13, 2016), *aff'd*, Kanawha Cnty. Cir. Ct., Docket No. 17-AA-4 (June 5, 2017).

11. An increase in the type of duties contemplated in the current class specification does not require a change in classification. *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997), *aff'd*, Kanawha Cnty. Cir. Ct., Docket No. 97-AA-51 (Apr. 23, 1999).

12. Grievant failed to prove that the HHRPM 2 classification was the best fit for the position or that Respondent DOP's determination was arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.³ 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: July 19, 2023

Billie Thacker Catlett
Chief Administrative Law Judge

³ 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.