

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SARAH JANE BROWN,
Grievant,

v.

Docket No. 2016-1490-MAPS

**DIVISION OF JUSTICE AND
COMMUNITY SERVICES and
DIVISION OF PERSONNEL,**
Respondents.

DECISION

Sarah Jane Brown, Grievant, filed this grievance against her employer the West Virginia Division of Justice and Community Services ("DJCS"), Respondent, protesting classification. The original grievance was filed on April 4, 2016, and the grievance statement provides: "On March 16, 2016 the West Virginia Division of Personnel incorrectly classified Position Number 0018 as being classified as a Criminal Justice Specialist 3." The relief requested was "[t]o be correctly classified as a CJ Program Manager."

A hearing was held at level one on May 20, 2016, the hearing was not recorded pursuant to agreement between the then parties.¹ The May 25, 2016 level one Decision cites § 156-1-4.3 of the Code of State Rules and acknowledged the inability to grant the relief requested. The Chief Administrator provided with "significant reluctance" that he did not have the authority to grant the relief requested, but made it clear that "[t]he Director

¹ A level one hearing is to be recorded. "All the testimony at a level one and level three hearing shall be recorded by mechanical means and a copy of the recording proved to any party upon request." W. Va. Code § 6C-2-3(m). The level one chief administrator stated in his decision that the "parties mutually agreed that there was no need to electronically record and transcribe a record." The undersigned does not provide a ruling on the legality of this so-called agreement between Grievant and Respondent DJCS.

is in agreement with the substantive portion of the grievance, and believes the Grievant is not correctly classified.” After the level one hearing, Grievant sent a memorandum to this Grievance Board requesting that West Virginia Division of Personnel (“DOP”) be joined as a party and that level two be waived.² An Order joining the Division of Personnel as an indispensable party and denying the request to proceed to level three hearing was entered on September 15, 2016, by this Grievance Board, signed by its Chief Administrative Law Judge. “The Division of Personnel must be joined and made a party in any state employee grievance involving classification and compensation matters.” W. VA. CODE ST. R. § 156-1-6.13.

A level two mediation session with all three parties was held on December 8, 2016. Grievant appealed to level three on or about December 16, 2106. A level three hearing was held before the undersigned Administrative Law Judge on May 5, 2017, at the Grievance Board’s Charleston office. Grievant appeared *pro se*.^{3 4} Respondent DJCS was represented by Jeffrey D. Estep, Chief Deputy Director, with legal counsel, Celeste Webb-Barber, Assistant Attorney General. Respondent DOP was represented by Wendy Campbell, Assistant Director, Classification and Compensation Unit with legal counsel Karen O’Sullivan Thornton, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties’ Proposed Findings of Fact

² W. Va. Code § 6C-2-4(b) (1) requires the Grievant to file a request for mediation within ten days of receiving an adverse decision at level one.

³ “*Pro se*” is translated from Latin as “for oneself” and in this context, means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

⁴ While Grievant appeared *pro se*, it was apparent from the outset of the hearing that Grievant and Respondent DJCS planned for DJCS counsel to put forth the majority, if not all, of Grievant’s case in chief.

and Conclusions of Law documents on or about June 23, 2017, the assigned date for the submission of the proposals.

Synopsis

Grievant filed a grievance against her employer alleging her position is improperly classified, seeking reallocation. It is Grievant's assertion that her position should be classified as a Criminal Justice Program Manager, pay grade 20 and not a Criminal Justice Specialist 3, pay grade 16. Grievant's employer, the West Virginia Division of Justice and Community Services, supports Grievant's assertion and requested relief.

The Division of Personnel is the entity of WV State government charged with making classification determinations. Upon reviewing the documents related to Grievant's position, and performing an on-site job audit, DOP determined that Grievant's job duties fit into the classification of Criminal Justice Specialist 3, and did not opine that the best fit classification for the duties performed by Grievant was the Criminal Justice Program Manager classification. Respondent DJCS and Grievant did not prove that Respondent DOP's classification decision was clearly wrong. It is understood that Grievant is a valued employee and does steadfast important work; nevertheless, pursuant to the relevant regulations and decisive factors it was not established that Grievant's preferred classification was the "best fit" classification for the position as it currently stands. This grievance is DENIED.

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

Findings of Fact

1. The West Virginia Division of Justice and Community Services ("DJCS"), Respondent, is an agency under the Department of Military Affairs and Public Safety and serves as West Virginia's criminal justice planning agency. DJCS serves as the State Administrative Agency (SAA) for grant funded programs provided by the U.S. Department of Justice, as well as designated programs from the U.S. Department of Education, U.S. Department of Health and Human Services, other federal agencies as necessary, and the State of West Virginia. DJCS is experienced in program administration that requires the coordination of all facets of the criminal and juvenile justice systems, including law enforcement, jails, courts, corrections, community supervision and victim services.

2. Grievant has been employed by DJCS for approximately eleven years and occupies a position in the DJCS within the Department of Military Affairs and Public Safety that has been classified as a Criminal Justice Specialist 3 ("CJS 3"). Prior to a 2009 promotion the position was classified as a CJS 1. See DOP Ex 1, Testimony Grievant.

3. As part of her duties, Grievant oversees and manages numerous federal and state grant programs, manages numerous sub-grantees, actively leads or participates on various grant boards, and supervises six (6) employees.

4. The West Virginia Division of Personnel is the entity in State government charged by law with classifying positions in the Classified Service. On a regular basis, year in and year out, DOP reviews Position Description Forms⁵ for positions statewide to determine the appropriate classification. W. VA. CODE § 29-6-1 *et seq.*

⁵ A Position Description Form (PDF) is identified in the DOP Administrative Rule, W. Va.

5. A DOP Position Description Form (“PDF”) for the position Grievant occupies was signed and submitted to DOP for a position classification review (review and reallocation) in 2014. At the time, Grievant was in a position classified as a Criminal Justice Specialist 3 (CJS 3)⁶. After a review of the PDF, Roberta Salyers, then Manager for the Classification and Compensation (“Class and Comp”) section of the DOP determined the position should remain allocated to the classification of CJS 3. This determination was relayed to the agency on October 23, 2014, by Bruce Cottrill, then Assistant Director of the Class and Comp section, stating the duties and responsibilities for this position as described on the PDF are within the scope and nature of the CJS 3 class specification. See DOP Ex 1-2, Testimony Grievant and Wendy Campbell, current Assistant Director, Classification and Compensation Unit.

6. The agency was provided notice that it had fifteen working days to request reconsideration of the determination.⁷ See DOP Ex 1-2.

7. DJCS, subsequently requested a job audit for several employees, including Grievant.

8. DOP received a request from Jeffrey D. Estep, Chief Deputy Director, DJCS, dated November 13, 2015, and while it began as an appeal for the position occupied by another DJCS employee, Jason W. Metzger, it included within it a request

Code R. § 143-1-4.5, as the official document detailing the duties and responsibilities of a position and it is used by DOP to properly allocate positions within the classified service.

⁶ On or about September 8, 2014, Director Staton submitted a Position Description Form to DOP, the PDF completed by Grievant and DJCS incorrectly listed the position as being classified as a CJS 1. See DOP Ex 1.

⁷ W. Va. Code R. § 143-1-4.7 requires an employee or the appointing authority to seek reconsideration of a classification determination made by the DOP within fifteen working days of the notification.

for reconsideration of the classification determinations made on the positions Grievant and Grievant's supervisor, Leslie Boggess, occupy. DOP Ex 5, L-3 Testimony DJCS Deputy Director Estep and DOP Assistant Director Campbell.

9. Then Director of DOP, Sara Walker, had her staff review the position again. A job audit of the position was conducted by DOP on January 22, 2016. Assistant Director, Classification and Compensation Unit Wendy Elswick⁸ sent correspondence to Mr. Estep affirming the original classification determination of CJS 3 stating the primary role of the position has remained the same and does not meet the criteria to warrant a change in classification. DOP Ex 6

10. On or about March 16, 2016, DOP again determined that Grievant's position remained properly classified. DOP Ex 6

11. On April 16, 2016, the position Grievant's supervisor, Leslie Boggess, occupies was reallocated from the classification of Administrative Services Manager 2 to the classification of CJPM.⁹ The classification determination was communicated to DJCS by DOP on March 15, 2016, explaining the audit revealed, among other things, that the position has direct supervision of 23 employees and responsibility for all personnel transactions for these employees (including Grievant and her staff), and serves as the Deputy Director of all programs and grants in the DJCS which currently total over 30 (which also includes those grants under Grievant and her staff). The agency was informed

⁸ Ms. Elswick now goes by Ms. Campbell. She was not employed at the DOP when the first classification determination of CJS 3 was rendered.

⁹ The CJPM classification is the same classification to which Grievant and DJCS now seek to have the position Grievant occupies reallocated. This is the same classification to which the position Grievant's supervisor occupies was recently reallocated.

that they had the option to reallocate the position or realign duties. The DJCS opted to reallocate the position. DOP Ex 7, Campbell testimony

12. The classification specifications for the CJS 3 and CJPM read in pertinent part as follows:¹⁰

CRIMINAL JUSTICE SPECIALIST 3

Nature of Work

Under limited supervision, performs advanced level professional work in one or more of a varied number of criminal justice program development, improvement and research activities in the State. These development, improvement and research activities may be within sub-areas of corrections, law enforcement, prosecution and/or court management. The specialist may work in one or more specialty areas: planning, grants management, program development, program assessment grant/compliance monitoring, data analysis and research studies. Typically is held responsible for a complex statewide grant or research project or program and performs highly complex work as a senior specialist in the area of assignment. Trains or leads lower level personnel. Performs related work as required.

Distinguishing Characteristics

The Criminal Justice Specialist 3 is distinguished from the Criminal Justice Specialist 2 by the most complex assignments of statewide grant or research projects or programs. Performs as a senior specialist in the area of assignment with lead worker/project leadership responsibility.

Examples of Work

Performs more complex or sensitive criminal justice systems assignments. Plans, organizes and coordinates complex projects or grants in the area of assignment.

Identifies complex criminal justice system development needs through meetings with state and local government officials, community leaders, and private sector parties, and by collecting and reviewing relevant criminal justice data.

Trains and leads new personnel and others on the work of the unit.

Conducts workshops and meetings to advise state and local government

¹⁰ W. Va. Code R. § 143-1-3.19 defines "Class Specification" as "[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."

officials, community leaders, and private sector parties of available programs and trains these parties on grant writing and grant procedures/administration.

Reviews grant applications for accuracy in such areas as financial documentation, program guidelines, etc.

Assists grantees in developing and maintaining grant management systems for financial records and monthly reports.

Monitors the administration of state and local criminal justice grants to assure compliance with grant requirements.

Monitors criminal justice agencies for compliance with applicable state and federal laws and regulations.

Designs and implements complex scientific research projects, including statewide data collection procedures, to study sub-areas or topics in criminal justice.

Obtains, validates and analyzes data using statistical and spreadsheet software packages.

Presents the results of research studies and relevant conclusions to the Legislature, criminal justice professionals and the public.

Prepares statistical, research and planning documents.

CRIMINAL JUSTICE PROGRAM MANAGER

Nature of Work

Under administrative direction, performs complex administrative, managerial, and supervisory work with responsibility for a major program component within the Division of Criminal Justice Services. Responsible for developing and implementing methods related to program specialty area. Provides information, advice, or data to management for program decisions. Supervises the work of professional, technical and support personnel. Performs related work as required.

Examples of Work

Directs and coordinates staff in the implementation and administration of state and federal programs.

Interacts with federal and state agencies on program administration, funding levels, and interpretation of regulations and policies.

Supervises the evaluation of criminal justice grant-in-aid and/or technical assistance programs.

Supervises the development of the budget for grant programs and recommends the allocation of funds.

Oversees the disbursement of grant monies to sub-grant agencies.

Writes reports on grant program operations.

Interacts with non-profit agencies, federal, state, regional and local

government officials and agencies, and community leaders relative to program guidelines.

See DOP Exs 9-10.

13. When reviewing a PDF to determine whether a reallocation is appropriate, DOP looks for a substantial change in the predominant duties of the position. The PDF is compared to the classification specifications to come up with the “best fit” for the position. The PDF is one of the primary sources of official information about a position containing official duties, responsibilities, supervisory relationships and other pertinent information relevant to a position. See W. Va. Code R. §143-1-3.70 and §143-1-4.5 et seq.

14. Based upon a review of the PDFs submitted by DJCS for the position Grievant occupies, as well as performing an on-site job audit, DOP determined the appropriate classification of the position to be Criminal Justice Specialist 3 (“CJS 3”).

15. Grievant and Respondent DJCS were not pleased with DOP’s analysis and determination regarding the best fit job classification of Grievant’s position.

16. William Richard “Rick” Staton, Director of DJCS since July 1, 2014, testified at the level three hearing. Mr. Staton is not Grievant’s direct supervisor and does not assign or review her daily work.

17. Grievant and DJCS both want the position Grievant occupies to be placed in the same classification as that assigned to the positions Grievant’s supervisor, Leslie Boggess and Chuck Sadler occupy. In an effort to bolster the position, Director Staton and Deputy Chief Estep, by their testimony, unwittingly diminished the level of

responsibility of the two other positions. See Testimony Estep, Testimony Staton, Testimony Campbell.

18. Among other information Director Staton testified that “[w]e (DJCS and Grievant) collectively pursued the reclassification”¹¹ to recognize Grievant’s strengths and qualities, the nature of the impact her “programs” have on the agency and to recognize her accomplishments. Also, because she is a good employee. See L-3 Testimony. Respondent is attempting to officially recognize Grievant’s excellent work and dedication; Respondent wishes to increase the amount of Grievant’s yearly compensation.¹²

19. Wendy Campbell, Assistant Director for the Class and Comp section of the DOP, testified at the level three hearing. The Class and Comp section is responsible for, among other things, ensuring that all 20,000 plus positions in the classified service are properly classified and paid within the pay grade assigned to their classification. Statutory authority for doing such lies in W. Va. Code §29-6-1 *et seq.* and W. Va. Code R. §143-1-1 *et seq.*

20. Assistant Director Campbell was asked to explain the difference between the term “reallocation” and “reclassification”, in that Grievant and DJCS were continually throughout the hearing interchanging the terms indiscriminately (misusing the

¹¹ DJCS and Grievant interchangeably referred to reallocations and reclassifications and argued that they were in the best position to make classification determinations for their agency, ironically demonstrating a lack of understanding between those two classification terms. They are seeking a reallocation, not a reclassification.

¹² Director Staton initially testified that the grievance was not an attempt to get Grievant more money; however, later admitted that it was, **in fact, in large part to get Grievant more money**. Mr. Staton testified that 95% of the matter [the grievance] would be resolved if the Grievant could receive a salary increase. Staton L-3 testimony

terminology). W. Va. Code R. § 143-1-3.72 defines “[r]eallocation” as the “[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.” and W. Va. Code R. §143-1-3.74 defines “[r]eclassification” as “[t]he revision by the Board of the specifications of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, compensation range, or minimum qualifications for the classes involved.” Assistant Director Campbell explained the terms are not synonymous.

21. Assistant Director Campbell described the classification process. The PDF is identified in the DOP Administrative Rule, W. Va. Code R. § 143-1-4.5, as the official document detailing the duties and responsibilities of a position and it is used by DOP to properly allocate positions within the classified service. PDFs are received by the DOP on a daily basis. Ms. Campbell has reviewed and made classification determinations on thousands of PDFs during her tenure with DOP. Assistant Director Campbell explained that when reviewing a PDF to determine whether a reallocation is appropriate, the DOP looks for a substantial change in the predominant duties of the position. The PDF is compared to the class specifications to come up with the “best fit” for the position.

22. Assistant Director Campbell credibly explained why DOP believes the position is properly allocated to the CJS 3 classification referring to the classification specification, the PDF and the information provided during the job audit.

23. Ms. Campbell also explained why the position pursuant to DOP analysis should not be classified as a CJPM. The position is not performing what DOP considers qualifying administrative work. DOP definition of “administrative” requires, “work activities relating to planning, directing, controlling, supervising, and budgeting of agency or unit operation, programs and missions”. The position does not have these responsibilities to the level prescribe to the CJPM classification. Campbell L-3 testimony.

24. Assistant Director Campbell made an effort to help Grievant understand DOP’s classification determination. She explained that the DOP is required to look for the “best fit”, in terms of classification for the position, and must identify a significant change in the duties and responsibilities of the position to allocate the position to another classification. In this case, Campbell stated DOP did not believe that the role of the position had gone under a significant change necessary for a reallocation. While there was an increase in the number of grants and the amount of grant funding, the work was generally the same.

25. Grievant is an exceptional employee who is dedicated, motivated and productive. DOP classifies the position, not the individual employee placed in the position.

26. Within the current State Classification Plan, both before and after the job audit was conducted, DOP, by three different high level staff, two different Assistant Directors and a Manager, all determined the “best fit,” in terms of classification for the position Grievant occupies, to be the CJS 3 classification. DOP Exs 1-2 and 6

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant filed this grievance contesting West Virginia Division of Personnel's (DOP) determination regarding the job classification of her position. Grievant and the West Virginia Division of Justice and Community Services ("DJCS"), her State employer, argue that DOP incorrectly classified Grievant's current position in its position reallocation decisions. Grievant and DJCS maintain that proper reallocation would be to be upgraded to a Criminal Justice Program Manager classification in that Grievant is performing duties that are consistent with the Program Manager classification. The West Virginia Division of Personnel maintains that Grievant's responsibilities and duties do not mandate reallocation of her position. Upon reviewing the documents related to Grievant's position, and performing an on-site job audit, DOP maintains that Grievant's duties best

fit into the classification of Criminal Justice Specialist 3. DOP has not concluded that the position should be reallocated to a Program Manager classification.

WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. DOP is required to classify positions, not employees, into the classification that is the “best fit” within the current State Classification Plan. State agencies, such as the DEP utilize such positions and must adhere to that plan in making their employees' assignments. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994).

Division of Personnel's Rule 3.72 defines “Reallocation” as “[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position.” For a reallocation to occur, there must have been a significant change in the job duties and responsibilities of the position grievant occupies. The key in seeking reallocation is to demonstrate “a significant change in the kind or level of duties and responsibilities.” *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997) An increase in tasks should not be confused with “*kind or level of duties*.” An increase in lesser tiered tasks does not mandate an increase in classification.

In a classification grievance, the focus is upon the grievant's duties for the relevant period, and whether they more closely match those of another cited classification specification than the classification to which he/she is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989). An

increase in the number of duties 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). A 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). The predominant duties of the position in question are class-controlling.¹³ *Broadbudd v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990).

Respondent DJCS and Grievant argue that the Program Manager classification is unique to DJCS. The specifications and qualifications specific to their particular needs. Thus, DJCS is the most appropriately situated entity to determine whether Grievant is performing those duties pursuant to the Program Manager classification.¹⁴ It is highly likely that this situation is not as unique as DJCS would like to think. Respondent DJCS wants to provide a dedicated employee with additional compensation. The work product and amount of work performed by this worker is commendable, Respondent DJCS in

¹³ DOP's classification 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 classification specification is its most critical section. See generally, *Dollison v. W. Va. Dep't of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

¹⁴ Deputy Direct Estep during his testimony highlighted that he assisted in writing the class specification for the CJPM; however, he admitted he did not know how class specifications are interpreted.

acknowledgement of this worker's dedication and importance attempts to have the employee reallocated.¹⁵

At the level three hearing, DJCS Director Staton and Deputy Director Estep, individually testified that they believed that Ms. Brown is qualified to be a Program Manager. Respondent DJCS highlights that Grievant manages over \$18,000,000 in grant monies, which is a notable portion of DJCS's overall grant monies. Respondent DJCS maintains that Grievant's duties and responsibilities have increased with the addition of new grant programs and money. Furthermore, with the addition of new programs, Grievant has had to help develop procedures to implement the programs. Grievant described her job duties and responsibilities in a typical work day, using the day before the hearing as an example:

- The work day starts at 7:00. She arrived early, turned on the lights, checked regular (paper) mail in box, e.g., things like financials or reports from sub grantees, letters from law enforcement/prosecutors. She sorted the mail, prepared any necessary responses and files documents. (This task takes 5-10 minutes daily.)
- She turned on computer, checked emails regarding grants¹⁶ and checked calendar. She responded to emails personally or assigned to staff to respond. Sometimes she sends emails to someone higher up in the office [Leslie Boggess, Jeff Estep or Rick Staton] to handle, or at the very least copies them to make them aware of issues. (This task takes 5 minutes or longer if response/s necessary daily.)

¹⁵ Respondent DOP specifically insists that recognizing strengths and qualities of an employee is not a reason to reallocate a position. DOP classifies a position, not the individual employee placed in the position. The employee can be the best employee in the entire agency and that will have no bearing on the classification of the position. The appropriate mechanism to provide a salary increase to recognize strengths and qualities of an employee would be to provide the employee with a salary advancement, better known as a "merit" increase, it is not to misclassify an employee. See DOP's PFOF/COL.

¹⁶ When asked what a "grant" was, Grievant explained that essentially a grant is "funds" that come into her office (DJCS) from the federal or state government that are awarded to do specific work based on established guidelines.

- She reviewed grant files from the accountants. If there were any changes she emailed the changes to the grantees so they are aware of cuts that have been made. She faxed the changes to them. She put any changes on a spread sheet to track grant expenditures and then filed the spread sheets. (This task takes approximately one hour daily.)
- She met with her staff to discuss what they were doing that day. (This task takes approximately one and one half hours daily though could be longer.)
- She participated in a conference call with a Board on which she serves. (This task took two hours. However, Board, Committee and Task Force calls only occur approximately once every two weeks. When they occur, they can take from 2 hours to all day.)*
- She participated in a conference call with a subcommittee under the SAFE Commission on which she serves. (*This task is included in the estimate above of time spent with Boards, Committees, and Task Forces. Approximately once every two months she leads a conference call/meeting; when not the lead, she serves as resource to the entity.)
- She finished an implementation plan report for the Stop Violence Against Women Act grant and Victims of Crime Act grant. Deputy Director reviewed the report and made some changes which she corrected. Working on reports of one kind or another is a daily activity. (The task took approximately one hour.)
- She reviewed minutes from the SAFE committee meeting and made changes. After changes are made she submits them to the chair of the committee for review. She also reviews other grant minutes. When the chair sends back the final minutes she sends out the final minutes and the agenda to the whole Commission. (This task takes approximately one hour.)
- She worked on grant adjustments.¹⁷ (This task takes one plus hours daily.)
- She finished up the day by returning emails and phone calls to grantees and sub grantees. Types of issues addressed include: questions about grant adjustments, submission of documentation for reports, and inventory for grant supplies (This takes the remainder of the day, approximately 1 hour.)

See Grievant's L-3 testimony.

¹⁷ This is when the grant budget is revised in some manner that deviates from the original grant budget. When the grantee or sub grantee changes the budget, she has to revise the budget documents under the contract. [Budgets are proposed by the grantees and Grievant. The advisory board makes a final recommendation that is submitted to the Governor who makes the final grant award.]

Grievant acknowledged that all job duties she described fit under the “Examples of Work” of the CJS 3 class specification, but claimed they also fit under the “Examples of Work” listed for the CJPM class specification. The only difference she sees in the classifications is the language “major program”. Grievant testified that the PDF was a fair and accurate description of the job duties and responsibilities of the position she occupies at the time it was completed; however, since completion of the PDF she has taken on responsibility for two more grants and three more staff positions. Nonetheless, Grievant further testified that even with the increase in grant funding she was still performing the same general duties she had been performing prior to the increase. The staff that fall under Grievant on the organizational chart for DJCS perform primarily the same job duties as relates to the grants they are responsible for that Grievant does on the grants for which she is responsible and she only assists them if they request assistance.¹⁸ See DJCS Ex 1, Grievant L-3 testimony.

Respondent DJCS is reminded classification determinations are of a position and the duties of the position.

Assistant Director Campbell explained why DOP believes the position is properly allocated to the CJS 3 classification referring to the classification specification, the PDF and the information provided during the job audit. First, the class specifications are read in pyramid fashion from the top down with the “Nature of Work” being the most important. The “Distinguishing Characteristics” only come into play when there is a class series.

¹⁸ Grievant’s staff have responsibility for the Victims of Crime Act grants, Sexual Assault Services program grant and the National Sexual Assault Kit Initiative grant. Two of the three being the purported new grants. See Testimony Grievant.

The CJPM does not fall within the CJS class series and therefore does not contain a distinguishing characteristics section. Class specifications are written to be general and broad. The “Examples of Work” are just examples, they are not meant to be all-inclusive. Ms. Campbell credibly went on to discuss the specific job duties and responsibilities of the position Grievant occupies as compared to the CJS 3 class specification.¹⁹ Grievant operates a good portion of the time autonomously and therefore is operating under limited supervision doing advanced professional work with respect to the grants primarily related to “victims”, including researching areas of need and gaps in services to determine where to focus efforts and activities of the grants. The position works with law enforcement and prosecution. The position involves more than one specialty area involving complex grant work. The position involves planning. The position is responsible for managing the grants and is responsible for program development related to the grants. The job involves data analysis and research especially as relates to needs assessments and assessments to ensure that the programs under the grants comply with all required regulations. The position is responsible for monitoring grants for compliance and monitoring subgrantees as well. Essentially the position handles grants management, program development, program assessment, does grant and compliance monitoring to

¹⁹ An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). This Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

makes sure timeframes and requirements for each grant are met, and does the data analysis and research studies to determine areas of need. These job duties and responsibilities fall squarely within the CJS 3 class specification. DOP maintains the CJS 3 classification is the “best fit”. Campbell L-3 Testimony.

Ms. Campbell explained why the position should not be classified as a CJPM. The position is not performing what the DOP considers qualifying administrative work as the classification requires.²⁰ While the position does appear to be performing some supervisory work with her staff, they, and she, actually all seem to be fairly autonomous in performing their assigned duties and responsibilities. It is Grievant’s supervisor, Leslie Boggess, who is, in fact, performing the administrative functions for DJCS according to the information provided by Ms. Boggess and DJCS during the recent review of that position. The position Grievant occupies is not responsible for a major program component of the DJCS; rather the position Ms. Boggess occupies has that responsibility. It is the DOP’s position that Grievant is responsible for a number of grants and that the grants do not equate to responsibility for a major program component. Ms. Boggess, as the Deputy Director in the CJPM position for DJCS, is responsible for overseeing all of the grants and staff that work with the grants for the DJCS. DOP considers the grants, *in totem*, to be the “major program” component within the DJCS. The position Ms. Boggess occupies was reallocated based on her having responsibility for the major

²⁰ DOP definition of “administrative” requires, “work activities relating to planning, directing, controlling, supervising, and budgeting of agency or unit operation, programs and missions.”

program component of the DJCS. As such, the CJPM is not the “best fit” for the position Grievant occupies. Campbell L-3 testimony.

When questioned why DOP did not think the purported development of new programs should fall within the CJPM classification, Ms. Campbell noted that the CJS 3 class specification specifically includes the requirement of “program development”. Developing new and additional programs under the grants did not change the duties and responsibilities of the position enough to warrant a reallocation. Even if the position began doing program development for the first time under the new grants, that would not warrant a reallocation, as it is a job duty and responsibility that has been contained within the CJS 3 specification all along. See Campbell testimony. While the DJCS argued that it is in the best position to classify its positions, Director Staton and Deputy Director Estep both admitted that they are not trained to properly interpret DOP class specification. Assistant Director Campbell explained that while the agency owns the positions and can assign/realign duties and responsibilities as they see fit for the day to day effective operation of their agency, it is the DOP who is solely responsible, based on a statutory directive, to classify all the positions in the classified service and, in her expert opinion, the classification of CJS 3 is for all intents and purposes a “perfect fit” for the position Grievant occupies.

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); *Logdson 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); *Logdson, supra*.

The West Virginia Supreme Court of Appeals, in applying previous cases regarding rules of construction and interpretation of statutes by bodies charged by their administrations, found that DOP's "interpretation and explanation of the classifications should [be] 'given great weight unless clearly erroneous.'" *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) (per curiam). The clearly wrong standard is a deferential standard that requires the administrative law judge to presume that DOP's interpretation and explanation of the classifications is valid as long as it is supported by substantial evidence or by a rational basis. Syl. pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001) (citing Syl. pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)). DOP is not clearly wrong in the fact pattern of this matter. Nor is it established that DOP's actions were arbitrary and capricious or an abuse of discretion.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

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

3. 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).

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

6. 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, *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).

7. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

8. 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); *Logdson 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); *Logdson, supra*.

9. "Reallocation" is defined as a reassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position. W. Va. Code R. §143-

1-3.72. The key in seeking reallocation is to demonstrate “a significant change in the kind or level of duties and responsibilities.” *Stihler v. Div. of Natural Res.*, Docket No. 07-DNR-360D (Feb. 6, 2009) *citing*, *Keys v. Dep’t of Environmental Protection*, Docket No. 06-DEP-307 (April 20, 2007); *Kuntz/Wilford v. Dep’t of Health and Human Res.*, Docket No. 96-HHR-301 (March 26, 1997); *See Siler v. Div. of Juvenile Serv.*, Docket No. 06-DJS-331 (May 29, 2007). An increase in the number of duties does not necessarily establish the need for reallocation nor does an increase in the type of duties contemplated in the class specification. *Kuntz/Wilford, supra*.

10. The key to the analysis is to ascertain whether Grievant’s current classification constitutes the “best fit” for their required duties. *Simmons v. W. Va. Dep’t of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991); *Propst v. Dep’t of Health and Human Resources and Div. of Personnel*, Docket No. 93-HHR-351 (Dec. 3, 1993). 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*, *Broadbus v. W. Va. Div. of Human Services*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

11. Personnel classification 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 classification specification is its most critical section. *Atchison v. W. Va. Div. of Health*, Docket No. 90-H-444 (Apr. 22, 1991); *See generally, Dollison v. W. Va. Dep’t of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

12. DOP’s interpretation and explanation of the classification specifications at issue, if the language is determined to be ambiguous, should be given great weight unless clearly erroneous. *See Blankenship, supra., citing Dillon, supra.; See also Rossana v. Dept. of Health and Human Resources and Div. of Personnel*, Docket No. 05-HHR-460(B) (May 14, 2010).

13. Grievant did not persuasively demonstrate that the classification she identified was a better fit for her position’s duties than the classification determination of the Division of Personnel.

14. DOP’s determination regarding the best fit classification for Grievant’s position is not “arbitrary and capricious” or “clearly wrong.”

Accordingly, this 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* 156 C.S.R. 1 § 6.20 (2008).

Date: August 8, 2017

Landon R. Brown
Administrative Law Judge