

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DAVID R. FEWELL,
Grievant,**

v.

Docket No. 2017-0002-DEP

**DEPARTMENT OF ENVIRONMENTAL
PROTECTION/DIVISION OF AIR QUALITY
and DIVISION OF PERSONNEL,
Respondents.**

DECISION

David R. Fewell, Grievant, filed this grievance against his employer the Department of Environmental Protection/Division of Air Quality (“DEP”), Respondent, on July 1, 2016, protesting his job classification. The grievance statement provides:

Per 143CSR [sic], Subsection 47, the Grievant requested a position reallocation from Technical Analyst to Technical Analyst Sr. (8223) after agreeing to assume the former Unit Manager’s managerial responsibility in addition to maintaining his current technical analytical responsibilities. WVDOP’s opinion is the position is a [sic] Environmental Resources Program Manager 1 (8504), a 3 compensation range decrease than his current position.

The Relief Sought reads:

The Grievant seeks the Boards [sic] consideration that the WVDOP has improperly classified this reallocation request and requests back pay for the services he has provided as the Unit’s Acting Manager and Technical Analyst since the former Manager’s retirement on February 19, 2016.

Respondent, with notice to Grievant, waived this compensation and classification grievance from level one to level two and motioned that the West Virginia Division of Personnel (“DOP”), be joined as a co-Respondent. Grievant did not indicate an

objection. An *Order of Joinder* was entered by this Board and DOP was joined as an indispensable party on or about July 20, 2016. A mediation session was held on October 11, 2016. Grievant appealed to level three on October 20, 2016. A level three hearing was held before the undersigned Administrative Law Judge on February 23, 2017, at the Grievance Board's Charleston office. Grievant appeared *pro se*.¹ Respondent DEP was represented by Stephanie Burdette, DEP Human Resource Manager, with legal counsel, Greg S. Foster, Assistant Attorney General. Respondent DOP was represented by Wendy Campbell (formerly Wendy Elswick), DOP Assistant Director, Classification and Compensation Unit with legal representation Karen O'Sullivan Thornton, Assistant Attorney General. Also in attendance Leah Basford, Personnel Specialist with DOP who attended for observation and professional development.

This matter became mature for consideration upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law documents on or about March 24, 2017, the assigned date for the submission of the proposals. All parties presented fact/law proposals.

Synopsis

Grievant filed a grievance against his employer alleging his position is improperly classified, seeking reallocation. The West Virginia Division of Personnel, ("DOP"), was joined as an indispensable party. Grievant contends he is misclassified as a Technical

¹ "*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.

Analyst, pay grade 22 and suggests that the classification of Technical Analyst Senior, pay grade 23 more accurately reflects his job duties. Both Grievant and DEP, the employing State agency, seek to have the position reallocated as a Technical Analyst Senior classification.

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 duties best fit into the classification of Technical Analyst classification (or Environmental Resources Program Manager which is a lower pay grade). Grievant did not prove that Respondent DOP's classification decision was clearly wrong. It is understood why Grievant is steadfast with his opinion; nevertheless, pursuant to the relevant regulations and decisive factors Grievant has not established that his preferred classification was the "best fit" classification for his position. 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. Grievant occupies a position in the Division of Air Quality within the Department of Environmental Protection that is classified as a Technical Analyst, pay grade 22 (salary range \$47,352 - \$87,612).

2. Grievant seeks to have the position he occupies reallocated² to the classification of Technical Analyst Senior, pay grade 23 (salary range \$50,676 - \$93,756).

3. 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 Forms³ for positions statewide to determine the appropriate classification. See W. VA. CODE § 29-6-1 *et seq.*

4. In February of 2016, Robert “Bob” Betterton, Grievant’s former supervisor, retired. Mr. Betterton had been in a position classified as an Environmental Resources Program Manager 1 (“ERPM 1”), pay grade 19 (salary range \$39,372 - \$72,840). His primary responsibility was to supervise the Emissions Control Group that consisted of himself and four other positions, including the position occupied by Grievant. See Testimony Grievant, Laura Crowder, DEP Ex 9 and DOP Ex 1. The primary purpose of the Emissions Control Group is to conduct air emissions inventories that are used for regulatory development. L-3 Testimony Grievant.

5. A DOP Position Description Form (“PDF”) specifying Grievant’s expected duties and responsibilities was signed on or about February 8, 2016, and submitted to the DOP for a position classification review (review and reallocation). DOP Ex 1

² Reallocation is defined as “[r]eassignment 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.” See W. Va. Code R. § 143-1-3.75.

³ A Position Description Form (PDF) is identified in the DOP Administrative Rule, W. Va. Code R. § 143-1-4.5, as the official document detailing the duties and responsibilities of a position and it is used by DOP to properly allocate positions within the classified service.

6. Grievant's former supervisor retired from the Division of Air Quality ("DAQ") on or about Friday, February 19, 2016. He was a Biologist and his position was classified two pay grades below that of Grievant. Grievant assumed Mr. Betterton's supervisory duties on or about February 22, 2016.

7. Both Grievant and Respondent DEP believed because Grievant assumed supervisory responsibilities in addition to his prior technical job duties, Grievant's position should/would reallocate to a Technical Analyst Senior classification.

8. DOP's position classification review process, in recognition of alterations in Grievant's duties, in review of the submitted PDF, and related job classification, DOP opined the position Grievant occupies should be reallocated to the classification of ERPM

1. DOP Ex 1-2

9. An April 4, 2016 memorandum from DOP Assistant Director, Wendy Elswick (now Wendy Campbell), to Chad Bailey, DEP Human Resources Manager, communicated that, based on the February 8, 2016 PDF, DOP finds/recommended Grievant's position be reallocated from Technical Analyst position to an ERPM 1 classification. DOP Ex 2

10. DOP's April 4, 2016, reallocation decision was indicating a three-pay range decrease from Grievant's current position. DOP Ex 10

11. A second PDF dated May 11, 2016, was prepared and submitted to the DOP incorporating additional information of Grievant's retained TA duties and those additional responsibilities and supervisory duties of his former supervisor. DOP Ex 3

12. A request for reconsideration of the classification determination was submitted to DOP by correspondence from Chad Bailey, HR Director, DEP, dated May 17, 2016. The request indicated that the original PDF submitted only reflected the managerial duties and not the technical duties that the position would retain and as such, a second PDF was submitted with the request. A review of the two PDFs indicated each of the PDFs reflected both supervisory and the technical duties. See DOP Ex 1 and 3 and Testimony Campbell.

13. The classification specifications for the ERPM 1, Technical Analyst and Technical Analyst, Senior read in pertinent part as follows⁴:

ENVIRONMENTAL RESOURCES PROGRAM MANAGER 1

Nature of Work

Under administrative direction performs professional work at the managerial level. Serves as the manager of a formally designated specialized environmental resources program or subsidiary environmental resources program under direction of an administrator, manager or agency head and as may be outlined by state code. Exercises delegated authority to staff organizational unit to pursue goals through orderly and efficient planning, directing and controlling of activities where objectives, operations, and statutory requirements are of a specific program of singular scope and require specialized knowledge of the methodology of the technical field. Work requires analysis and interpretation of scientific or technical theory and principles; professional practices; agency philosophy, operational policies and regulations; and knowledge of a specific field where situations may be atypical or precedent setting. Duties include direction and supervision of a small professional or technical staff. Has latitude to exercise independent judgment in execution of duties within jurisdiction. Work is reviewed primarily for results obtained; timeliness; compliance with laws, rules, regulations, procedures and policies. Performs related work as required.

⁴ 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."

Distinguishing Characteristics

Directs the operations of a small organizational unit identified as a statewide program. Work requires knowledge of specific scientific or technical theory and principles of an environmental specialty area. Operational policy and procedures are relatively stable and singular in theme. Exercises latitude in determining work procedures and priorities and advises and makes recommendations regarding program policies, rules, regulations and procedures. Includes supervision of a limited variety of technical or professional support staff. Is accountable to an administrator, manager or the agency head.

Examples of Work

Administers an integral part of an environmental program of the state consistent with state policy and accepted principles.

Staffs organizational unit to effect orderly, efficient and economical operations.

Recommends and assists in preparation of legislation and administrative procedures as necessary to maintain conservation activities consistent with current needs and circumstances.

Delivers speeches; writes articles and disseminates other informational materials to explain conservation principles and acquaint public and private organizations with mission, policies, regulations; details impact on activities; and encourages cooperation and support.

Assists with preparation of budget and/or grant documents covering staff and equipment needs, and approves expenditures.

Attends meetings, seminars and symposiums to maintain knowledge of technical, scientific and professional advancements in the area of assignment.

Plans, organizes, implements, monitors and controls activities of professional, technical or scientific staff.

Coordinates plans and programs of the section with functions and services of other divisions, offices and activities of local, state, interstate, and federal government entities, and interested parties, and seeks agreement to resolve problems and/or establish common goals.

Testifies at legislative, judicial, or public hearings on behalf of the agency or as a subject-matter expert.

Administers and enforces laws, rules and regulations regarding conservation, development, protection, enjoyment and use of natural resources of the state for maintenance of intrinsic, ecological or beneficial value.

Negotiates utilization of resources consistent with public interest. Modifies or recommends action to revoke or suspend operational licenses or permits and may seek injunction, or civil action against violators. May initiate writs

and warrants, make arrests, and/or review, recommend or develop consent agreements.

Researches new procedures and directs scientific investigations to develop plans and recommendations for development, improvement, protection, preservation, regulation and use of natural resources based on predicted outcome. Prepares studies including descriptions of status, current practices, mitigation procedures, and progress reports regarding resource conservation, utilization and recovery. Recommends standards for resource depletion.

Develops and implements informational plans to advertise, promote and publicize state natural resources and conservation, preservation, use, and husbandry activities consistent with state plan.

TECHNICAL ANALYST

Nature of Work

Performs administrative work for a wide variety of services or creative works, the adequate performance of which requires engineering education, training and experience in the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as consultation, investigation, evaluation, and planning of engineering works and systems; planning the use of land and water; review of construction projects for the purpose of assuring compliance with plans any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of projects.

Distinguishing Characteristics

Applies technical techniques, procedures, and criteria within rules, regulations and operating procedures of the specialty area of assignment. This is full-performance level work and assignments are reviewed for output and quality. May serve as staff specialist in a particular area of special emphasis within the area of assignment.

Examples of Work

Supports the work of engineering designs, plans, calculation, inspections, and reports for specific projects.

Assists with the assignment, work, and performance of support and technicians assigned to specific projects.

Assists with interim and final inspections of construction projects to

determine compliance with applicable laws, regulations, and specifications. Assists with the preparation and reviews of complex plans and/or contracts for projects.

Assists in the writing of reports detailing recommendations, conclusions, and findings from inspections and reviews.

Reads professional journals and trade publications to gain knowledge of new technologies; assigns reading materials to subordinates.

Attends state and national meetings and seminars to improve and/or share engineering knowledge.

TECHNICAL ANALYST SENIOR

Nature of Work

Performs work at the administrative and supervisory level in charge of a department and/or units that provides a wide variety of services, or creative works, the adequate performance of which requires engineering education, training and experience in the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as consultation, investigation, evaluation, and planning of engineering works and systems; planning the use of land and water; review of construction projects for the purpose of assuring compliance with plans any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of projects. May involve occasional field activities and performs related work as required.

Distinguishing Characteristics

Has full responsibility for developing procedures, organizing operations, planning, scheduling, and evaluating the agency. Performs predominantly administrative duties involving budgeting, staff, coordinating and reporting activities. Supervises multiple recognized organization units of engineering staff and professional, technical, and support staff.

Examples of Work

Supervises the activities of several units of professionals and other staff; defines the mission and goals of each unit, assigns a budget, and evaluates the efficiency of the units by results received.

Represents the department and/or units before various boards and other groups in administrative matters.

Reviews the activities of subordinates' in the performance of their work.
Attends meetings with agency management to establish policy and procedure, budget and staffing allotments, legislation, and other matters as they pertain to the projects.
Attends state and national meetings and seminars to gain and/or share engineering knowledge.
Coordinates complex construction projects.
May review subordinates' project analyses of plans and/or contracts for projects; works closely with other agencies, departments, and/or units for which he/she has managerial responsibilities to assure quality of work and adherence to government's standards and procedures.
Write reports detailing recommendations, conclusions, and findings from inspections and reviews.
Reads professional journals and trade publications to gain knowledge of new technologies; assigns reading materials to subordinates.

See DOP Ex 7-9.

14. 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.

15. Based upon a review of the first and second PDFs submitted by DEP for the position Grievant occupies, DOP determined the appropriate classification of the position to be an ERPM 1.⁵ See DOP Ex 1-4.

16. In a June 13, 2016 letter from Ms. Sara P. Walker, DOP Director to Mr. Chad Bailey, DEP Human Resources Manager, the DOP responded to Grievant’s second

⁵ DOP classifies a position not the person.

PDF proving DOP's opinion regarding Grievant's position remained unchanged. DOP Ex 4 DOP affirmed its decision to reallocate the position to an ERPM 1.

17. Grievant and Respondent DEP were not pleased with DOP's analysis and determination regarding the best fit job classification of Grievant's position.

18. On October 19, 2016, Ms. Teresa A. Townsend, Personnel Specialist and Ms. Leah Basford, Personnel Specialist with the DOP's Classification and Compensation Section conducted a Job Audit Determination of Grievant's position.

19. In a November 17, 2016, letter from Mr. Joe F. Thomas, DOP Acting Director to Chad Bailey, DEP HR Manager, and based on the Job Audit Determination conducted by the DOP, DOP amended their previous decision and determined the Technical Analyst, TA classification was the "best fit" for Grievant's position. DOP Ex 6 This was the job classification Grievant originally possessed.

20. Grievant described his job duties and responsibilities in a typical work day to include the following activities:

- Reviews, prioritizes and answers emails himself or assigns to one of his staff to respond.
- Talks to his staff and to his supervisor. Determines what staff have done; what is completed and what still needs to be accomplished.
- Looks at Environmental Protection Agency ("EPA") data as relates to emissions. Gathers data from various sources that is then uploaded to the EPA database.
- Looks at data to identify trends and information that may not be consistent with what he believes is appropriate for the State.
- Supervisor gives him assignments and then he assigns to himself or to his staff to review, gather and/or collect requested information. He also receives requests

from other sections of DAQ and handles them in the same manner. And, he may receive Regional requests that are also handled the same.

- Conference calls with Regional EPA organizations that he and his staff participate in every week, but not every day. Calls last approximately one and one half hours.

See Testimony Grievant.

21. When asked the predominant duty of the position he occupies, Grievant indicated the majority of his duties, as described in a typical day, and as described on the PDFs, involve supervising his staff and making sure the objectives and goals of the group are met (“better than half of my time is spent supervising”). See Testimony Grievant.

22. DAQ’s Air Emission Inventory consists of area emissions, stationary emissions, mobile emissions, and database management; each is the responsibility of one employee working independently of the others (employee’s work does not overlap another and is not completed by another). In addition to supervising these employees, the Grievant is responsible for evaluation and oversight of all these specific emissions sources and personally responsible for technically evaluating the stationary emissions sources. DEP Ex 11, DOP Ex 3 PDF pages 3-4, and Grievant Testimony

23. Grievant indicated that the original PDF submitted for his position was a fair and accurate description of his job duties and responsibilities at the time it was completed and signed though Grievant admitted he did not complete the PDF himself contrary to his attestation on the form. See Testimony Grievant and DOP Ex 1.

24. Grievant indicated that his former supervisor, Mr. Betterton, completed the first PDF in its entirety, including the employee portion. Grievant testified that on the second PDF submitted to DOP, his current supervisor, Laura Crowder, completed the

supervisor portion of the PDF, and Grievant completed the employee portion himself. The second PDF has virtually identical language with only a few additions and/or alterations to what was originally submitted on the first PDF. Ms. Crowder provided conflicting testimony regarding the completion of the PDFs. See L-3 Testimony Grievant, Crowder and DOP Ex 1 and 3.

25. Wendy Campbell, Assistant Director of the Classification and Compensation section of the DOP, testified at the level three hearing. The Classification and Compensation section is statutorily responsible for, among other things, ensuring that all classified positions in state government are classified and paid appropriately. See L-3 Testimony.

26. 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 DOP on a daily basis. Ms. 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 classification specifications to come up with the “best fit” for the position.

27. After conducting a job audit and obtaining additional information supplied by the Grievant during said audit, the DOP reevaluated its classification determination and determined the position should be classified as a Technical Analyst. Assistant Director Campbell explained this was so because the job audit revealed that the position’s technical duties remained the predominant duties of the position, as opposed to the newly

added supervisory duties as had been indicated on both PDFs that were submitted. As the supervisory duties were not the predominant duties and were lower level duties than the Technical Analyst duties, the position was determined “best fit” for the Technical Analyst classification that it had originally been assigned prior to the review of either of the PDFs. See Testimony Campbell, DOP Ex 1, 3 and 6.

28. Absorbing all the work that is assigned to a lower paygrade, does not necessarily increase the complexity of a position; rather, DOP finds that the added duties may dilute the level of responsibility of the higher position. See L-3 Campbell testimony.

29. The DOP *Classification Glossary of Terms* defines “unit” as “[a] division, a section, or a workgroup that contains staff.” The DOP interprets “staff” in the definition to be plural, meaning more than one employee. See Testimony Campbell and DOP Ex. 11.

30. DOP determination as to the best fit classification for Grievant’s position has been either Technical Analyst or Environmental Resources Program Manager. DOP has not recommended that the position be reallocated to a Technical Analyst Senior classification.

Discussion

This grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 DOP's determination regarding the job classification of his position. Grievant and the Department of Environmental Protection/Division of Air Quality ("DEP"), his State employer, argue that DOP incorrectly classified Grievant's current position in its prior position reallocation decisions. Grievant and DEP maintain that proper reallocation would be to be upgraded to a Technical Analyst Senior (TAS) classification in that Grievant retained all his previous technical duties and added the responsibilities and supervisory duties of his former supervisor. The West Virginia Division of Personnel maintains that Grievant's responsibilities and duties do not meet the requirements of a TAS position. DOP notes that absorbing the work that is assigned to a lower classification, does not necessarily increase the complexity of a

position; rather, DOP finds that the added duties may dilute the level of responsibility of the higher position. DOP's determination as to the best fit classification for Grievant's position has been either Technical Analyst (pay grade 22) or Environmental Resources Program Manager (pay grade 19). DOP has not concluded that the position should be reallocated to a Technical Analyst Senior classification, pay grade 23.

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.⁶ *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990).

In review, a Position Description Form was filed with DOP seeking reallocation of a Technical Analyst position to a Technical Analyst Senior Classification.⁷ This reallocation was sought in that Grievant had taken on some if not all the responsibilities and supervisory duties of his retired supervisor while maintaining his prior technical

⁶ 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).

⁷ 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 allocate positions within the classified service. The PDF is compared to the classification specifications to come up with the "best fit" for the position.

responsibilities and duties. Grievant would like an increase in salary, and seemingly the employing State agency is not against approving more salary; nevertheless, there is a complication. The mechanism to achieve the salary increase (reallocation of the position) did not produce the intended objective.⁸ DOP's analysis of the situation included the completion of no less than two PDFs, an on-site audit and numerous administrative reviews. Initially DOP recommended Grievant's position be reallocated from Technical Analyst to an Environmental Resources Program Manager (ERPM 1). This reallocation was a three-compensation range decrease for Grievant. A second PDF was filed incorporating additional information regarding Grievant's retained TA duties and those additional responsibilities and supervisory duties of Grievant's former Supervisor. See L-3 testimony. DOP responded to this second PDF in a letter dated June 13, 2016, from Sara P. Walker, then DOP Director to Chad Bailey, DEP Human Resources Manager affirming DOP's previous position analysis, to classify Grievant's position with the alteration in duties as an ERPM 1. For one reason or another, DOP granted additional reconsideration, DOP conducted a Job Audit Determination. This audit was held at Grievant's DEP office by DOP's Personnel Specialist. Subsequent to the Job Audit analysis, Acting DOP Director, Joe F. Thomas issued a letter amending the previous decision(s) and determined/ruled the TA Classification Specification "best fit" Grievant's position. This was the classification Grievant occupied prior to the reallocation request.

⁸ A fair and equitable method for state employees to pursue and/or be granted an increase in salary would more than likely have avoided this and certainly many other grievances pursued out of frustration and lack of viable options.

There are two or three clear points of disconnect between Grievant, DEP and DOP. Nevertheless, the major point of contention is the effect of Grievant assuming a number if not all of his former supervisor's prior duties. The fact that Grievant assumed the duties of his previous supervisor is not contested, what is viewed conversely is the cumulative effect of these duties if performed by a superiorly classified position.⁹

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)).

Per DOP Classification Specification, the primary nature of work and distinguishing characteristics for an ERPM 1 is performing professional work at the managerial level and the work requires knowledge of specific scientific or technical theory and principles of environmental specialty area. The DOP's Classification Terms (Glossary) definition of

⁹ No one is inferring or stating supervision of others in the work place is a simple or easy task. It is however a task and as such is valued at a prescribed point or level of expertise/professional responsibility. Simply put, if a position is above the recognized level of performance, assuming lesser tiered tasks may not increase the overall classification-function level of the position.

“managerial” includes overseeing a formally designated organizational unit or program that requires extensive planning, organizing, and monitoring of work activities of subordinate staff, controlling resources including staff, budget, equipment, and all the means used to accomplish work within the assigned area of responsibility. The ERPM 1 position might be interpreted as being more managerial in nature and not technical. DOP’s Classification Specification describes the nature of work and distinguishing characteristics of a TA position. Primarily, a TA performs administrative work for a wide variety of services or creative work requiring engineering education, training, and experience in the application of special knowledge of mathematical, physical, and engineering sciences. A TA position might generically be perceived more technical in nature and not managerial.

DOP explained that while the Technical Analyst, Senior classification lists supervisory duties, it anticipates performance of supervisory duties at a significantly higher level than those which Grievant performs (requiring the supervisor be responsible for an entire department or multiple units of staff). On the other hand, the ERPM 1 classification is intended for a position that is assigned supervisory duties, as well as requiring specialized knowledge of the methodology of a technical field and analysis and interpretation of scientific or technical theory and principles. The position Grievant occupies absorbed all the lower level supervisory duties of the ERPM 1 position while retaining his technical responsibilities as well. DOP persuasively justified that absorbing all the work of the ERPM 1 position which is assigned to a lower paygrade (paygrade 19) does not necessarily increase the complexity of the position; rather, the added duties tend

to dilute the level of responsibility of the higher level Technical Analyst position, which is assigned to paygrade 22. See Testimony Campbell and DOP Ex 7, 9 and 10. It is DOP's expert opinion that "if" the supervisory duties have become the predominant duties of the position, the job duties and responsibilities of the position Grievant occupies fall squarely within the ERPM 1 classification. See Testimony Campbell and DOP Ex 7-9. If the supervisory duties are not predominant duties pursuant to the current State Classification Plan, the "best fit" in terms of classification for the position Grievant occupies, is Technical Analyst.¹⁰

It seems a key component has been identified as whether the acquired supervisory duties have become the predominant duties of the position. It is more likely than not that Grievant and Respondent DEP never contemplated Grievant's position classification might be diluted by the added duties. Grievant's position has both technical and supervisor responsibilities. DOP determination as to the best fit classification for the Grievant's position has been either Technical Analyst or Environmental Resources Program Manager. DOP does not conclude that the position should be reallocated to a Technical Analyst Senior classification, pay grade 23.

DOP's interpretation of the classification specifications is given great weight unless clearly erroneous. (Citations omitted) DOP has persuasively communicated that added duties can dilute the level of responsibility of a position. It is not necessarily the number

¹⁰ After hearing Grievant's testimony during the level three hearing, Assistant Director Campbell testified that the position should be classified as an ERPM 1, as originally determined by DOP, because of the predominant job duties and responsibilities as described by Grievant himself, under oath, during testimony at the hearing.

of duties but the level of complexity/quality of work which is relevant. An increase in tasks does not unequivocally mandate an increase in classification. Absorbing the work that is assigned to a lower classification/paygrade, does not necessarily increase the complexity of a position. In the facts of this matter, DOP's determination is not popular. DOP's ruling goes contrary to the intent and rationale for the original request. Nevertheless, the determination by DOP is not arbitrary and capricious.¹¹ Grievant has not demonstrated by a preponderance of the evidence that DOP's determination for his position is clearly wrong.

Conclusions of Law

1. The subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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

¹¹ 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 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). 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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, *Hayes v. W. Va. Department of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989).

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, *Broadus 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 he identified was a better fit for his position's duties than the classification determination of the Division of Personnel.

14. Grievant has not shown by a preponderance of the evidence that his duties and responsibilities best fit within the Technical Analyst Senior classifications more so than the Technical Analyst classification to which the DOP determined the position should be assigned.

15. Grievant was unable to prove by a preponderance of the evidence that DOP's classification for his position was clearly wrong or arbitrary and capricious.

16. DOP did not violate any rule or regulation and lawfully determined the best fit classification for Grievant's position is either Technical Analyst or Environmental Resources Program Manager.

17. 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: May 15, 2017

Landon R. Brown
Administrative Law Judge