

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SHERRI ANN STURGIS,
Grievant,**

v.

Docket No. 2016-1619-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILD SUPPORT ENFORCEMENT, and
DIVISION OF PERSONNEL
Respondent.**

DECISION

PROCEDURAL HISTORY

Grievant, Sherri Ann Sturgis, is employed by Respondent, Department of Health and Human Resources/Bureau for Child Support Enforcement ("BCSE"). Grievant filed a grievance on May 5, 2016, seeking to have her position reallocated to a Child Support Specialist 3, with back pay and benefits retroactive to November 2013. The grievance was waived to Level Two by BCSE on May 13, 2016.

Upon examination of the pleadings, the Division of Personnel ("Personnel") was joined as an indispensable party by Order dated May 23, 2016, by Administrative Law Judge ("ALJ") Billie Thacker Catlett.

A Level Two Mediation was conducted on August 29, 2016, which resulted in an Order of Unsuccessful Mediation being entered by ALJ William B. McGinley on August 31, 2016. Grievant appealed to Level Three on or about September 8, 2016. Grievant amended both her Statement of Grievance and Relief Sought in four additional pages of information she attached to her level three Grievance Form, which included an allegation of bad faith on the part of her supervisor for not promoting her to a Child Support Specialist 3 position.

Personnel filed a Motion to Dismiss it as an indispensable party to the grievance on November 23, 2016. Personnel claimed it had no authority to promote an employee, nor could it require an agency to promote an employee.

Grievant requested a continuance of the Level Three hearing which was scheduled for December 1, 2016, so that she could prepare additional documentation to submit to Personnel. Grievant subsequently submitted a Position Description Form to Personnel for review on November 29, 2016.

ALJ Lewis G. Brewer entered an Order Dismissing Party on December 15, 2016, dismissing Personnel from the grievance.

A Level Three hearing was scheduled for March 27, 2017. Prior to the hearing, Grievant submitted a Motion to Re-Join Division of Personnel as An Indispensable Party.

A Level Three hearing was held on March 27, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*. BCSE was represented by counsel, Michael Bevers, Esq. The undersigned informed the parties she would hear the evidence before making a ruling on the Motion to re-join Personnel. Following the conclusion of the hearing, the undersigned concluded that Personnel was an indispensable party, and issued an Order on May 11, 2017, granting Grievant's Motion to re-join Personnel.

The Level III hearing was continued on October 13, 2017, to allow Personnel an opportunity to present its case, and to allow Grievant an opportunity to respond. Following the close of the hearing, the parties indicated they wished to submit Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on November 13, 2017, the deadline for the parties' submissions.

SYNOPSIS

Grievant seeks reclassification from a CSS2 to a CSS3 during the time she worked in the Lincoln County BCSE office. Grievant alleged bad faith on the part of her Supervisor in discouraging her from seeking reclassification and/or promotion. Grievant filed this grievance while working in the Lincoln County office. Shortly thereafter, she accepted a CSS3 position in another location. Grievant proved by a preponderance of the evidence that she was working as a CSS3 while in the Lincoln County. Grievant did not prove that her Supervisor acted in bad faith, as defined in *W. Va. Code* §6C-2-3(2). Grievant is entitled to all the back wages and benefits she would have earned had she been reclassified to a CSS3, from May 5, 2015, one year prior to the date of the filing of the grievance, until the date Grievant resigned from the Lincoln County BCSE office, May 28, 2016.

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

FINDINGS OF FACT

1. Grievant, Sherri Sturgis, has been employed with Respondent, Bureau of Child Support Enforcement ("BCSE"), since 2007. She has served as a Child Support Tech 1 and 2, Child Support Specialist 2, and is currently a Child Support Specialist 3.
2. Grievant served as a Child Support Specialist 2 ("CSS2") in the Office of Central Registry, handling interstate cases, from 2010-2013.
3. Grievant transferred to Lincoln County, and worked as a CSS2 from April 2013 through May 2016.

4. Grievant filed this grievance on May 5, 2016, requesting reclassification from a CSS2 to CSS3 for the time she worked in the Lincoln County office.

5. Grievant filed an amended grievance on September 7, 2016, claiming that her Supervisor acted in bad faith in preventing her from being reclassified and/or promoted from a CSS2 to a CSS3 while working in Lincoln County.

6. Grievant applied for and received a Child Support Specialist 3 ("CSS3") position in the Charleston office, and began work there on May 28, 2016.

7. During the time Grievant worked as a CSS2 in the Lincoln County office, Grievant did not seek reallocation of her position to a CSS3.

8. Grievant discussed the reallocation process with her supervisor, Stacy Hawley, but Ms. Hawley discouraged her from proceeding with the reallocation process. Grievant testified she did not know she could request reallocation with or without her supervisor's approval.

9. Stacy Hawley intentionally refused to promote and/or assist Grievant and other employees in applying for reclassification/promotion within the Lincoln County BCSE office.

10. Stacy Hawley was not a credible witness based upon the documentation and testimony directly contradicting her testimony.

11. Grievant did not fill out a Position Description Form ("PDF") on her position in Lincoln County until November 29, 2016, after the Level II mediation.

12. The Nature of Work for a Child Support Specialist 2 is as follows:

Under limited supervision, performs full-performance level case management work in child support enforcement. Manages a full caseload in providing services of the Bureau for Child Support Enforcement. Performs related work as required.

The Distinguishing Characteristics of a Child Support Specialist 2 are:

Under limited supervision, provides full-performance child support services. Employees assigned to positions at this level will have more independence of action and will have successfully completed a one-year probational period as a Child Support Specialist 1. The Child Support Specialist 2 will interact with a variety of professional practitioners in the legal community, as well as other agencies. The Child Support Specialist 2 is distinguished from the Child Support Specialist 3 by the complexity of assignments.

DHHR Ex. 1.

13. The Nature of Work for a Child Support Specialist 3 is as follows:

Under limited supervision, performs advanced level case management work in child support enforcement. Employees at this level perform advanced level work as a lead worker in the regional offices with the highest difficulty and complex cases such as interstate, foster care, and disputed paternity, and unusually sensitive or complex cases and for lead worker positions in the above Central Office Units with subordinate Child Support Specialist I and II positions. Will mentor and train other Child Support Specialists and be a back-up to the supervisor when they are out of the office. Performs related work as required.

The Distinguishing Characteristics of a Child Support Specialist 3 are:

Employees in this classification will have previously served as a Child Support Specialist 1 and 2.

Under limited supervision, a Child Support Specialist 3 provides advanced level child support services. Employees assigned to positions at this level will have greater independence of action. Interacts with a variety of professional practitioners in the legal community, as well as other agencies. Must be able to assess the customer's needs and the posture of the case and determine appropriate course of action. Performs advanced level work with the highest difficulty and complex cases such as interstate, foster care, and disputed paternity. Will serve as a lead worker and will mentor and train other Child Support Specialist and be a back-up to the supervisor when they are out of the office.

G. Ex. 1; DHHR. Ex. 2.

14. The two positions are distinguished by the complexity of assignments, as well as increased administrative responsibility.

15. The Examples of Work for the two positions are identical, with the exception of the following examples which are included on the CSS3 position description:

- Handles customer service inquiries of all levels of difficulty.
- Composes correspondence of all levels of complexity.
- Assists BCSE Attorney with complex litigation.
- Mentors/trains Child Support Specialist I and II.
- Participates in regional or statewide projects.
- Demonstrates advanced ability to master the technical aspects of the Child Support Enforcement's automated system.
- Engages in community outreach.
- May serve as a back-up for the supervisor.

G. Ex. 1; DHHR Ex. 2.

16. Grievant served as a back-up for her Supervisor, Stacy Hawley, in the Lincoln County BCSE office.

17. Grievant served as a mentor/trainer for new and existing employees in the Lincoln County BCSE office.

18. Grievant was responsible for preparing the rotation schedule in the Lincoln County office.

19. Grievant was selected to serve on the Region 35 Pilot Project. She was responsible for foster care cases, and was assigned to customer service as a mentor/trainer.

20. Grievant worked on complex cases, including interstate, foster care, disputed paternity, and other advanced level cases.

DISCUSSION

In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work she is doing is a better fit in a different classification than the one in which her position is currently classified. See *Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001). DOP's Rule 3.75 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." 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 the type of duties contemplated in the current class specification does not require reallocation. *Id.*

Grievances contesting a grievant's current classification are therefore decided under rules of law which give DOP's interpretation of classification specifications great weight unless that interpretation is shown to be clearly erroneous. 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). It is fair to say that a grievant challenging her classification has an uphill battle. *Bennett v. Insurance Comm'n and Div. of Pers.*, Docket No. 07-INS-299 (June 27, 2008).

When an employee requests reclassification or reallocation, DOP normally makes its classification determination based on the Position Description Form completed by the

employee. Classification is a highly technical matter, based on carefully drafted class specifications and a complex pay plan, using terms of art to describe duties and job types defined by the DOP. To do this DOP fits positions into specifications based on a lengthy technical document, the aforementioned Position Description Form. DOP specifications are to be read in pyramid fashion, i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the “Nature of Work” section of a classification specification is its most critical section. *See generally, Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

The **Nature of Work** for a Child Support Specialist 2 is as follows:

Under limited supervision, performs full-performance level case management work in child support enforcement. Manages a full caseload in providing services of the Bureau for Child Support Enforcement. Performs related work as required.

The **Distinguishing Characteristics** of a Child Support Specialist 2 are:

Under limited supervision, provides full-performance child support services. Employees assigned to positions at this level will have more independence of action and will have successfully completed a one-year probational period as a Child Support Specialist 1. The Child Support Specialist 2 will interact with a variety of professional practitioners in the legal community, as well as other agencies. The Child Support Specialist 2 is distinguished from the Child Support Specialist 3 by the complexity of assignments.

DHHR Ex. 1.

The **Nature of Work** for a Child Support Specialist 3 is as follows:

Under limited supervision, performs advanced level case management work in child support enforcement. Employees at this level perform advanced level work as a lead worker in the regional offices with the highest difficulty and complex cases such as interstate, foster care, and

disputed paternity, and unusually sensitive or complex cases and for lead worker positions in the above Central Office Units with subordinate Child Support Specialist I and II positions. Will mentor and train other Child Support Specialists and be a back-up to the supervisor when they are out of the office. Performs related work as required.

The **Distinguishing Characteristics** of a Child Support Specialist 3 are:

Employees in this classification will have previously served as a Child Support Specialist 1 and 2.

Under limited supervision, a Child Support Specialist 3 provides advanced level child support services. Employees assigned to positions at this level will have greater independence of action. Interacts with a variety of professional practitioners in the legal community, as well as other agencies. Must be able to assess the customer's needs and the posture of the case and determine appropriate course of action. Performs advanced level work with the highest difficulty and complex cases such as interstate, foster care, and disputed paternity. Will serve as a lead worker and will mentor and train other Child Support Specialist and be a back-up to the supervisor when they are out of the office.

G. Ex. 1; DHHR. Ex. 2.

The two positions are distinguished by the complexity of assignments, as well as increased administrative responsibility.

The **Examples of Work** for the two positions are identical, with the exception of the following examples which are included on the CSS3 position description:

- Handles customer service inquiries of all levels of difficulty.
- Composes correspondence of all levels of complexity.
- Assists BCSE Attorney with complex litigation.
- Mentors/trains Child Support Specialist I and II.
- Participates in regional or statewide projects.
- Demonstrates advanced ability to master the technical aspects of the Child Support Enforcement's automated system.
- Engages in community outreach.
- May serve as a back-up for the supervisor.

G. Ex. 1; DHHR Ex. 2.

The 2013-2014 Performance Standards and Expectations for the Hamlin, Lincoln County BCSE Region 5, include the following:

CS Specialist III's will serve as back-up to the Supervisor and assist in mentoring and providing training to new employee as assigned.

CS Specialist III's will be responsible for preparing rotation monthly sheets for 4:30 and 5:00 coverage & for 8:30 to 9:00 telephone coverage.

CS Specialist III's are required to take additional trainings to aid them for their extra duties. During the 2013-2014 year CS Specialist III's are required to enroll & complete the following trainings: Managing & the Law, Preventing Harassment: A Shared Responsibility, & Incivility in the work place. The CSS III is to notify the Supervisor & Regional Manager when these are completed.

G. Ex. 2 (emphasis in original).

The 2014-2015 and 2015-2016 Performance Standards and Expectations for the Hamlin, Lincoln County BCSE Region 5, add that CSS3s "are encouraged to review trainings offered and to take any they fell(sic) will benefit and aid them in their duties."

Gs. Ex. 3, 4.

Grievant claims she served as a back-up to her Supervisor, and assisted in mentoring and providing training to new employees. A November 14, 2013 email from Ms. Hawley to the Hamlin office staff informs them that while she (Ms. Hawley) is away from the office Grievant will serve as her back-up. G. Ex. 5.

A January 3, 2014, email from Ms. Hawley to the office staff refers to an attachment entitled "Instructions for Supervisor Back-up's Responsibilities and Duties and Staff's Responsibilities." The attachment is a 3-page, single-spaced, very detailed list of instructions and responsibilities for the back-up. The email instructs the staff that "Sherri is my back-up." G. Ex. 6.

A June 20, 2014 email was sent to all Supervisors from Henrietta Webb, the Regional Manager, Region 5, regarding a policy change, and instructing them to go over the policy with their staff. Grievant was included in the email to all Supervisors. G. Ex. 8.

On June 25, 2015, Ms. Hawley sent an email to the staff regarding handling fire drills, in which she states, "Sherri is next in line", with instructions to Grievant regarding fire drill protocol. G. Ex. 17.

There are several emails dealing with office scheduling, payroll, fire drills, meeting attendance, and other administrative matters in which Grievant is clearly being given the responsibility to carry out the various tasks on behalf of the Supervisor and Regional Manager. G. Exs. 10, 11, 15, 16, 17.

Ms. Hawley sent an email to her staff on July 10, 2014, indicating that "Sherri has all state cases and a lot of our ufisa cases and they take extra time." G. Ex. 9.

Katrina Nida started work in the Lincoln County office in July, 2015. She relied on Grievant for training and advice. Ms. Hawley did not interact with employees personally. Every communication was via email, and she rarely came out of her office. Ms. Nida said Ms. Hawley told her Grievant was the designated person for training. Ms. Nida said she and other workers sought Grievant's advice and assistance on a daily basis. Ms. Nida left the Lincoln County office in May 2016, because of the bad work atmosphere.

In 2015, BCSE introduced a pilot project to create regional offices covering multiple counties. Lincoln County would become part of Region 35. The CSS' were asked to make a wish list of the types of cases they wanted. Grievant indicated she "wished" someone else would take her UIFSA cases. G. Ex. 18.

Connie Altizer became Grievant's supervisor on the Region 35 pilot project. Grievant was assigned to handle foster care cases in the region. G. Ex. 20. As the project progressed, Grievant was assigned to customer service to train new employees, while remaining a contact person for CPS workers. G. Ex. 21.

In October 2015, Ms. Altizer asked Grievant to summarize her work with foster care cases for Lincoln County. G. Ex. 22. Grievant was still handling foster care cases for the county while working in customer service for the Regional office.

At some point, Teresa Darnell, Child Support Supervisor in Logan and Boone counties, became Grievant's supervisor for the Region 35 pilot project. Ms. Darnell testified that she did not assign Grievant as a mentor during the time she was involved in Region 35. However, as noted above, Ms. Altizer did assign Grievant to that role.

Grievant alleges that her supervisor, Ms. Hawley, willfully worked her out of classification, and resisted any attempts on the part of Grievant to be reclassified or promoted to a CSS3. At all times relevant to this grievance, there were no CSS3s in the Lincoln County office, but there was a CSS3 vacancy. There was never a posting for that CSS3 position. It stands to reason that if there was no CSS3 in the Lincoln County office, someone had to be working on the complex cases, and carrying out the other tasks which would be performed by a CSS3.

In March 2016, Grievant sent a confidential email to Henrietta Webb, Regional Manager, regarding problems those in Lincoln County were having with Ms. Hawley. Ms. Webb assured her the information would remain confidential, and that she would look into the issues. G. Ex. 28. Grievant again informed her superiors of problems in the office in May 2016 and was assured they would be addressed. G. Ex. 29.

After Grievant left the Lincoln County office, Ms. Hawley began bad-mouthing her to the Lincoln County staff. One employee, Karen Morton, informed Grievant that the staff had filed complaints about Ms. Hawley. Henrietta Webb, the Regional Manager, had even interviewed employees in the Lincoln County office about the complaints, and Ms. Morton stood up for Grievant. Apparently, the interviews were not kept confidential, and Ms. Hawley's treatment of the staff became even more hostile. G. Ex. 27.

Grievant had informed Ms. Hawley that she wanted to try to have her position changed to a CSS3, and that she was going to complete a Position Description Form ("PDF"). Ms. Hawley told Grievant that she (Hawley) would have to agree upon the PDF, and she encouraged Grievant not to do it. Ms. Hawley told Grievant if she was promoted, and then got demoted, it would look bad for Ms. Hawley. Grievant interpreted Ms. Hawley's statement to mean she would not approve the PDF. Grievant believed Ms. Hawley had to approve the form before it could be submitted to Personnel, so she did not complete the form at that time. Grievant was aware that Ms. Hawley did not voluntarily promote people in her office. Ms. Hawley had told Grievant once that she did things to prevent one of the CSS1s in the office, Debbie Quintrell, from being promoted to a CSS2.

Ms. Hawley had discouraged employees from seeking reclassification in the past. Juanita Nelson started in the Lincoln County as a CSSI in November, 2013. She relied on Grievant for training and went to her with questions. She recalled Ms. Hawley telling her that Grievant was her back-up. At some point, Ms. Nelson asked Ms. Hawley when she would be promoted to a CSS2, as she had been there more than one year. Ms. Hawley told her she did not promote people, because they could get demoted, and that would look bad for her.

After about 2 years, Ms. Nelson interviewed for a position in Charleston. She was asked why she had not been promoted to CSS2. She told the individual what Ms. Hawley told her. The person she interviewed with told Garrett Jacobs, the BCSE Commissioner, that no one was being promoted in the Lincoln County office. Henrietta Webb, the Regional Manager, interviewed Ms. Nelson about the issue. Ms. Nelson was then promoted to CSS2, as was the other CSSI in the Lincoln County office, Debbie Quintrell, who had been there longer than Ms. Nelson.

Stacy Hawley testified that there had been no CSS3 in the Lincoln County office since 2012. She has been the Supervisor in Lincoln County since 2010. Ms. Hawley denied that she had assigned Grievant as a mentor or as a back-up supervisor. She testified that any one of the employees in her office could have acted as a back-up when she was not there. She also testified that while Grievant may have answered other employee's questions, she was not "assigned" to be a mentor.

In situations such as this, where the existence or nonexistence of material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). 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).

The 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' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Ms. Hawley's testimony is simply incredible. While she attempted to downplay Grievant's role in the Lincoln County office, the documentary evidence introduced by Grievant directly contradicts her assertions that she did not designate Grievant as a back-up or a mentor. Moreover, her testimony supports Grievant's and Ms. Nelson's testimony that Ms. Hawley would not support her employees in advancing their careers within her office. It is especially telling that Ms. Hawley would not even promote her CSS1s to CSS2s despite the normal progression after one year. See DHHR Ex. 1. Indeed, once Ms. Hawley's superiors learned that she had CSS1s in her office who had been working in that capacity for more than one year, they were both immediately promoted to CSS2s.

Wendy Campbell, Assistant Director for Classification and Compensation for the Division of Personnel, testified that Personnel needs to be able to distinguish specific duties which would justify reallocation, and that it was hard to have CSS3s in the smaller offices like Lincoln County, because there was an overlap of duties. Ms. Campbell's testimony on the overlap of duties falls neatly into the "[p]erforms related work as required"

language included in virtually all Position Descriptions. See R. Exs. 1, 2. In this case, it is neither instructive nor illustrative of Grievant's duties, as Personnel did not review Grievant's duties. This leads to both Personnel's and DHHR's primary defense in this matter: That Grievant did not complete a Position Description Form and follow the proper procedure for reclassification of her position.

During the time Grievant worked as a CSS2 in the Lincoln County office, Grievant did not seek reallocation of her position to a CSS3, because she believed Ms. Hawley would not approve her Position Description Form, nor support her efforts to be promoted and/or reclassified. Grievant did not fill out a Position Description Form on her position in Lincoln County until November 29, 2016, after the Level II mediation. The Division of Personnel returned the PDF to Department of Health and Human Resources Human Resources Manager, Lynn Huddleston, on February 8, 2017. Personnel did not review the PDF because, at that time, Grievant no longer worked as a CSS2, and "Position Description Forms will only be reviewed for duties that are currently being performed." R. Ex. 4.

Ms. Campbell testified that the Division of Personnel will not review a reallocation request retroactively, as it has no way of performing an audit of the position, or determining whether an employee was performing the duties and responsibilities he or she claimed made them eligible for a reallocation or reclassification.

There are only two ways Grievant could have gone from a CSS2 to a CSS3. One way was to apply for a posted, vacant CSS3 position. The other way is through reallocation. An employee begins the reallocation process by completing a PDF of his or her current position. The form must be signed off by the employee's supervisor, and then

it is forwarded through channels through the Department's Human Resources office, and then to Personnel. There is no guarantee that a position will be reallocated.

Ms. Campbell asserts that, in the instant case, there has been no Personnel decision regarding Grievant's position for the Grievance Board to review. Grievant did not pursue reallocation through the correct channels at the time she was eligible to do so, i.e., when she was actually working as a CSS2 in Lincoln County.

Interestingly, despite Ms. Campbell's assertion that Personnel will not review a reallocation request retroactively, as it has no way of performing an audit of the position, or determining whether an employee was performing the duties and responsibilities he or she claimed made them eligible for a reallocation or reclassification, Personnel did review Grievant's PDF after it was re-joined in this grievance. Carrie Sizemore, DOP's Operations Manager, Classification and Compensation Section, testified that DOP reviewed Grievant's PDF and determined that Grievant was correctly classified as a CSS2.¹ Personnel cannot have it both ways.

There is no question that this is an unusual reclassification case, in that no PDF had been filed by Grievant while she was working as a CSS2 in Lincoln County. However, there are extenuating circumstances in this case that lead the undersigned to conclude that the fault does not lie with Grievant for this omission.

There can be no doubt that Ms. Hawley intentionally discouraged her employees from progressing in their careers by telling them she would not support them in efforts to be promoted or reclassified. She also deliberately led Grievant to believe she would not

¹ See also, DHHR/BCSE's Proposed Findings of Fact and Conclusions of Law, p. 16.

approve Grievant's PDF, and Grievant believed she needed Ms. Hawley's approval before submitting the form to Personnel. There was enough evidence of Ms. Hawley's efforts to keep her employees where they were to give credence to Grievant's beliefs about her chances of success under Ms. Hawley's supervision.

The documentation and testimony in this case supports Grievant's claim that she was performing the duties of a CSS3 while employed in the Lincoln County BCSE office. Due to no fault of her own, she was unable to progress in that office, and should not now be penalized for Ms. Hawley's failures as a supervisor.

The remaining issue to decide is Grievant's backpay award. A misclassification is a continuing practice, and a grievance may be initiated at any time during which the misclassification continues. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 456 S.E.2d 399 (1995). A grievant must file her grievance no later than ten days after her misclassification ends. *Gaskins v. W. Va. Dep't of Health/Div. of Personnel*, Docket No. 90-H-032 (Apr. 12, 1990). Back pay is limited to the ten-day period preceding the filing of the grievance, if an employer properly asserts a timeliness defense. *Martin, supra*. No timeliness defense was made in this grievance by Respondents.

West Virginia Code §6C-2-3(2) provides that

When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.

In support of her claim for back pay, Grievant argues that state agencies have a duty to properly classify and pay their employees, and that her employer intentionally discouraged and prevented her from seeking reclassification. It is true that Ms. Hawley

discouraged Grievant from seeking reclassification. However, there is no evidence that Ms. Hawley concealed any fact from Grievant, which, according to the statute, is a necessary component in a claim of bad faith. Ms. Hawley did not tell Grievant she could not seek reclassification; she merely indicated she might not agree with Grievant's description of her duties on her PDF.

It is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work she is doing is a better fit in a different classification than the one in which her position is currently classified. See *Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001).

2. DOP's Rule 3.75 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." 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 the type of duties contemplated in the current class specification does not require reallocation. *Id.*

3. When an employee requests reclassification or reallocation, DOP normally makes its classification determination based on the Position Description Form completed by the employee. Classification is a highly technical matter, based on carefully drafted

class specifications and a complex pay plan, using terms of art to describe duties and job types defined by the DOP. To do this DOP fits positions into specifications based on a lengthy technical document, the aforementioned Position Description Form. DOP specifications are to be read in pyramid fashion, i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the “Nature of Work” section of a classification specification is its most critical section. See generally, *Dollison v. W. Va. Dep’t of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

4. Grievant has demonstrated that, when examining her duties compared to the “Nature of Work” and “Distinguishing Characteristics” for the relevant classifications, there existed a significant change in her job duties to warrant reclassification.

5. Where the existence or nonexistence of material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep’t of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). 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).

6. The 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' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

7. *W. Va. Code* §6C-2-4(a)(1), provides that

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing.

8. *W. Va. Code* §6C-2-3(c)(1) provides that "Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two".

9. There was no timeliness defense raised which would limit the amount of backpay to which Grievant is entitled.

10. *W. Va. Code* §6C-2-3(c)(2) provides that:

When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.

11. Grievant has not proven by a preponderance of the evidence that her Supervisor acted in bad faith in her attempts to prevent Grievant from filing a PDF, or from processing her request for reclassification.

Accordingly, the grievance is **GRANTED**. Grievant is entitled to all the back wages and benefits she would have earned had she been reclassified to a CSS3, from May 5, 2015, one year prior to the date of the filing of the grievance, until the date Grievant resigned from the Lincoln County BCSE office, May 28, 2016.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See *W. Va. Code* § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by *W. Va. Code* § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also W. Va. Code St. R. § 156-1-6.20* (2008).

DATE: December 22, 2017.

Mary Jo Swartz
Administrative Law Judge