

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DAVID M. AUSTIN,
Grievant,**

v.

Docket No. 2017-1364-DOT

**DIVISION OF HIGHWAYS, and
DIVISION OF PERSONNEL,
Respondents.**

DECISION

David M. Austin, Grievant, filed this grievance against his employer, Division of Highways, Respondent, protesting his newly assigned job classification. Grievant filed his original grievance to level two on or about December 2, 2016. The grievance statement provides:

I was encouraged to fill out a position description form with the hopes of getting some type of financial increase in salary. I have been a Supervisor II for over 25 [years] and have filled out these forms on several other occasions. It was determined that I should be declassified [sic] to a Supervisor I. I strongly disagree with these findings.

The relief sought reads: "To remain Supervisor II[.]"

A *Dismissal and Transfer Order* was entered by Chief Administrative Law Judge Billie Thacker Catlett on January 17, 2017, dismissing the grievance from the level two docket and transferring it to the level one docket. The level one grievance evaluator waived the grievance to level two indicating she did not have the authority to grant the relief requested. By *Order of Joinder*, this Board joined the West Virginia Division of Personnel ("DOP") as an indispensable party to the grievance on February 1, 2017.¹ A

¹ DOP is the entity in State government charged by law with classifying positions in the Classified Service. See W. VA. CODE § 29-6-1 *et seq.*

level two mediation was conducted on May 26, 2017. At the conclusion of the mediation, this matter was placed in abeyance. An *Order Placing Grievance in Abeyance* was entered by ALJ Catlett on June 2, 2017. Grievant appealed to level three on August 15, 2017. A level three hearing was held before the undersigned Administrative Law Judge on December 1, 2017, at the Grievance Board's Beckley Office. Grievant appeared *pro se*.² Respondent Division of Highways ("DOH") appeared by Jason Workman, Esquire and Respondent Division of Personnel ("DOP"), was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. In addition to the level three hearing the parties were provided the opportunity to submit written Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about January 12, 2018, the assigned date for the submission of the fact/law proposals.

Synopsis

Grievant is in opposition to the reallocation classification of the position he occupies from Supervisor II, pay grade 11 to Supervisor I, pay grade 9. The specific amount of pay Grievant receives as compensation was not altered. 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 audit, the Division of Personnel determined that Grievant's position best fit into the classification of Supervisor I. Grievant did not prove that Respondent DOP's classification decision was clearly wrong. This grievance is DENIED.

² "*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.

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

Findings of Fact

1. Grievant, David Austin, occupies a position that was classified as a Supervisor 2. See Grievant's Testimony.

2. DOP is the entity in State government charged by law with classifying positions in the Classified Service. DOP is aware of a systemic problem in DOH that relates to the misclassification of supervisory positions. DOP requested Position Description Forms ("PDFs") for positions allocated to the Supervisor 2 classification in an effort to ensure the positions were properly allocated within the State Classification Plan. See L-3 Testimony Wendy Campbell, Assistant Director of the Classification and Compensation

3. A PDF was completed by Grievant on August 1, 2016, and received by DOP on August 4, 2016. After a review of the PDF, DOP determined the position should be classified as a Supervisor 1.³ See DOP Exs 1 and 2 and Testimony Campbell.

4. The PDF is identified in DOP's 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 and Wendy Campbell, Assistant Director of the

³ Grievant claims he has filled out PDFs about every two years since the 1990s; however, Assistant Director Campbell stated that DOP has no record of such. See Grievant and Campbell L-3 Testimony.

Classification and Compensation (“Class & Comp”) section of DOP, has personally reviewed and made classification determinations on thousands of PDFs. See Testimony Campbell, DOP Ex 7.

5. A request for reconsideration of the classification determination was submitted to DOP by Kathleen Dempsey, Director of Human Resources for the DOH, on October 17, 2016. The request by DOH merely forwarded an email from Grievant which stated the sole reason he completed the PDF was to get a salary increase. The request provided no additional information with regard to job duties and responsibilities of the position. Assistant Director Campbell explained that completion of a PDF is an inappropriate mechanism for an employee to use when seeking a salary increase. A PDF is used for the sole purpose of appropriately classifying a position. See DOP Ex 3 and Testimony Campbell.

6. By letter dated November 29, 2016, then Acting Director of DOP, Joe F. Thomas, responded to the request for reconsideration affirming DOP’s original decision to classify the position as a Supervisor 1. The rationale was that the primary role of the position did not meet the level of responsibility of a Supervisor 2, which requires oversight of employees engaged in technical work requiring advanced training. See DOP Ex 4 and Testimony Campbell

7. The position Grievant occupies was downwardly reallocated to the Supervisor 1 classification effective February 18, 2017. At the discretion of DOH, Grievant received no reduction in his salary and his pay remained at \$18.1154/hour. See DOP Ex 5 and Testimony Campbell.

8. A job audit of the position was conducted by DOP on June 29, 2017.⁴ By memorandum dated July 24, 2017, from Assistant Director Wendy Campbell to HR Director Dempsey the DOP again affirmed the original classification determination to classify the position as a Supervisor 1. While Grievant contends that the position he occupies is technical in nature, DOP relying on its definition of “technical” as found in Appendix A of the DOP’s Pay Plan Policy (DOP-P12). The position and the three subordinate positions it supervises are not technical in nature, thus, the duties and responsibilities are not commensurate with the Supervisor 2 classification. See DOP Ex 6 and Testimony Campbell.

9. “Technical” has been defined in DOP’s Glossary of Terms as: “[w]ork requiring the practical application of scientific, engineering, mathematical, or design principles.” This Glossary has now been incorporated into DOP’s Pay Plan Policy (DOP-P12). The definition of technical is identical in the former Glossary as compared to the current policy.⁵ Assistant Director Campbell explained that technical work requires advanced level training such as would be received by one obtaining a college degree or training comparable to such. See DOP Exs 10 and 11 and Testimony Campbell.

10. The class specifications for the Supervisor 2, pay grade 11 and the Supervisor 1, pay grade 9, read in pertinent part as follows:⁶

⁴ A job audit is conducted by the DOP at the Employee’s worksite and allows the employee to clarify and provide additional information about job duties and responsibilities from those that are included on the PDF.

⁵ When first placed in the Pay Plan Policy, a comma was inadvertently left out of the definition, but has since been corrected.

⁶ DOP’s Administrative Rule, W. Va. Code R. §143-1-4.3.a. defines “class specification” as “a general description of the kinds of work characteristic of positions properly allocated to that class and does not prescribe the duties of any position. It does not limit the expressed or implied

SUPERVISOR 2

Nature of Work

Under general supervision, performs full performance *supervisory work overseeing a section of employees engaged in technical work requiring advanced training*. Work is reviewed by superiors through results produced or obtained in meetings. May represent the agency before committees and the general public. Performs related work as required.

Distinguishing Characteristics

Supervisor 2 is distinguished from Supervisor 1 by the nature of the work supervised and by the level of collateral work assigned to the position. The nature of work supervised is typically of a technical nature as opposed to clerical at the Supervisor 1 level. May be a working supervisor performing related work of a more advanced level than the subordinates supervised.

Examples of Work

Plans, assigns, and coordinates the work of subordinates; trains employees in work methods.

Interprets and applies departmental policies and regulations for employees and others in state government.

Advises subordinates of changes in policy and procedure.

Responds to questions or problems of subordinates; restructures work procedures to align with changes in state or federal laws and programs.

Performs field visit inspections and spot-checks records to document activities and evaluate the performance of the unit.

Ensures that equipment, supplies, and materials are available to complete work.

Represents the unit before agency management, administrative hearings, business or civic groups, or other forums.

Performs employee performance evaluations, approves annual and sick leave, and recommends hiring, disciplinary actions and other employee activity.

Discusses personnel issues with employees; answers grievance issues within mandated time frames in an effort to solve problems.

SUPERVISOR 1

Nature of Work

Under general supervision, performs full performance *supervisory work overseeing the activities of clerical support staff, semi-or-fully-skilled trade workers, or inspectors*. Completes annual performance appraisals,

authority of the appointing authority to prescribe or alter the duties of any position.”

approves sick and annual leave, makes recommendations and is held responsible for the performance of the employees supervised. Work is reviewed by superiors through results produced or through meetings to evaluate output. Performs related work as required.

Distinguishing Characteristics

Supervisor 1 is usually a working supervisor who makes work assignments, reviews employees' work, and compiles reports on section activities in addition to performing tasks similar to their employees. In some instances, may be a working supervisor performing related work of a more advanced level than subordinates.

Examples of Work

Performs duties that are similar or related to the work performed by subordinates.

Makes work assignments to employees; reviews the work of subordinates to ensure accuracy.

Trains employees in proper work methods.

Ensures that equipment, supplies, and materials are available to complete work.

Inspects work areas to ensure that tasks are completed in a timely manner.

Evaluates employees' performance; counsels employees and recommends corrective action.

Answers inquiries from employees; relays information from management.

Updates and compiles reports outlining the unit's activities, including other factors such as amount of work produced, monies spent or collected, or inventory.

Discusses personnel issues with employees; answers grievance issues within mandated time frames in an effort to solve problems.

(Emphasis added) See DOP Exs 7-9.

11. Grievant did not provide any evidence with regard to his job duties and responsibilities. L-3 Testimony

12. Assistant Director Campbell explained that the Class & Comp section is responsible for, among other things, ensuring that all classified positions in State government are classified and paid appropriately within the State Classification and Compensation Plans. See Testimony Campbell.

13. Based upon a review of the position occupied by the Grievant, Ms. Campbell does not believe the position has been properly allocated for years. Assistant Director Campbell stated that all the Supervisor 2 positions in the DOH had been misclassified and working out of classification for a considerable period of time. She further noted that Grievant's supervisor, Scottie Miller, described on the PDF the additional duties added to the position since the last review as: "Conduct Employee Performance Appraisals [.] Recommendation for Hire[.]" If this was indeed the case, and prior to this duty being added it was not being performed, not only should the position not have been previously classified as a Supervisor 2, it should not have even been classified as a Supervisor 1. Supervisors are required to perform Employee Performance Appraisals on all subordinate staff they oversee. This is a fundamental responsibility of a supervisor. See DOP Ex 1 and Testimony Campbell.

14. Assistant Director Campbell explained that the position Grievant occupies was reallocated because DOP found it to have been misclassified. She explained the difference described in the nature of work of the class specifications for the Supervisor 2 and the Supervisor 1; specifically, the distinction between requiring oversight of technical versus clerical staff. The position Grievant occupies does not have subordinate positions under it that engage in "technical work requiring advanced training" as is required by the Supervisor 2 class specification.

15 The position in discussion, currently has responsibility to some degree for three subordinate staff positions assigned to the Storekeeper 3 classification. DOP does

not consider the Storekeeper 3 positions in DOH to be “technical” pursuant to the applicable definition used by DOP.

16. After reviewing the position on no less than three separate occasions and by no less than five different DOP employees, including the former Acting Director of the Division of Personnel (now Deputy Director), DOP has consistently found that within the current State Classification Plan, the “best fit”, in terms of classification for the position Grievant occupies, is Supervisor 1. See Testimony Campbell.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant asserts the position he occupies should remain classified as a Supervisor 2 after DOP determined the position should be downwardly reallocated to the classification of Supervisor 1. DOP is the entity in State government charged by law with classifying positions in the Classified Service. See W. VA. CODE § 29-6-1 *et seq.* 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). On a regular basis, year in and year out, DOP reviews PDFs for positions statewide to determine their appropriate classification.

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).

The 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 Resources*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broadus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Grievant provided no testimony or evidence regarding the duties and responsibilities of the position he occupies.

Based upon a review of the position's PDF, DOP determined the position Grievant occupies was misclassified and should be downwardly reallocated to the classification of

Supervisor 1. According to DOP, the position has been misclassified for years. The position has responsibility for three subordinate staff positions all assigned to the Storekeeper 3 classification. The Storekeeper 3 positions in DOH are not technical in nature as defined by DOP. "Technical" is defined by DOP as: "[w]ork requiring the practical application of scientific engineering, mathematical, or design principles." For purposes of interpreting and applying the State Classification Plan, DOP interprets technical work to require advanced level training such as one might obtain by receiving a college degree.

The Supervisor 2 classification requires that the position supervise other positions that are performing technical work. The position occupied by Grievant does not have responsibility for technical staff as is required by the Supervisor 2 class specification. Grievant attempted to argue that because the position he occupies had been classified as a Supervisor 2 for many years, that the job had not changed, and that he nor the agency had asked for a reallocation, the position should remain classified as a Supervisor 2. These contentions are not overly persuasive. Further, the contention(s) do nothing to counter the proposition that Grievant has never assumed the full duties and responsibilities of a Supervisor 2.

Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dept. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *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). 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 or her judgment for that of DOP. See generally, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

The PDF is identified in DOP's Administrative Rule 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. The PDF is compared to the classification specifications to come up with the "best fit" for the position. As part of the PDF review process, DOP looked at the history of the position, including the job posting, current duties, position authority and other relevant factors. Assistant Director Campbell's testimony was credible. Pursuant to the testimony and evidence provided, within the current State Classification Plan, the "best fit", in terms of classification for the position Grievant occupies, is Supervisor I. Grievant has not established by a preponderance of the evidence a persuasive argument proving an alternate conclusion. 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 following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

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 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 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).

8. 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, *Broaddus v. W. Va. Div. of Human Services*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). In a classification grievance, the focus is upon whether the grievant’s duties for the relevant period of time more closely match those of another cited classification specification than the classification to which he is currently assigned. *See generally, Hayes, supra.*

9. 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).

10. 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).

11. 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*.

12. Grievant has not established DOP's determination is clearly wrong or arbitrary and capricious.

13. Grievant has not established by a preponderance of the evidence that the position he occupies should be classified as a Supervisor 2.

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: March 1, 2018

Landon R. Brown
Administrative Law Judge