

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CYNTHIA SNOW,
Grievant,

v.

Docket No. 2017-1117-DOT

DIVISION OF MOTOR VEHICLES and
DIVISION OF PERSONNEL
Respondents.

DECISION

Cynthia Snow, Grievant, is employed by Respondent, Division of Motor Vehicles (“DMV”), as a Supervisor 1, in Welch, McDowell County, West Virginia. Grievant filed a level three grievance form dated October 22, 2016, alleging: Demotion without cause; also, Grievant told that any subsequent promotion would involve diminished pay grade increase after said demotion. As relief, Grievant seeks: “To be made whole in every way, including retention of classification & pay grade corresponding to actual classification only.”

Respondent DMV waived level one of the grievance procedure and moved that the grievance be remanded to level two for mediation. By Order dated November 28, 2016, the Division of Personnel (“DOP”) was joined as a party and the motion to remand was denied. Subsequently, both Respondents renewed motions to remand the grievance to level two noting that Grievant had not suffered any loss of pay or benefits in the action that was the subject of the grievance.

WEST VIRGINIA CODE § 6C-2-4 (a)(4) states the following:

An employee may proceed directly to level three upon the agreement of the parties or when the grievant has been

discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits. Level one and level two proceedings are waived in these matters.

Once it was determined that the action which is the basis for this grievance did not result in a “loss of compensation or benefits,” the grievance was remanded to level two for mediation by Order dated May 12, 2017. A mediation was conducted on May 16, 2017, and Grievant appealed to level three on May 19, 2017.

A level three hearing was conducted on November 17, 2017. Grievant appeared personally and was represented by Gordon Simmons, UE 170, West Virginia Public Workers Union. Respondent DMV was represented by Gretchen Murphy, Assistant Attorney General and Respondent DOP was represented by Karen O’Sullivan Thornton, Senior Assistant Attorney General. This matter became mature for decision on January 8, 2018, upon receipt of the last Proposed Findings of Fact and Conclusions of law submitted by the parties.

Synopsis

Grievant contests what she characterizes as a demotion from the Supervisor 2 classification to the Supervisor 1 classification. She is also upset that she will not receive a pay increase if she obtains a Supervisor 2 position with the DMV within two years of the change in her position. Grievant’s position was actually reallocated to the Supervisor 1 classification as a result of a review of all DMV Supervisor 2 positions. The DOP concluded that the present duties of these positions are a better fit for the Supervisor 1 classification because Grievant and others supervise clerical employees instead of technical employees. DOP’s classification decision was not arbitrary or capricious. Because Grievant retained the same pay and benefits in the Supervisor 1 position which

she received for the Supervisor 2 position, the unambiguous language of the DOP *Pay Plan Policy* prohibits her from receiving a raise in pay for taking a Supervisor 2 position for the DMV within the next twenty-four months.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant Cynthia Snow has been employed in the Welch office of the DMV for fourteen years. The last twelve of those years she held a position in the Supervisor classification.

2. Grievant was hired as a Customer Service Representative (“CSR”) when the Welch DMV office was originally opened. After a year in that position, she was promoted to a CSR Lead position.

3. While Grievant was holding the Lead position the employee in a position classified as a Supervisor 3 position left the DMV. Grievant temporarily performed the duties of the position while the job was posted and filled.

4. Grievant applied for the Supervisor 3 position but was not the successful candidate because she did not meet the minimum requirements to hold a Supervisor 3 classification. The successful applicant left the position within a year of accepting it.

5. On April 24, 2006, Respondent posted the same position in the Supervisor 2 classification, ostensibly so that Grievant could qualify for the position. Grievant applied for the position and was selected to fill it.¹ Grievant’s duties include supervising four CSRs including a Lead CSR.

¹ Grievant Exhibit 1, the position posting.

6. Division of Personnel (“DOP”) staff meet with the Human Resources office of the DMV concerning the problem of CSR Leads failing to qualify for Supervisor 2 positions. The Division of Personnel Classification and Compensation section conducted a review of all DMV Supervisor 2 positions. This review resulted in all the Supervisor 2 positions being reallocated to the Supervisor 1 classification. Grievant’s position was one of the Supervisor 2 positions which was reallocated.

7. The DOP *Administrative Rule* defines “demotion” as follows:

3.28. Demotion. -- A change in the status of an employee from a position in one class to a position in a lower job class as measured by compensation range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower rate in the compensation range assigned to the class. There are two (2) types of demotion:

3.28.a. Demotion with Prejudice. -- A disciplinary action resulting in the reduction in pay and a change in job class to a lower job class.

3.28.b. Demotion without Prejudice. -- A reduction in pay and/or a change in job class to a lower job class due to business necessity or as a result of an employee being selected for a vacant, posted position for which he or she applied.

W. VA. CODE ST. R. § 143-1-3.28.

8. The DOP *Administrative Rule* defines “reallocation” as follows:

3.72. Reallocation. -- Reassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind and/or level of duties and responsibilities assigned to the position *or to address a misalignment of title and duties.* (Emphasis Added).

W. VA. CODE ST. R. § 143-1-3.72.

9. The “Nature of Work” and “Distinguishing Characteristics” sections of the DOP Classification Specifications for the Supervisor 1 classification state the following:

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, 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.

10. The "Nature of Work" and "Distinguishing Characteristics" sections of the DOP Classification Specifications for the Supervisor 2 classification state the following:

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.

Grievant Exhibit 2.

11. The “Nature of Work” section of the DOP Classification Specifications for the Customer Service Representative classification state the following:

CUSTOMER SERVICE REPRESENTATIVE

Nature of Work: Under general supervision, performs full performance level clerical/public contact work involving the processing, recording and issuance of drivers' license, vehicle registration, vehicle titles, and related documents. Work is characterized by regular and recurring tasks requiring knowledge and interpretation of motor vehicle and driver registration and license laws, policies and procedures. Operates moderately complex office equipment on a regular basis. Refers unusual or hostile situations to a supervisor. Performs related work as required.

12. The DOP *Pay Plan Policy, Appendix A* defines the terms “Clerical” and “Technical” as follows:

4. Clerical. - Typically involves established procedures, forms, and deadlines. Involves processing of routine and non-routine information, operation of office machines, greeting customers/visitors or others to exchange information. May involve handling money and/or negotiables. May involve confidential contacts/information.

21. Technical. - Work requiring the practical application of scientific engineering, mathematical, or design principles.²

Id.

13. After reviewing the DMV Supervisor 2 positions, including Grievant's, the DOP Classification and Compensation section determined that the best classification fit for these positions was Supervisor 1 instead of Supervisor 2. One of the major reasons for that determination is that the DMV Supervisor 2 positions were supervision workers in

² There was some discussion at the hearing regarding whether the classification terms had been placed on the *Pay Plan Policy* when the grievance was filed, or the terms were still in a separate glossary. However, the definitions for “clerical” and “technical” were the same in both documents so the timing issue is of no consequence.

the CSR classification which have predominate duties which are clerical as opposed to technical duties.³ Consequently, all the Supervisor 2s, including Grievant's, were reallocated to the Supervisor 1 classification.

14. The effective date of the reallocation of Grievant's position was November 26, 2016. Respondent DMV did not reduce the pay or benefits which Grievant receives as a result of the reallocation of her position to the Supervisor 1 classification.

15. Over the years, the DOP approved the prior job postings when the DMV Supervisor 2 positions were advertised and filled.

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, W. VA. CODE R §156-1-3. *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.*

The action which is the source of this grievance needs to be properly characterized. Grievant alleges that she was demoted. However, the change in classification was not a result of disciplinary action, nor a DMV business necessity, and Grievant did not apply for a vacant position in the lower classification. Accordingly, the action does not fit the definition of "demotion" in the DOP *Administrative Rule*. W. VA.

³ Level three testimony of Wendy Campbell, DOP Assistant Director for Classification and Compensation.

CODE ST. R. § 143-1-3.28, See FOF 7 *supra*. Additionally, a demotion is generally initiated by the employing agency. In this instance the DMV was satisfied with the Supervisor 2 classification. The action was initiated by the DOP.

Pursuant to the *Administrative Rule*, the action which is the source of Grievant's chagrin was a reallocation. The action had nothing to do with Grievant's performance or her qualifications. Rather the change in the classification was the result of a comparison performed by the DOP staff of the duties and responsibilities for the position Grievant holds with the Classification Specifications. This action resulted in a reallocation because the DOP found a misalignment between the classification title for the position Grievant holds and the nature of the duties for that position set out in the classification specifications for Supervisor 2.⁴ Consequently the action fits squarely under the *Administrative Rule* definition for reallocation. See, W. VA. CODE ST. R. § 143-1-3.72, FOF 8, *supra*.

In making reallocation decisions the focus is upon the Grievant's position duties for the relevant period, and whether they more closely match those of another cited classification specification than the one to which her position is currently assigned. See *generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1998).

The key to the analysis in this case is whether Grievant's current classification constitutes the "best fit" for the duties she performs. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The

⁴ It is significant that the action was taken by the DOP because that agency has sole authority to reallocate position classifications. See, W. VA. CODE ST. R. § 143-1-4.7.

predominant duties of the position are class controlling. *Broadbuss v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990).

The West Virginia Supreme Court of Appeals has routinely held that, “Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt. 1, *Dillon v. Bd. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). In a *per curiam* decision, the Supreme Court applied the foregoing principle to DOP’s interpretation of classification specifications. *W. Va. Dep’t of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993). The clearly wrong standard requires the reviewing authority to 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); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007). Because the Division of Personnel is charged with the administration of the Classification and Compensation statutes, rules and regulations, its interpretations and explanations of the classification specifications must be upheld unless they are arbitrary and capricious. See, *W. Va. Dep’t of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993).

DOP’s position classification specifications generally contain five sections listed from top to bottom as follows: “Nature of Work”; “Distinguishing Characteristics”; “Examples of Work”; “Knowledge, Skills and Abilities”; and “Minimum Qualifications”. These specifications are read in “pyramid fashion” (from top to bottom) with the different sections to be considered going from most general/more critical to more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). Accordingly,

the “Nature of Work” section of the classification specification is the most critical section. *See generally, Dollison v. W. Va. Dep’t of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989). This section sets out the predominant or essential duties of the position, which are class-controlling. *Broadbuss v. W. Va. Div. of Human Ser., supra*.

The Nature of Work section of the classification specification for the Supervisor 2 position starts by stating “Under general supervision, performs full performance *supervisory work overseeing a section of employees engaged in technical work requiring advanced training.*” (Emphasis added). The next section is “Distinguishing Characteristics” which states:

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. (Emphasis Added).⁵

In contrast, the “Nature of Work” section for classification specifications for the Supervisor 1 position starts by stating, “Under general supervision, performs full performance *supervisory work overseeing the activities of clerical support staff, semi-or-fully-skilled trade workers, or inspectors.*”⁶ (Emphasis added).

The DOP staff determined that the work of the employees supervised by Grievant was clerical rather than technical in nature. That conclusion was bolstered by the fact that the four Customer Service Representatives supervised by Grievant do not perform “work requiring the practical application of scientific engineering, mathematical, or design

⁵ See, FOF 10, *supra*.

⁶ See, FOF 9, *supra*.

principles” which would be necessary to meet the definition of technical work.⁷

Additionally, the “Nature of Work” section in the classification specifications for Customer Service Representatives describes the positions as follows:

Under general supervision, performs full performance level *clerical/public contact work* involving the processing, recording and issuance of drivers' license, vehicle registration, vehicle titles, and related documents. Work is characterized by regular and recurring tasks requiring knowledge and interpretation of motor vehicle and driver registration and license laws, policies and procedures. Operates moderately complex office equipment on a regular basis. Refers unusual or hostile situations to a supervisor. Performs related work as required. (Emphasis added).

In addition to labeling the duties as “clerical,” the work described fits squarely under the definition of “clerical” work found in the DOP *Pay Plan Policy, Appendix A*.⁸ The four CSR positions supervised by Grievant are clerical positions.

DOP’s classification determination and subsequent reallocation of Grievant’s position from a Supervisor 2 to a Supervisor 1 classification was consistent with the classification specifications. The determination was neither clearly wrong nor arbitrary and capricious.

Grievant’s next concern was the statement that if she was promoted to a position on the Supervisor 2 classification within the next two years she would not receive a pay increase for moving to a higher classification. The resolution to this issue is controlled by the DOP *Pay Plan Policy*. Section III.B.3 of the policy states:

An employee who has been demoted without prejudice or reallocated downward may retain his or her current salary or have his or her salary reduced at the appointing authority’s discretion so long as the employee’s pay rate is within the

⁷ See, DOP *Pay Plan Policy, Appendix A*, FOF 12, *supra*.

⁸ *Id.*

compensation range of the job class to which the employee was demoted or reallocated.

Id.

Grievant was reallocated down one classification. Respondent DMV allowed her to retain the salary she was receiving in the Supervisor 2, classification. Grievant did not suffer a reduction of pay or benefits as a result of the reallocation.

DOP *Pay Plan Policy*. Section III.B.4 further states:

An employee who is subsequently promoted or reallocated within the next 24 months within the same agency, shall receive a salary increase under this section only to the extent that they would have received a salary increase had they not been demoted or reallocated to a lower compensation range.

Id.

The policy is clear. Because Grievant did not suffer a pay reduction when her position was reallocated down one step, she will not receive a pay increase if she returns to a position of Supervisor 2 with the same agency within twenty-four months.

Grievant's frustration is understandable. The reallocation action took place through no fault of her own and she had no way to impact it. Additionally, the DOP had approved all the job postings for the Supervisor 2 positions when they were originally filled. However, the key factor is "whether Grievant's *current* classification constitutes the "best fit" for the duties that she performs." *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991).⁹ There may have been

⁹ Emphasis added.

differences if the positions or how they were characterized when they were originally posted. But the “best fit” for the duties and responsibilities of Grievant’s current position is the Supervisor 1 classification. Accordingly, the grievance is DENIED.

Conclusions of Law

1. 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, W. VA. CODE R §156-1-3. *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.*

2. Under the DOP *Administrative Rule* “demotion” is defined as:

3.28 A change in the status of an employee from a position in one class to a position in a lower job class as measured by compensation range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower rate in the compensation range assigned to the class. There are two (2) types of demotion:

3.28.a. Demotion with Prejudice. -- A disciplinary action resulting in the reduction in pay and a change in job class to a lower job class.

3.28.b. Demotion without Prejudice. -- A reduction in pay and/or a change in job class to a lower job class due to business necessity or as a result of an employee being selected for a vacant, posted position for which he or she applied.

W. VA. CODE ST. R. § 143-1-3.28.

3. The DOP *Administrative Rule* defines “reallocation” is defined as”

3.72. Reassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind and/or level of duties and responsibilities assigned to the position *or to address a misalignment of title and duties.* (Emphasis Added).

W. VA. CODE ST. R. § 143-1-3.72.

4. Grievant was not demoted. Her position was reallocated by the DOP from the Supervisor 2 classification to the Supervisor 1 classification.

5. In making reallocation decisions the focus is upon the Grievant's position duties for the relevant period, and whether they more closely match those of another cited classification specification than the one to which her position is currently assigned. See *generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1998). The key to the analysis in this case is whether Grievant's current classification constitutes the "best fit" for the duties that she performs. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991).

6. "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt.1, *Dillon v. Bd. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). See, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) (applying this principal to DOP classification determinations).

7. Grievant did not prove by a preponderance of the evidence that the decision to reallocate her position was clearly wrong or arbitrary and capricious.

8. Because Grievant did not suffer a lose of pay or benefits with the downward reallocation of her position, the DOP *Pay Plan Policy* prohibits her from receiving a raise

in pay for taking a Supervisor 2 position for the DMV within twenty-four months of that reallocation.

Accordingly, the 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: February 28, 2018.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**