

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BONITA BRADSHAW and JOSEPH TURNER,
Grievants,**

v.

Docket No. 2018-1392-CONS

**OFFICES OF THE INSURANCE COMMISSIONER,
and DIVISION OF PERSONNEL,
Respondents.**

DECISION

Bonita Bradshaw and Joseph Turner, Grievants, each filed a grievance against their employer, the Workers' Compensation Office of Judges ("OOJ"), currently a department within the West Virginia Offices of the Insurance Commissioner ("OIC"), Respondent on June 15, 2018. Grievants generally complain about the positions they occupy being reallocated from the classification of Paralegal, pay grade 10 to the classification of Paralegal 1, pay grade 9. Grievants seek to have the positions they occupy returned to the Paralegal classification.

On June 21, 2018, Respondent OIC filed an agreed waiver to level three stating OIC lacked authority to grant the relief requested. By *Order of Consolidation and Order of Joinder*, dated June 27, 2018 this Grievance Board joined West Virginia Division of Personnel ("DOP") as a necessary party to this matter. DOP objected to the matter proceeding directly to level three and requested that it be remanded to level two for a mediation. The matter was remanded to level two and a mediation was set. A mediation session was held on September 27, 2018. Grievants, by counsel, appealed to level three on October 11, 2018. A level three hearing was held before the undersigned Administrative Law Judge on January 14, 2019, at the Grievance Board's

Charleston office. Grievants appeared in person and were represented by John Everett Roush, Esq., American Federation of Teachers-WV, AFL-CIO. Respondent OIC appeared by Debbie Hughes, Human Resources Director, and was represented by David Gilbert, Assistant Attorney General. Respondent DOP appeared by Wendy Campbell, Assistant Director, Classification and Compensation Section, and was represented by Karen O'Sullivan Thornton, Assistant Attorney General. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. This matter became mature for decision on February 28, 2019, the assigned mailing date for the submission of the parties' proposed findings of fact and conclusions of law. Respondent OIC did not submit an independent fact/law proposal.

Synopsis

Grievants were both in positions originally classified as Paralegal, paygrade 10. Upon review of Position Description Forms (PDF), DOP determined the positions should be reallocated to the classification of Office Assistant 2 (OA 2). After working closely with OIC, OOJ and other State agencies who utilize the Paralegal class specifications, DOP drafted new and revised class specifications for the Paralegal class series. The class specifications underwent the scrutiny of the Unlawful Practice of Law (UPL) committee of the West Virginia State Bar (State Bar) before being brought before the State Personnel Board (SPB)¹ for consideration. The SPB approved a new class

¹ The SPB consists of five members appointed by the Governor, with the advice and consent of the Senate, and the Secretary of the Department of Administration or his or her designee who serves as an ex officio nonvoting member. W. Va. Code § 29-6-6.

specification of Paralegal 1, assigning it to paygrade 9 and approved a title change to the old Paralegal class specification creating a new Paralegal 2 classification and assigning it to paygrade 10. Once these classifications were in place, DOP revised their original classification determinations on the positions occupied by Grievants reallocating them to the Paralegal 1 classification.

At no time throughout this entire process did Grievants suffer a loss in pay. Grievants argue that the positions they occupy should be returned to their original classification of Paralegal and reassigned to paygrade 10. Respondent DOP argues but for its actions in drafting new class specifications and working with State agencies and the UPL committee, the positions occupied by the Grievants would remain appropriately classified as OA 2s. The Paralegal classification the Grievants seek no longer exists as a result of SPB action. This Grievance is DENIED.

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

Findings of Fact

1. The West Virginia Offices of the Insurance Commissioner ("OIC") regulates the insurance market in West Virginia. The Office of Judges ("OOJ"), a sub-division of the OIC, conducts hearings, receives and weighs evidence and arguments and then issues written decisions in appeals from initial claim management decisions.

2. Grievants occupy positions with OOJ and are both classified as Paralegal 1, which is assigned to paygrade 9. The positions were both originally classified as Paralegal, paygrade 10. Grievance forms and Grievants' L-3 testimony.

3. The Division of Personnel (“DOP”) is the entity of WV State government charged with making classification determinations. See WEST VIRGINIA CODE § 29-6-10 Wendy Campbell, Assistant Director, Classification and Compensation Section for DOP testified at the level three hearing. The Classification and Compensation section is statutorily responsible for, among other things, ensuring that all classified positions in state government are classified and paid appropriately. L-3 Testimony Campbell.

4. DOP discovered that, unbeknownst to them without any of the required reporting from the agency, many changes had occurred within the OOJ as relates to job assignments. As such, the DOP began looking at all the positions in the OOJ to determine the appropriate classification allocations. DOP requested a Position Description Form (“PDF”)² for all positions classified as Paralegal.³ L-3 Testimony Wendy Campbell, Assistant Director, Classification and Compensation Section.

5. After review of the PDFs for the positions occupied by Grievants, and job audits,⁴ DOP determined the positions should be reallocated to the classification of Office Assistant 2 (OA 2) due to the overwhelmingly clerical nature of the job duties the positions performed. DOP Exs 1-3 and L-3 Testimony Campbell.

² The PDF is identified in the DOP Administrative Rule, W. Va. Code R. § 143-1-4.5, as the official document detailing the duties and responsibilities of a position and it is used by DOP to properly allocate positions within the classified service. PDFs are received by DOP on a daily basis and Campbell reviews every PDF. She has reviewed thousands of PDFs during her tenure with DOP. Campbell explained that when reviewing a PDF to determine whether a reallocation is appropriate, the DOP looks for a substantial change in the predominant duties of the position. The PDF is compared to the classification specifications to come up with the “best fit” for the position.

³ DOP has requested other PDFs as well; however, for purposes of this grievance only the Paralegal positions are relevant. The complexity and level of duties and responsibilities of a variety of positions have significantly changed as a result of restructuring and reorganization within the OOJ.

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.

6. On or about January 9, 2017, Grievants were advised of the proposal that the classification title of the positions they held were to be changed to Office Assistant 2. Grievants objected to this change.

7. The classification determinations were appealed and DOP, in agreement with the OIC, put the appeals on hold while they worked together, along with the OOJ and other state agencies on revisions to the Paralegal class series.

8. DOP drafted new and revised class specifications for the Paralegal class series. The drafts were circulated to the OIC, OOJ, and the Human Resource Advisory Committee (HRAC)⁵ for review and comment. Concern over the language in the class specifications was raised with the State Bar. As a result, the class specifications underwent the scrutiny of the State Bar's Unlawful Practice of Law committee before being brought before the State Personnel Board ("SPB") for consideration.

9. At its meeting on April 19, 2018, the SPB approved a new class specification of Paralegal 1, assigning it to paygrade 9 and approved a title change to the old Paralegal class specification creating a new Paralegal 2 classification and assigning it to paygrade 10. With this action by the SPB, the old Paralegal class specification, pay grade 10, no longer exists within the State Classification Plan. See DOP Exs 4-7 and L-3 testimony.

10. Once the actions of the SPB were effective and the revised class series was in place, DOP addressed the appeals that had been pending from the OA 2 classification determinations made on the positions occupied by Grievants.

⁵ The HRAC is comprised of human resource employees in the executive branch of state government and affiliated county health departments.

11. DOP revised the original classification determinations reallocating the positions from the classification of OA 2 to the Paralegal 1 classification. As a part of the reallocation process, employees were required to complete job applications that were submitted along with the personnel transaction for a determination that the employees meet the minimum qualifications of the positions to which they are being reallocated. Grievants were required to complete job applications for the reallocations to Paralegal 1. See Grievants' Exs 2-3, DOP Exs 9-10, Testimony Grievants and Campbell.

12. Ultimately Grievants' job classification titles were changed from Paralegal to Paralegal 1.

13. Grievants suffered no loss in pay as a result of the reallocation of the positions they occupy to the classification of Paralegal 1, paygrade 9. The pay range for paygrade 9 is \$22,584 to \$41,784. Both Grievants receive pay that falls within the pay range of paygrade 9. See DOP Ex 7 and Testimony Grievants.

14. The State Personnel Board ("SPB") is the only entity in the State with statutory authority to create and abolish classifications, and to assign paygrades to the classifications in the State Classification Plan. L-3 Testimony Campbell, Assistant Director, Classification and Compensation Section.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is

offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievants seek to have their positions returned to the former classification of Paralegal and reassigned to paygrade 10. Grievants assert that a reallocation of their positions is in violation of the WVCSR §143-1-4.7.⁶ Grievants maintain there were no significant change in their duties and believe they are entitled to restoration of the classification title and paygrade which they formerly possessed. Respondents contend that the positions have been misclassified and more appropriately should have been placed in the Office Assistant 2 classification up and until the State Personnel Board (SPB) created the new Paralegal 1 class specification assigned to paygrade 9.

A "[r]eallocation" is defined as a reassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position *or to address a misalignment*

⁶ Section 4.7, Title 143 Legislative Rule West Virginia Division of Personnel; Series 1 Administrative Rule of The West Virginia Division of Personnel, provides: Position Reallocation. - Whenever significant changes occur in the duties and responsibilities permanently assigned to a position, the Director shall reallocate the position to its proper class. The incumbent or the appointing authority may seek a reconsideration of the allocation action by submitting a written request to the Director within fifteen (15) working days of the effective date of the action. The Director shall not reallocate a position based on temporary changes in the duties and responsibilities assigned to the position.

of title and duties. [Emphasis added.] W. Va. Code R. §143-1-3.72. DOP has a statutory mandate to ensure that all positions in the classified service are appropriately classified. W. Va. Code §29-6-1, *et seq.* The complexity and level of duties and responsibilities of a variety of positions were significantly changed as a result of restructuring and reorganization within the OOJ. (L-3 Testimony Campbell) Once the DOP discovered that the positions occupied by the Grievants had been misclassified, they set out to properly allocate the positions within the State Classification Plan.

The OOJ and Grievants were not in favor of this classification determination and requested reconsideration from the DOP. In an effort to work collaboratively with the OIC, and in turn the OOJ, the agencies mutually agreed to place a hold on the appeals while they worked together on revisions to the Paralegal class series. In support of this effort, DOP drafted new and revised class specifications. The drafts were circulated to the OIC, OOJ, and the HRAC for review. Without the knowledge of DOP, the draft documents were provided to the State Bar and as a result, the class specifications underwent a tremendous amount of scrutiny by the State Bar's Unlawful Practice of Law committee before the DOP was able to bring the proposed documents before the SPB for consideration.

At its meeting on April 19, 2018, the State Personnel Board approved a new class specification of Paralegal 1, assigning it to paygrade 9 and a title change to the old Paralegal class specification creating a new Paralegal 2 classification and assigning it to paygrade 10. With this action by the SPB, the old Paralegal class specification, paygrade 10, no longer exists within the State Classification Plan.

WEST VIRGINIA CODE authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as the OIC, which utilize such positions, must adhere to that plan in making their employees' assignments. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994). The key to the classification analysis is ascertaining which classification constitutes the "best fit" for the required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broadbuss v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990); *Bradley v. Dep't of Transp./Div. of Highways and Div. of Per.*, Docket No. 2008-1772-DOT (Feb. 27, 2009).

Grievants believed at the time of initiation of the grievance that the change from Pay Grade 10 to Pay Grade 9 would impact their salaries at least in the future. They believed that the upper limit of the paygrade 9 salary range would form a cap or ceiling on the salary they would be eligible to receive from future pay raises of any type. This fear is misplaced, see WVDOP Pay Plan Policy (III, C at pp. 6 – 7.) The new paygrade does not form a cap or ceiling on the salary that Grievants would be eligible to receive from future pay raises.

In order for Grievants to prevail upon a claim of misclassification, they must prove by a preponderance of the evidence that their duties for the relevant period more closely match another cited Division of Personnel classification specification than the one under which it is currently assigned. See generally, *Hayes v. W. Va. Dep't of Natural Res.*,

Docket No. NR-88-038 (Mar. 28, 1989). See *Campbell v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-385 (May 26, 2006); *Falquero v. Dep't of Env'tl. Prot. and Div. of Pers.*, Docket No. 2008-1902-DEP (Feb. 3, 2010). Grievants have not meet this burden. Once the actions of the SPB were effective and the revised class series was in place, DOP revised the original classification determinations reallocating the positions from the classification of OA 2 to the Paralegal 1 classification. Had it not been for the efforts of the DOP and the actions of the SPB in creating the new Paralegal 1 classification, the positions occupied by the Grievants would have remained classified as OA 2s.

Grievants have not established that actions taken by the SPB to revise the Paralegal class series and paygrades was unlawful. Additionally, they have failed to demonstrate by a preponderance of the evidence, that the actions taken by Respondents in reallocating their positions to the Paralegal 1 classification were arbitrary and capricious.⁷ Furthermore, Grievants have not shown they have suffered a loss in pay or any other harm or injury as a result of the change in the classification of the positions they occupy. The Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. *W. Va.*

⁷ Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)) See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993). The clearly wrong standard of review is deferential and 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); *Bradley v. Dep't of Transp./Div. of Highways and Div. of Per.*, Docket No. 2008-1772-DOT (Feb. 27, 2009).

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, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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. WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as the OIC, which utilize such positions, must adhere to that plan in making their employees' assignments. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994).

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. The key to the classification analysis is ascertaining which classification constitutes the "best fit" for the required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broadbuss v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990); *Bradley v. Dep't of Transp./Div. of Highways and Div. of Per.*, Docket No. 2008-1772-DOT (Feb. 27, 2009).

7. The DOP Legislative Rule 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." 143 C.S.R. 1 § 3.75.

8. "Classification determinations are not made based upon comparison to other employees, but upon which classification description is the "best fit" for that employee's duties. *Baldwin v. Dep't of Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999); *Garretson v. W. Va. Dep't of Health & Human Res. and Div. of Personnel*, Docket No. 07-HHR-397 (Oct. 22, 2008)." *Hart v. Dep't of Health & Human Ser., and Div. of Per.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009).

9. 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). The Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993).

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); *Bradley v. Dep't of Transp./Div. of Highways and Div. of Per.*, Docket No. 2008-1772-DOT (Feb. 27, 2009).

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. Grievants did not prove by a preponderance of the evidence that the decision of the DOP regarding which classification was the best fit for Grievants' position was clearly wrong or arbitrary and capricious.

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 (2018).

Date: April 10, 2019

Landon R. Brown
Deputy Chief Administrative Law Judge