

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**PEGGY LAMB,**  
Grievant,

v.

**Docket No. 2018-1018-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
BUREAU FOR CHILDREN AND FAMILIES and  
DIVISION OF PERSONNEL,**  
Respondents.

**DECISION**

Grievant, Peggy Lamb, filed this action against her employer, Department of Health and Human Resources, on or about February 24, 2018. Grievant alleges that she was worked out of classification. Grievant seeks to be made whole in every way including back pay with interest. The grievance was waived at Level One of the process on March 6, 2018. The Division of Personnel was joined as an indispensable party on March 9, 2018. This case was placed in abeyance to allow the parties an opportunity to discuss a possible settlement on June 4, 2018. The grievance was convened on August 22, 2018, for a mediation session.

A Level Three evidentiary hearing was conducted before the undersigned on January 28, 2019, at the Grievance Board's Westover office. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. The Department of Health and Human Resources appeared by its counsel, Mindy Parsley, Assistant Attorney General. The Division of Personnel appeared by its counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter

became mature for consideration upon receipt of the last of the parties' fact/law proposals on April 1, 2019.

### **Synopsis**

Grievant claims that she was performing duties outside of the Health and Human Services Aide classification assigned to the position she formerly occupied. Grievant seeks a retroactive salary increase for an unspecified period of time when she was performing extra work. It is undisputed that Grievant failed to submit a Position Description Form to the Division of Personnel for a classification determination. Grievant failed to demonstrate by a preponderance of the evidence that Respondents acted in an arbitrary and capricious manner as it relates to classification and compensation of the position she occupied. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievant was employed by the Department of Health and Human Resources at its Upshur County office as a Health and Human Services Aide (HHS Aide), pay grade 5, beginning on July 1, 2005.
2. Grievant voluntarily left the HHS Aide position for a new position at the West Virginia Children's Home effective April 1, 2018.
3. Grievant asserts that she was performing duties outside of the HHS Aide classification assigned to the position she formerly occupied. Grievant identified four duties she was asked to perform that she believed caused her to be working out of classification. Those duties were managing a caseload, preparing and mailing letters for

Child Protective Service Workers, retrieving and providing case records upon request, and compiling information for the “kids in care” reports.

4. Grievant claimed these four duties were dumped on her in approximately 2017 when Sarah Crum, Social Services Coordinator, pay grade 18, became her supervisor. Grievant believed that she was performing her supervisor’s job duties.

5. Grievant claimed to have inquired of the Department of Health and Human Resources in regard to changing the classification of her position and in regard to seeking additional compensation for her work. Grievant did not complete a Position Description Form at any point while she occupied the HHS Aide position.

6. Grievant could not identify another classification to which she believed the HHS Aide position she formerly occupied should have been reallocated. The record was clear that Grievant did not provide actual case management and was not responsible for assessing and determining the needs of families, as a licensed social worker would do.

7. Grievant claimed she had been performing the work of her supervisor, Ms. Crum, though provided no testimony or evidence that she had ever worked in a supervisory capacity.

8. Grievant was required to maintain all the files in Lewis and Upshur counties for an unspecified period of time due to another employee vacating an HHS Aide position.

9. The predominant duties of the HHS Aide position formerly occupied by Grievant involved retrieving records out of a computer system and making copies for adoption records request.

10. Tina Helmick, Department of Health and Human Resources Community Services Manager for the Lewis, Upshur and Braxton County offices, and Ms. Crum

indicated that the duties described by Grievant were consistent with the duties expected to be performed by an HHS Aide.

11. Wendy Campbell, Assistant Director, Classification and Compensation section of the Division of Personnel, indicated that the job duties described by Grievant were consistent with those listed in the class specification and the job posting under which Grievant was hired into the HHS Aide position.

12. Ms. Campbell opined that the additional duties and extra work of which Grievant complained would not have caused the position to rise to a higher-level classification beyond the HHS Aide classification to which the position was originally assigned.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See *W. Va. Code* § 29-6A-6. See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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).

In order for Grievant to prevail upon a claim seeking reallocation and a back pay award, she must prove by a preponderance of the evidence that her duties for the relevant

time period more closely match another cited Division of Personnel classification specification than that under which she is currently assigned. See generally, *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). Division of Personnel 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).

Grievant alleges she has been performing extra work for an unspecified period of time and that she should be compensated at a higher rate of pay for that period. The Division of Personnel asserts that Grievant did not complete a Position Description Form, and has since vacated the position and, as such, a classification determination cannot be made and Grievant is not entitled to retroactive wages.

Grievant was employed by the Department of Health and Human Resources at the Upshur county office as an HHS Aide between July 1, 2005, and April 1, 2018, when she voluntarily vacated the position for a new job. Grievant asserts that she was performing duties outside of the HHS Aide classification. Those duties were managing a caseload, preparing and mailing letters for Child Protective Service Workers, retrieving and providing case records upon request, and compiling information for the "kids in care" reports.

Division of Personnel's Rule 3.78 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.*

Grievant indicated that she inquired of the Department of Health and Human Resources in regard to challenging the classification of her position and in regard to seeking additional compensation for her work prior to her vacating the HHS Aide position; however, the record lacks corroborating evidence of such. It is undisputed that at no point during her tenure in the HHS Aide position did Grievant complete a Position Description Form in order for the Division of Personnel to determine proper allocation of the position. Pursuant to Division of Personnel rules, for the purpose of reallocation, the Division of Personnel cannot make a classification determination without a Position Description Form containing the current duties of the position. In addition, a classification analysis cannot occur once the employee no longer occupies the position.

The record also established that Grievant was unable to identify another classification to which she believed the HHS Aide position she formerly occupied should have been reallocated had she submitted a Position Description Form. The record demonstrated that Grievant was not performing social worker duties in that she did not provide case management services and was not responsible for assessing families and determining their needs as a licensed social worker would do.

Grievant argues that because there was a period of time when she was required to maintain all the files in two counties due to an employee vacating another HHS Aide position that she was entitled to additional compensation. Wendy Campbell, Assistant Director, Classification and Compensation section of the Division of Personnel, opined that the additional duties and extra work would not have caused the position to rise to a higher-level classification beyond the HHS Aide classification to which the position was originally assigned. While Ms. Campbell could not retrospectively make a classification determination on the position formerly occupied by Grievant, she opined that the job duties described were consistent with those listed in the class specifications and the job posting under which Grievant was hired into the HHS Aide position. Grievant failed to demonstrate by a preponderance of the evidence that the Respondents acted in an arbitrary and capricious manner as it related to the classification of the position or as it relates to the compensation she was receiving at the time she was employed in the HHS Aide position.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. In order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely match another cited Division of Personnel classification specification than that

under which she is currently assigned. See generally, *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).

3. Division of Personnel 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. Dep't of Health*, Docket No. 90-H-444 (Apr. 22, 1991); See generally, *Dollison v. W. Va. Dep't of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

4. The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997). "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id.*

5. The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. *Moore v. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994).

6. 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).

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 was 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)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). 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." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

8. 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. Dep't of Health v. Blankenship*, 431 S.E.2d 681 (W. Va. 1993); *Princeton Community Hosp. v. State Health Planning*, 328 S.E.2d 164 (W. Va. 1985); *Dillon v. Bd. of Ed. of County of Mingo*, 301 S.E.2d 588 (1983).

9. Grievant failed to demonstrate by a preponderance of the evidence that the Respondents acted in an arbitrary and capricious manner as it related to the classification

of the position or as it relates to the compensation she was receiving at the time she was employed in the Health and Human Services Aide position.

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 24, 2019**

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**Ronald L. Reece**  
**Administrative Law Judge**