

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PATRICIA SHIRK,
Grievant,**

v.

Docket No. 2017-1419-DOT

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

DECISION

Grievant, Patricia Shirk, is employed by Respondent, Division of Highways. On December 22, 2016, Grievant filed this grievance against Respondent stating, “Demoted without good cause.” Grievant seeks “[t]o be made whole in every way including restoration of Grievant’s classification and reversal of all adverse personnel actions.”

As the matter involved a classification decision, the level one grievance evaluator waived the grievance to level two by undated order received by the Grievance Board December 29, 2016. By order entered January 4, 2017, the Grievance Board joined the Division of Personnel (“DOP”) as an indispensable party. Following mediation, Grievant appealed to level three of the grievance process on May 15, 2017. A level three hearing was held on September 14, 2017, at which time Grievant was unable to answer questions regarding the Position Description Form (“PDF”) used in making the classification determination and indicated she was not certain whether she had signed the PDF. The hearing was continued to allow Grievant to complete a PDF, which would be reviewed anew by DOP. The hearing was rescheduled for January 9, 2018, but was continued at Grievant’s request due to medical reasons. The hearing was rescheduled a second time, for May 2, 2018, for which Grievant failed to appear. An *Order to Show*

Cause was issued on May 3, 2018. Grievant, by email on the day of hearing, stated that she was out sick the morning of the hearing and had not received the *Notice of Hearing*. The undersigned determined Grievant had demonstrated good cause for her failure to appear and the hearing was rescheduled to December 6, 2018. The second and final day of hearing was held on that date, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent DOH appeared by Kathleen Dempsey and was represented by counsel, Xueyan Z. Palmer, Assistant Attorney General. Respondent DOP appeared by Wendy Campbell and was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on January 23, 2019, upon final receipt of the parties' written proposed findings of fact and conclusions of law.¹

Synopsis

Grievant is employed by Respondent DOH as a Supervisor 1 and grieved her demotion from a Supervisor 2 to a Supervisor 1. Grievant was not demoted; the position she occupies was reallocated by the Division of Personnel. Supervisor 1s oversee the activities of clerical support staff, semi-or-fully-skilled trade workers, or inspectors and Supervisor 2s oversee employees engaged in technical work requiring advanced training. Grievant failed to prove her subordinate employees were engaged in technical work requiring advanced training. Therefore, Grievant failed to prove the Division of Personnel's reallocation of her position was arbitrary and capricious. Accordingly, the grievance is denied.

¹ Respondent DOH elected not to file proposed findings of fact and conclusions of law.

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

Findings of Fact

1. Grievant is employed by Respondent Division of Highways as a Supervisor 1. Grievant was previously employed by Respondent as a Supervisor 2, but her position was reallocated from a Supervisor 2 to a Supervisor 1 by Respondent DOP, which is the subject of the grievance.

2. On August 4, 2016, Respondent DOP received a Position Description Form ("PDF") for the position Grievant occupies, which was then classified as a Supervisor 2.

3. The PDF "is the basic source of official information in position allocation" and "describes the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a position." W. VA. CODE ST. R. § 143-1-3.68.

4. On December 9, 2016, Respondent DOP determined the position should be allocated as a Supervisor 1. That determination was the original subject of the grievance.

5. During the first day of the level three hearing in this matter, Grievant stated she did not recall completing the employee section of the PDF and did not believe that the signature on the form was her signature.²

² Although the signature on the original PDF and the PDF Grievant later completed do appear similar, the initials of Grievant's supervisor appear next to the signature in the original PDF, which could indicate Grievant's supervisor had signed the document on Grievant's behalf. However, as Grievant completed the second PDF, and the evaluation by the DOP of that PDF had the same result as the review of the first PDF, it is not necessary to determine whether Grievant completed the first PDF.

6. Grievant completed the second PDF on September 22, 2017. Grievant described the important and essential duties of the position as follows, including the approximate percent of time spent on each duty:

35% - Maintain records for budgets keeping audit ready. Reconcile P-card monthly with all supporting documentation. Includes Purchase Requests and approval as appropriate.

25% - Investigate, initiate and generate contracts, hold pre-bid meetings, review bids submitted for not just the dollar amount but the details and standards for which the contract is written.

20% - Supervise, direct, coordinate work schedules and approve leave for at least 3 employees. Oversee security (at least 10) and janitorial (at least 4 people). Develop written procedures for each job within the General Services group. Write employee reviews, questions for job seekers/interviews, hold interviews, etc.

15% - Make necessary purchases for storeroom and 16 labs throughout West Virginia. Follow contracts established for proper items being purchased from appropriate vendors, such as Grainger, Liberty etc. Negotiate lower prices for any non-contact vendor.

5% - Attend conferences, meetings, etc. Manage/coordinate functions within our location. EX: Flu shots, [e]mployee recognition functions, etc.

7. In addition, in answer to what decisions the position has total authority to make, Grievant stated, "Typically I do not need authorization or approval." Grievant stated that only the reconciliation of her P-card is reviewed. Grievant stated that the position has the responsibility to approve the hiring of employees and the disciplining of employees.

8. Director Ron Stanevich, completed the supervisor section of the form and also included an additional three pages of comments and clarifications. Director

Stanevich disputed that Grievant supervised the janitors and security as those positions are contracted out to vendors. He stated Grievant “directs and coordinates where work is needed to be done or where assistance may be needed” for the janitors and security. Director Stanevich disputed that the position has total authority to make decisions, clarifying that the majority of actions required authorization and approval. Director Stanevich also disputed that the position has authority to approve the hiring and discipline of employees, stating that the position may only recommend these actions.

9. Respondent DOP conducted an on-site job audit of the position on December 15, 2017. Respondent also conducted a review of the PDFs of the positions Grievant supervises.

10. By letter dated December 26, 2017, DOP Assistant Director, Wendy Campbell, notified Respondent DOH’s Human Resources Division Acting Director, Drema Smith, that the position would remain classified as a Supervisor 1.

11. The classification specification for Supervisor 1 states the nature of work as follows:

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.

The specification further states the distinguishing characteristics of classification as follows:

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.

12. The classification specification for Supervisor 2 states the nature of work as follows:

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.

The specification further states the distinguishing characteristics of classification as follows:

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.

13. Grievant supervises three positions: a Storekeeper 2, a Transportation Worker 2, and a Transportation Worker 3. The Storekeeper position is clerical in nature. The Transportation Worker positions are semi-or-fully skilled trade workers. None of the positions are technical in nature.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant argued in its proposed findings of fact and conclusions of law that Grievant was demoted and that Respondent DOP was complicit in Respondent DOH’s functional demotion of and retaliation against Grievant. Grievant asserts she proved the duties of her subordinate personnel were technical in nature and that her position should be classified as a Supervisor 2. Respondent DOP asserts that its classification of the position was not arbitrary and capricious and that Grievant failed to prove the position should be classified as a Supervisor 2.

Grievant asserts she was demoted. This is incorrect. “Demotion” is “[a] change in the status of an employee from a position in one class to a position in a lower job class. . . .” W. VA. CODE ST. R. § 143-1-3.28. “Reallocation” is “[r]eassignment 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. W. VA. CODE ST. R. § 143-1-3.72. Thus, demotion involves the movement of an employee from one position to another. Reallocation is a change in the position an employee occupies. Grievant was not demoted; the position she occupies was reallocated.

Grievant also asserts reallocation was retaliatory. Grievant previously successfully grieved an unpaid suspension in violation of her rights under the Family Medical Leave Act, functional demotion, and retaliation. See *Shirk v. Div. of Highways*, Docket No. 2017-2494-CONS (Feb. 20, 2018); *Shirk v. Div. of Highways*, Docket No.

2018-0938-CONS (Nov. 14, 2018). Grievant argues, citing Director Stanevich's comments on the PDF, that the classification determination was a continuation of the retaliation and functional demotion of Grievant. This argument is without merit as Respondent DOP's initial reallocation of the position on December 9, 2016, predates the filing of both of the above-mentioned grievances. In addition, Director Stanevich's comments were not determinative in the final classification decision. The classification decision in this matter hinged on whether Grievant supervised employees who were engaged in technical work. None of Director Stanevich's comments related to whether or not Grievant's subordinates were engaged in technical work.

Therefore, the relevant determination in this grievance is whether Respondent DOP erred in reallocating the position Grievant occupies from Supervisor 2 to Supervisor 1. The Division of Personnel has discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Pers.*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff'd* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

When a grievant alleges he has been misclassified, he must prove by a preponderance of the evidence that the work he is doing is a better fit in a different classification than the one in which his position is currently classified. See *Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001). In order to determine the best fit, the class specifications at issue must be analyzed. "In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole." W. VA. CODE ST. R. § 143-1-4.4(b). Further. "[t]he fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class." W. VA. CODE ST. R. § 143-1-4.4(d). Division of Personnel class 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), *aff'd*, Kan. Co. Cir Ct. Docket No. 89-AA-220 (Jan. 10, 1991).

The relevant distinction between the Supervisor 1 and Supervisor 2 classifications in this grievance is that a Supervisor 2 supervises employees who are engaged in technical work and a Supervisor 1 supervises clerical support staff, semi-or-

fully-skilled trade workers, or inspectors. Grievant supervises three positions: a Storekeeper 2, a Transportation Worker 2, and a Transportation Worker 3. Grievant asserts these positions are technical in nature but provided little evidence to support that claim. DOP Assistant Director Campbell testified, based on her review of the PDFs for the position and the job audit, that the positions were clerical or semi-or-fully skilled trade in nature. Grievant also testified, but testified mostly regarding her background, employment history, grievance history and her oversight of the contract janitors and security. None of that testimony is relevant to the classification determination. Grievant did not supervise the contractors as they were not employed by the State. Grievant testified only briefly regarding the nature of the work performed by her actual subordinates and the only testimony she offered to support that her subordinates performed technical work was that the Transportation Worker 3 worked in the scientific labs and was an electrician. Her testimony was unclear, but it appears that the Transportation Worker 3 repaired equipment in the labs. This would be skilled trade work, not technical work.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17,

1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. "Demotion" is "[a] change in the status of an employee from a position in one class to a position in a lower job class. . . ." W. VA. CODE ST. R. § 143-1-3.28. "Reallocation" is "[r]eassignment 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. W. VA. CODE ST. R. § 143-1-3.72.

3. Grievant was not demoted. The position she occupies was reallocated by the Division of Personnel.

4. The Division of Personnel has discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Pers.*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff'd* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

5. 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. When a grievant alleges he has been misclassified, he must prove by a preponderance of the evidence that the work he is doing is a better fit in a different

classification than the one in which his position is currently classified. See *Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oliver v. W. Va. Dep't of Health & Human Res./Bureau for Child Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001).

7. “In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole.” W. VA. CODE ST. R. § 143-1-4.4(b). Further. “[t]he fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.” W. VA. CODE ST. R. § 143-1-4.4(d). Division of Personnel class 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), *aff'd*, Kan. Co. Cir Ct. Docket No. 89-AA-220 (Jan. 10, 1991).

8. Grievant failed to prove the Division of Personnel’s reallocation of her position was arbitrary and capricious.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: March 5, 2019

Billie Thacker Catlett
Chief Administrative Law Judge