

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIM SMITH,
Grievant,

v.

Docket No. 2019-0696-DEP

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
and DIVISION OF PERSONNEL,**
Respondents.

DECISION

Kim Smith, Grievant, filed this grievance against her employer the Department of Environmental Protection (“DEP”), Respondent, on December 21, 2018, protesting the classification of her position. Grievant seeks to have the position she occupies reallocated to the classification of Environmental Resources Specialist (ERS) 3.

Initially Grievant attempted to file directly to level two of the grievance process. The West Virginia Public Employees Grievance Board issued a *Transfer Order* dated January 7, 2019, remanding this matter back to level one. On or about January 15, 2019, Respondent DEP and Grievant submitted an agreed motion to waive this matter from level one to level two and further requested the West Virginia Division of Personnel be joined as a necessary party. The West Virginia Division of Personnel (“DOP”), was joined as a necessary party by *Order of Joinder* entered on February 5, 2019. In accordance with proper notice and mutual agreement of the parties, a mediation session was held on April 16, 2019. Grievant appealed to level three on April 24, 2019. A level three hearing was held before the undersigned Administrative Law Judge on September 27, 2019, at the Grievance Board’s Charleston office. Grievant appeared in person and by counsel Robert J. Smith, Esquire. Respondent DEP appeared by Chad Bailey,

Human Resources Manager and was represented by Anthony D. Eates, II, Deputy Attorney General. Respondent DOP appeared by Wendy Campbell, Assistant Director of the Classification and Compensation (“Class and Comp”) section and was represented by Karen O’Sullivan Thornton, Assistant Attorney General. The parties were provided the opportunity to file Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision upon receipt of the last of the parties’ proposed findings of fact and conclusions of law on or about November 4, 2019, the assigned mailing date for the submission of the parties’ fact/law proposals.

Synopsis

Grievant is employed by Respondent DEP in a position classified as an Environmental Resources Specialist 2. Grievant believes the position she occupies should be classified as an Environmental Resources Specialist 3. The Division of Personnel is the entity of WV State government charged with making classification determinations. DOP develops and manages the State’s Classification/Compensation Plan. Upon reviewing the documents related to Grievant’s position, and performing an on-site audit, DOP determined that the position occupied by Grievant is not assigned complex scientific work at the advanced level within the ERS class series and does not have recognized lead worker responsibilities, both of which are fundamental requirements of the ERS 3 classification. Grievant failed to prove she was engaged in recognized duties at the advanced level within the ERS class series. Grievant failed to prove DOP’s determination that the position should not be allocated to the ERS 3 classification was arbitrary, capricious or clearly wrong. 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. Grievant is employed by the Department of Environmental Protection (“DEP”) in a position classified as an Environmental Resources Specialist 2 (ERS 2). Grievant is employed as the State Coordinator for Adopt-a-Highway and Operation Wildflower.

2. A Position Description Form (PDF) for the position occupied by Grievant was submitted to the West Virginia Division of Personnel (DOP) on August 21, 2018. Based upon a review of the PDF, on September 24, 2018, DOP made the determination that the position should be allocated to the Public Information Specialist (PIS) 2 classification.

3. 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 the DOP on a daily basis.

4. Wendy Campbell, Assistant Director for the Classification and Compensation section of the DOP, testified at the level three hearing. Ms. Campbell’s section of DOP is responsible for ensuring that all positions in the classified service in state government are classified appropriately and that employees are paid within the range of the pay grade assigned to the classification of the position they occupy. Wendy

Campbell (also known as Wendy Elswick) has personally reviewed and made classification determinations on thousands of PDFs. (L-3 Testimony Campbell)

5. The classification determination for the position occupied by Grievant was communicated to the DEP and Grievant by letter dated September 25, 2018. In the letter, Ms. Campbell explained that the position should be reallocated to the PIS 2 classification based on the duties identified by Grievant on the PDF. (DOP Exhibit 3)

6. By letter dated October 4, 2018, Grievant appealed the DOP's classification determination requesting a reconsideration. As part of the appeal review process, Respondent DOP conducted a job audit¹ of the position on November 1, 2018. After a review of the request for reconsideration, along with the job audit, DOP determined the position should be changed from the PIS 2 classification back to the ERS 2 classification. This decision was primarily based on Grievant's representation of the scientific nature of duties she performed during the job audit. DOP relayed the information to DEP and the Grievant by letter from DOP Director Sheryl Webb, dated November 30, 2018. (DOP Exhibit 5)

7. At the level three hearing, Grievant provided detailed testimony in regard to the duties and responsibilities of the position she occupies. Grievant identified and described what she identified as the predominant duties of the position she occupies, giving essentially equal weight to two duties relating to the adopt-a-highway program: 1) application process - more specifically, administering applications for the program by

¹ A job audit is conducted by DOP at the employee's worksite and allows the employee and the employee's supervisor to clarify and provide additional information about the job duties and responsibilities of the position.

processing the applications and entering them in a database, communicating by email with DOH regarding the applications and road clean-up locations and mailing out packets to applicants once approved; and 2) work with the volunteer groups - more specifically, preparing for the special clean-up projects that occur a couple of times a year by sending postcard reminders to the volunteers, selecting and ordering thank you gifts, communicating with DOH garages to ensure they have necessary supplies, registering volunteers, printing out a report that lists the volunteers, and sending the report to the DOH garages for the day of event. (L-3 Testimony Grievant)

8. The class specifications for the PIS 2, ERS 2, and ERS 3 read in pertinent part as follows:

PUBLIC INFORMATION SPECIALIST 2

Nature of Work:

Under general supervision, at the full-performance level, writes, edits, and produces or assists in the production of a variety of educational, informational, and promotional multimedia materials. Plans and participates in public hearings and press opportunities. Communication with print and audio/visual press may frequently be necessary. Develops ideas from inception to finished form. Performs related work as required.

Distinguishing Characteristics:

Work at this level is subject to general administrative review and/or revision. Subjects dealt with generally are of a sensitive or controversial nature, or work is within a highly visible division/agency.

Examples of Work:

- Writes and edits brochures, newsletters, departmental publications, consumer and other informational materials; prepares or assists with the preparation of graphics compositions and layout.
- Collects information from a variety of sources and writes news releases covering regular and periodic activities of the department or division for daily and/or weekly newspapers and for non-print news releases.
- Obtains story and feature materials through personal interviews with officials and others.

- Plans and participates in public hearings, press opportunities.
- Produces and presents, under direction from supervisors, radio and television programs and slide presentations concerning educational, informational, or promotional activities and services.
- Creates high-caliber interactive design, codes and tests communication campaigns for the Web, online advertising and other new media delivery modes, such as PDA's, podcasts or blogs.
- Composes layouts for Web and online campaigns.
- Interprets marketing strategy, objectives and client goals into visual design using a variety of graphic and art media to create professional and effective results.
- Participates in the development and execution of online marketing strategies.
- Answers correspondence and telephone calls pertaining to promotional, informational, or educational matters.
- May assign and lead work of professional and/or clerical staff.
- Attends public meetings and events to gather information for materials written.

ENVIRONMENTAL RESOURCES SPECIALIST 2

Nature of Work:

At the full-performance level, performs complex professional work in a specialty area in the acquisition, preservation, management and protection of the state's environmental/natural resources. Work involves the application of scientific principles, laws and regulations and program planning techniques in the specialty area. Areas include grants and contract administration, environmental/natural resources, program development and evaluation, education, or environmental monitoring and compliance. Typically, positions are involved in a state-wide specialty program. Travel over difficult terrain and in inclement weather may be required. Performs related work as required.

Distinguishing Characteristics:

This classification differs from the Environmental Resources Specialist 1 by the full-performance level work and complex work in the assigned area. Incumbents are involved in a state-wide specialty program area. The Environmental Resources Specialist 3 differs from Environmental Resources Specialist 2 by the performing as lead worker in complex program assignment with responsibility for multi-agency and multi-level coordination of program activities.

Examples of Work:

- Collects and reviews technical/scientific data related to

environmental/natural resources quality; assists in preparing detailed statistical/narrative reports.

- Conducts field inspections to identify pollution sources, monitor contract activities and to assess environmental/natural resources quality impact.
- Collects, analyzes and evaluates data in the area of assignment.
- Presents findings of studies and explains proposed plans to state and local officials and the general public.
- Collates data, composes and compiles statistical and narrative reports relating to operational and comprehensive plans.
- Consults on the technical development of grants, grant proposals and programs relating to the area of assignments.
- Implements and monitors programs supported by planning agency grants.
- Conducts testing of plans developed by lower level planners.
- Composes correspondence and memos. Visits project sites to monitor projects, collect samples or to take photographs.
- Develops and presents a variety of solutions to problems uncovered by data collection.
- May supervise subordinate specialist and/or clerical staff.
- Verifies ownership and property rights from county court records; conducts negotiations with landowners.

ENVIRONMENTAL RESOURCES SPECIALIST 3

Nature of Work:

At the advanced level performs complex professional work in a state-wide specialty area in the acquisition, preservation, management and enhancement of the state's environmental/natural resources. Work involves the application of complex scientific principles, complex laws and regulations and extensive program planning techniques in the specialty area. May supervise subordinate Environmental Resources Specialist and support positions; performs as a lead worker in complex program assignments with responsibility for multi-agency and multi-level coordination of program activities. Responsible for planning, organizing and implementing a state-wide program in the area of assignment. Performs related work as required.

Distinguishing Characteristics:

This class differs from the Environmental Resources Specialist 2 by performing at the advanced level as a lead worker in complex program assignment with responsibility for multiagency and multi-level coordination of program activities. Responsible for planning, organizing and implementing a statewide program in the areas of assignment.

Examples of Work:

- Develops policies in relation to state and regional resources.
- Conducts meetings of local, statewide, public and/or private agencies relating to planning programs or policies dealing with environmental concerns.
- Conducts field reviews of projects proposed, under construction, or completed, to assure environmental safeguards are being implemented.
- Collects and researches data such as air, soil and water quality from reports of federal or state agencies, permits or through field reviews of proposed or existing sites.
- Coordinates environmental analysis activity with federal and state or local agencies and recommends modifications or mitigations to reduce or alleviate aspects of the impacts.
- Consults with public officials regarding planning programs and policies.
- Acts as a liaison between agency and others involved in the process.
- May supervise subordinates and clerical support staff.
- Reviews progress of subordinate staff and provides technical guidance.
- Evaluates plans, proposals, grants, permits, policies and other documents submitted for accuracy, completeness and compliance with rules and regulations.
- May prepare annual budget requests.

(DOP Exhibits 6-8)

9. The Class and Comp section of the DOP is responsible for, among other things, drafting the class specifications and ensuring that all classified positions in State government are classified and paid appropriately within the State's Class and Comp Plans. (L3 Testimony Campbell) "Reallocation" 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. W. Va. Code R. §143-1-3.72.

10. "Advanced level" performance is one of the four levels of performance contained within the DOP's classification performance level spectrum, i.e. entry-level, full-performance, advanced and expert. The DOP defines "advanced level" performance as:

This level is assigned to duties and responsibilities which are complex,

difficult and varied, relative to the work in the class series. Work requires the development and adoption of non-standard procedures and has more impact and consequence of error than the full performance level. Work may be performed under limited supervision or under limited direction. Incumbent possesses considerable latitude to accomplish tasks; may include lead worker duties.

(DOP Exhibit 10)

11. The DOP Pay Plan Policy (DOP-P12) defines “lead work/lead worker” as follows:

This is a level of work at which an incumbent is assigned the ongoing responsibility of scheduling and/or reviewing the work of other co-workers and guiding and training them while performing identical or similar kinds of work.

(DOP Exhibit 10)

12. The duties of the position occupied by Grievant does not serve in what is recognized by DOP as a lead worker capacity.

13. The duties of the position occupied by Grievant does not perform complex scientific work at the advanced level.

14. The duties of the position occupied by Grievant do not fit within the ERS 3 class specification because the position does not perform at the advanced level or at the level of complexity expected of the classification within the class series and does not perform as a lead worker. (DOP Exhibit 10 and L-3 Testimony Campbell)

15. Based solely on the L-3 testimony provided by Grievant, Assistant Director Campbell indicated a growing belief that the position’s work is predominantly clerical in nature in contrast to the representations made on the PDF and in the job audit. If true, this would indicate classification in the OA class series, which is a lower level than both the PIS and ERS class series. (L-3 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.*

The majority of the relevant facts giving rise to the grievance are not disputed: Grievant is employed by Department of Environmental Protection ("DEP") as the State Coordinator for Adopt-a-Highway and Operation Wildflower. Grievant's position is classified by the Division of Personnel ("DOP") as an Environmental Resources Specialist 2.² Grievant believes the position she occupies should be classified as an Environmental Resources Specialist 3 (ERS 3).

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*

² On September 24, 2018, DOP determined that the classification for Grievant's position was Public Information Specialist 2. On October 1, 2018, Grievant requested that DOP reconsider its determination. DOP conducted a desk audit on November 1, 2018, and ultimately determined that the proper classification was Grievant's original classification - Environmental Resources Specialist 2.

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 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 testified regarding the duties and responsibilities of the position she occupies. She identified and described the predominant duties of the position she occupies, giving essentially equal weight to two duties relating to the adopt-a-highway program: 1) application process - more specifically, administering applications for the program by processing the applications and entering them in a database, communicating by email with the DOH regarding the applications and road clean-up locations and mailing

out packets to applicants once approved; and 2) work with the volunteer groups - more specifically, preparing for the special clean-up projects that occur a couple of times a year by sending postcard reminders to the volunteers, selecting and ordering thank you gifts, communicating with DOH garages to ensure they have necessary supplies, registering volunteers, printing out a report that lists the volunteers, and sending the report to DOH garages for the day of event. Grievant relies on her communication with DOH employees to show she was a lead worker. Additionally, Grievant seems to rely on the fact that she refused her supervisor's directive to write twelve articles a year (as listed on her PDF) and instead prepared one unsolicited draft report on soil sampling (the only report she has ever written during her tenure in the position) to show the scientific aspect of her job.

Assistant Director Campbell testified and explained that when looking at the job duties and responsibilities detailed on the PDF and comparing them to the class specification, coupled with a desk audit, DOP determined the position Grievant occupies "*could be*" placed in the ERS 2 classification. Ms. Campbell explained that originally the position was placed in the PIS 2 classification based on the duties and responsibilities listed on the PDF specifically in relation to writing twelve articles a year and event planning, i.e. fall conference and clean up days, as well as getting information out to volunteers. However, during the job audit Grievant focused on providing information as relates to aspects of the job she believed to be scientific in nature. Based upon the information verbally provided by Grievant at the job audit, the fact that the position did not serve in a lead worker role and that the work did not rise to the level of advanced complex

work, DOP determined the position was clearly not an ERS 3, but rather permitted it to revert back to the ERS 2 classification. Ms. Campbell explained that the predominant duties of the position are class controlling.³

Grievant does not serve in a lead worker capacity as she has no co-workers within the DEP who perform the same or similar work to hers for which she has any sort of oversight. The DOP defines “Lead Work/Lead Worker” in the Pay Plan Policy (DOP-P12) as follows:

This is a level of work at which an incumbent is assigned the on-going responsibility of scheduling and/or reviewing the work of other co-workers and guiding and training them while performing identical or similar kinds of work.

Ms. Campbell testified contrary to Grievant’s argument, that by definition an employee in one agency cannot be a lead worker for employees in another agency, cannot be a lead worker for volunteers, and cannot be a lead worker for a vacant position. This has historically been the consistent interpretation and application of the lead worker definition by DOP.

Assistant Director Campbell explained that within the ERS class series the soil sampling described by Grievant (which seemed to be the sole “scientific” work the Grievant claimed to perform) does not rise to the advanced level work expected to be performed by the ERS 3 positions in the DEP. Grievant wants credit for soil sampling,

³ Assistant Director Campbell indicated based “solely” on the L-3 testimony of Grievant, she has a growing belief that the position in discussion work is predominantly clerical in nature in contrast to the representations made on the PDF and in the job audit. If true this would indicate classification in the OA class series, which is a lower level than both the PIS and ERS class series. Ms. Campbell explained that the predominant duties of the position are class controlling and based on Grievant’s testimony, as described in detail by Grievant herself, the predominant duties of the position are primarily clerical in nature.

testimony revealed that she had yet to perform any such function while in the position; rather, other individuals had actually performed the soil sampling.

The ERS 3 positions in DEP are assigned to the highest classification in the ERS class series based on the complex scientific work they perform at the advanced level. Such work also entails dealing with complex federal laws and regulations on a daily basis. As it relates to the job Grievant performs, she was only able to point to one applicable law relating to the adopt-a-highway program and could not identify with specificity what that law was. The position Grievant occupies is not required or expected to deal with complex federal laws and regulations nor is it expected to perform complex scientific work on any level. After the sworn testimony provided by Grievant at the level three hearing, it became clear to Ms. Campbell that the position did not do as much scientific work as had been represented by Grievant during the job audit; rather, the position is responsible for a significant amount duties of a clerical nature.

As it relates to this case, Wendy Campbell, DOP's Assistant Director of the Classification and Compensation Section, provided competent and thorough testimony explaining DOP's reasoning behind its determination in this case. Both Respondents DEP and DOP agree that Grievant is a conscientious and valuable employee; however, the position she occupies should not be classified as Environmental Resources Specialist 3. The reasons include, but are not limited to, the fact that Grievant's position is not at the "advanced level;" is not "complex professional work;" her work does not apply "complex scientific principles, complex laws and regulations;" and she does not perform as a "lead worker" because she does not review the work of other co-workers. Grievant

has not shown by a preponderance of the evidence that DOP is clearly wrong with regard to the classification determination of the position in discussion.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. W. VA. CODE § 29-6-10 authorizes the W. Va. Division of Personnel (DOP) to establish and maintain a position classification plan for all positions in the classified and classified exempt service. State agencies which utilize such positions, as a general rule, must adhere to that plan in making assignments to their employees.

3. 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).

4. 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).

5. "Reallocation" 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. W. Va. Code R. §143-1-3.72. The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." *Stihler v. Div. of Natural Res.*, Docket No. 07-DNR-360D (Feb. 6, 2009) *citing*, *Keys v. Dep't of Environmental Protection*, Docket No. 06-DEP-307 (April 20, 2007); *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (March 26, 1997); *See Siler v. Div. of Juvenile Serv.*, Docket No. 06-DJS-331 (May 29, 2007).

6. As the governing authoritative agency over the State's Classification/Compensation Plan, the West Virginia Division of Personnel's interpretation of its definition of professional experience should be given deference and is not arbitrary or capricious. *Prue v. Division of Corrections and Division of Personnel*, Docket No. 2017-1400-MAPS (Nov. 3, 2017).

7. 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).

8. 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).

9. 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*.

10. DOP is required to classify a position based on predominant duties, not duties that are performed on an occasional and intermittent basis. *Adkins v. Workforce W. Va. and Div. of Pers.*, Docket No. 2009-1457-DOC (Oct. 13, 2009). Employees who simply perform some duties normally associated with a higher classification may not be considered misclassified per se. *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (April 15, 1996). Furthermore, incidental duties which require an inconsequential

amount of employees' time will not warrant a higher classification, if the remainder of their duties are accurately described by their current classification. *Graham v. Nicholas County Bd. of Educ.*, Docket No. 93-34-224 (Jan. 6, 1994).

11. Grievant has not shown by a preponderance of the evidence that the duties and responsibilities of the position she occupies fall within the ERS 3 classification.

12. Grievant has not shown by a preponderance of the evidence that DOP acted in an arbitrary or capricious manner as relates to the classification determination of the position in discussion.

13. Grievant has not established DOP's determination is clearly wrong.

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: December 5, 2019

Landon R. Brown
Administrative Law Judge