

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KEITH BRYANT WALKER,  
Grievant,**

**v.**

**Docket No. 2017-2006-PSC**

**PUBLIC SERVICE COMMISSION AND  
DIVISION OF PERSONNEL,  
Respondents.**

**DECISION**

Grievant, Keith Bryant Walker, is employed by Respondent, Public Service Commission ("PSC"), as an Administrative Law Judge 1 ("ALJ 1"). On March 28, 2017, Grievant filed this grievance against Respondent, attaching a five-page statement of grievance and relief sought to the grievance form in which Grievant protested that his salary is lower than that of all other ALJ 1s employed by Respondent PSC, that Respondent PSC has refused to either seek reallocation of Grievant's position to ALJ 2, or to post a ALJ 2 position that has been vacant for several years, and that Grievant has been worked out of his classification. As relief, Grievant seeks reallocation of his position to ALJ 2, with a "fair and equitable salary increase," two additional incremental increases to "make Grievant's salary comparable to that of other ALJ 2's" employed by Respondent, eighteen months of back pay for Respondent intentionally working Grievant out of classification, and interest on the back pay.

Following the April 11, 2017 level one conference, a level one decision was rendered on May 11, 2017, denying the grievance. Grievant appealed to level two on May 19, 2017, and mediation was scheduled. On June 29, 2017, a telephone conference was conducted by the mediating administrative law judge during which it was determined that the mediation should be continued so that the Division of

Personnel (“DOP”) could be joined as a necessary party and that a Position Description Form (“PDF”) could be completed so that the DOP could review the position prior to mediation. By order entered June 29, 2017, the DOP was joined as a necessary party. Mediation was rescheduled after the DOP reviewed the PDF and determined that the position was properly classified as an ALJ 1. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on December 13, 2017. A level three hearing was held over two days on October 11, 2018 and October 12, 2018, before the undersigned at the Grievance Board’s Charleston, West Virginia office. Grievant appeared *pro se*. Respondent PSC appeared by Chief ALJ Keith George and by counsel, Belinda B. Jackson. Respondent DOP appeared by Assistant Director Wendy Campbell and by counsel, Karen O’Sullivan Thornton, Assistant Attorney General. At the beginning of the hearing, arguments were heard on a pending *Motion to Compel* filed by Grievant on August 11, 2018 seeking the production of emails between Chief ALJ George and PSC’s counsel. The emails were produced for *in camera* review, which was performed by Administrative Law Judge William B. McGinley, upon Respondent PCS’s objection to the undersigned conducting the review. Judge McGinley determined the emails were protected from disclosure by the attorney-client privilege. The remainder of the hearing was conducted by the undersigned. This matter became mature for decision on November 15, 2018, upon final receipt of the parties’ written Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant is employed by Respondent, Public Service Commission, as an Administrative Law Judge 1. Grievant asserts he has been performing the duties of an

Administrative Law Judge 2. Respondent, Division of Personnel, determined that Grievant's position was properly classified as an Administrative Law Judge 1. Grievant failed to prove that his position operates under limited supervision or that he is responsible for predominantly complex cases. Respondent DOP's classification determination was not arbitrary and capricious. Accordingly, the grievance is denied.

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, Keith Bryant Walker, is employed by Respondent PSC as an ALJ 1 within its Administrative Law Judge Division.

2. The PSC enforces and regulates the practices, services and rates of public utilities.<sup>1</sup> The PSC has a hearing procedure for various types of applications and complaints relating to public utilities. The PSC retains the most complex and socially important matters for hearing by the Commissioners themselves and refers the remainder to the Administrative Law Judge Division for hearing.

3. With the exception of residential billing disputes, the Division's ALJs have no authority to issue a final decision. The ALJs make recommended decisions to the Commission. The Commission issues the final decision.

4. The Administrative Law Judge Division is administered by Chief ALJ Keith George, who is assisted by Deputy Chief ALJ Matthew Minney. Chief ALJ George supervises the staff of the Division. The Division employs five ALJ 1s and one ALJ 2.

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<sup>1</sup> W.VA. CODE § 24-1-1(a).

5. Chief ALJ George reviews the work of the ALJs weekly during his review of case assignments. Each week Chief ALJ George receives case referrals from the Commission. Chief ALJ George reviews each referral and assigns it a complexity score on a 9-point scale based on the case's potential complexity. Chief ALJ George determines the potential complexity using the information available at the time and his long experience with the agency. Chief ALJ George reviews computer-generated reports of the Division's docket to determine the workload of each ALJ and to address any lapses in case processing by the ALJs. Chief ALJ George then assigns new cases to the ALJs based on his review of their workload, consideration of individual ALJ aptitudes, and the complexity of the cases to be assigned.

6. Determining the complexity of cases prospectively is difficult. The complexity of a case can change during the course of litigation. For example, a case that appears to be complex at filing that then settles early in the litigation does not involve complex work for the assigned ALJ. Chief ALJ George, in his weekly review of all pending cases, adjusts his assignments to the ALJs based on the complexity of the cases as they develop.

7. Chief ALJ George reviews all decisions drafted by the ALJs. Chief ALJ George has the authority to direct an ALJ to change his/her decision. If an ALJ refuses to change his/her decision, Chief ALJ George has the authority to reassign the case to another ALJ to draft the decision in accordance with his instructions.

8. Grievant was previously employed by Respondent as a Staff Attorney, classified as an Attorney 1. In 2014, Grievant was promoted to a vacant position as an ALJ 1. Grievant received a 15% increase in his salary upon his promotion. Grievant

attempted to negotiate a higher salary but was unsuccessful. Grievant is the lowest paid ALJ 1 in the Division.

9. Within the first year of his employment as an ALJ 1, Grievant began asserting to Chief ALJ George that he was being worked out of his classification and Grievant continued to assert the same in the years leading up to the filing of this grievance.

10. The DOP has sole authority to determine the classification of positions. The DOP issues classification specifications to describe the nature of each classified position. A position will be reallocated to another classification upon a significant change in the kind and/or level of duties and responsibilities permanently assigned to the position.<sup>2</sup>

11. The classification specification for ALJ 1 describes the nature of work as follows:

Under general supervision, at the full-performance level, performs professional legal work conducting quasi-judicial administrative hearings and writing formal decisions and recommendations on less complex cases arising under regulatory responsibility of the agency. Responsible for insuring that the litigants are afforded substantive and procedural due process through the proper scheduling of hearings, conducting hearings based on rules of evidence, controlling the making of a record, conducting necessary legal research, and rendering decisions based on findings of fact and conclusions of law. Work is reviewed for accuracy and compliance with legal standards and applicable laws and regulations. Performs related work as required.

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<sup>2</sup> W.VA. CODE ST. R. § 143-1-3.72 and § 143-1-4.7.

12. The distinguishing characteristics of the ALJ 1 classification are: "Positions in this class function as independent hearing examiners at the full-performance level."

13. The classification specification for ALJ 2 describes the nature of work as follows:

Under limited supervision, at the advanced level, performs professional legal work such as conducting quasi-judicial hearings and writing formal decisions and recommendations on complex cases arising under regulatory responsibility of the agency. Responsible for insuring that the litigants are afforded substantive and procedural due process through the proper scheduling of hearings, conducting hearings based on rules of evidence, controlling the making of a record, conducting necessary legal research, and rendering decisions based on findings of fact and conclusions of law. Work is reviewed for accuracy and compliance with legal standards and applicable laws and regulations. Performs related work as required.

14. The distinguishing characteristics of the ALJ 2 classification are: "Positions in this class are considered senior examiners or specialist[s] and have responsibility for complex cases which have potential for legal precedent or significant social or economic impact on the issue being adjudicated."

15. A PDF is the official record of the duties of a position. It is used by the DOP, in conjunction with the classification specifications and other related documents and information to determine the proper classification of a position. The classification determination is made within the Classification and Compensation Division. A staff member makes an initial determination, which is reviewed by the manager of the Division, which is then reviewed by the Assistant Director of the DOP, Wendy Campbell,

who directs the Division. The employee and the agency have the right to appeal the decision of the Assistant Director to the Director of the DOP.

16. On August 11, 2016, Grievant completed a PDF for the position he occupies. Grievant described the percentage of time spent on important and essential duties as follows:

60%: Without the need for supervision and working from general goals of the ALJ Division, preside over complex rate and certificate type cases involving large dollar amounts and expansion of services that impact entire communities and subdivisions of this State, both economically through the implementation of increased rates and charges, and socially by large development and improvement of utility facilities and services. The cases presided over have potential for, and at times have been cited as, legal precedent.

35%: Without the need for supervision and working from general goals of the ALJ Division, preside over customer complaint type cases that involve complex issues, including, but not limited to, quality of service, initiation of service, property damage, faulty company facilities, jurisdictional disputes, and/or complex fact patterns, including, but not limited to, large dollar amount billing disputes and unexplained usage circumstances. The disposition in these types of cases have the likelihood of impacting future cases that have the same or similar issues and/or facts.

5%: Without the need for supervision and work from general goals of the ALJ Division, preside over customer complaint type cases involving billing disputes.

17. Grievant also stated in the PDF that the position has “total authority” to make “all decisions,” but acknowledged that the Chief ALJ “predominantly reviews orders and decisions before filing” and the Deputy Chief ALJ reviews the same in the Chief’s absence.

18. Grievant included the following additional comment:

Since at least September 2015 my docket has consisted predominantly of complex cases that were managed, processed and disposed of by me with limited or no supervision. A review of the Commission's Docket and Hearing Databases reveal that since at least September 2015, I have presided over more complex rate cases, by a margin, than any other ALJ in the Division, including the Chief ALJ, Deputy Chief ALJ, and the sole ALJ 2. As such, since at least September 2015, have been performing the duties of an ALJ 2.

19. Chief ALJ George and the appointing authority for the agency, Michael A. Albert, disagreed with Grievant's description of the complexity of the job duties. Chief ALJ George attached a detailed eight-page explanation of his disagreement with Grievant's characterization of the job duties.

20. As part of his response to Grievant's statements in the PDF, Chief ALJ George undertook a review of all cases that had been assigned to Grievant for roughly a year prior to the filing of the grievance until the completion of the PDF, which totaled 138 cases. Chief ALJ George reviewed all cases and assigned a complexity score to each case, with 1 being "very simple" and 9 being "very complex." Chief ALJ George explained this review in his response to the PDF as follows:

This complexity analysis is retrospective. It reflects the cases as they actually developed. For cases still pending, some of the analysis is prospective. The cases were rated on a 1 to 9 scale with 1 being very simple and 9 being very complex. The analysis shows that 12 of the 138 cases were 6 or higher on the 9 point scale (roughly 8.7%). 106 of the 138 were 4 or lower (roughly 76.8%). There were 20 cases rated at 5 (roughly 14.5%).

21. Chief ALJ George concluded:

Mr. Walker's apparent analysis (which was not provided to his supervisor or attached to the form) apparently was that he designated certain case suffixes as "complex cases" and then he counted those cases on his docket and compared it



to the other Judges. The analysis is both overly simplistic and results in inaccurate conclusions. A great number of these “complex cases” were disposed by Mr. Walker in a three to five page Recommended Decisions (some of which is boilerplate). It is difficult to resolve a truly complex case in a four page Order even if one’s writing style is very terse. Mr. Walker concludes that he has done more complex cases than any other ALJ in the Division, including the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge and the ALJ II. That is simply inaccurate and over inflated. The Administrative Law Judge II handles more complex cases than Mr. Walker. The Chief Administrative Law Judge and the Deputy Chief Administrative Law Judge also handle more complex cases than Mr. Walker.

22. By letter dated November 16, 2017, Assistant Director Campbell notified Grievant and Respondent PSC of the DOPs determination that the position was properly classified as an ALJ 1 based on her review of the PDF and the classification specifications. Assistant Director Campbell determined there had been no significant change in the predominant duties of the position, which were to “preside over rate and certificate type cases” and to “preside over customer complaint cases.”

23. In making her determination, Assistant Director Campbell found Chief ALJ George’s thorough explanations of the duties more persuasive than Grievant’s conclusory statements. Of particular importance to her classification determination was the authority of the position and the degree of supervision. Assistant Director Campbell determined that, although Grievant asserted he had total authority to make decisions, in fact, Grievant’s decisions are only recommended decisions to the Commission and that those decisions are further subject to reviewed by Chief ALJ George, who has the authority to direct the decision be changed or reassign the case. She further determined that, although Grievant asserted he worked under limited supervision, Chief ALJ George’s management of the docket, assignment of cases, and review of the

recommended decisions is general supervision. In addition, based on the information on the complexity of cases assigned to Grievant provided by Chief ALJ George, Assistant Director Campbell determined that the majority of the work assigned to Grievant was not of the complexity contemplated by the ALJ 2 classification specification.

24. Grievant did not appeal the DOP's classification determination.

25. Grievant was assigned a significant number of potentially complex cases, but few of those cases developed into complex cases. Of the 146 cases Grievant asserted were potentially complex, 104 were resolved with an order of five pages or less, and some of the cases Grievant designated as potentially complex were not potentially complex.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 asserts that he is underpaid in comparison to the other ALJ 1s in the ALJ Division and that he has been worked out of his classification as an ALJ 1 for a period in excess of eighteen months. Respondent asserts that Grievant's rate of pay is proper and denies that Grievant has been worked out of classification.

Although Grievant asserts that he is underpaid as an ALJ 1 and provided evidence to prove that he is paid less than the other ALJ 1s, he makes no actual argument asserting entitlement to greater pay as an ALJ 1 and requested as relief only that his position be reallocated to an ALJ 2.

Employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-386 (Mar. 26, 1997). [E]mployees who are performing the same tasks with the same responsibilities should be placed within the same job classification,' but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. The requirement is that all classified employees must be compensated within their pay grade. See *Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp.*, Docket No. 94-DOH- 435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91- H-177 (May 29, 1992). See *AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).” *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

*Childress v. State Police and Div. of Personnel*, Docket No. 2008-0195-MAPS (Nov. 25, 2009), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-201 (Jan. 10, 2011), *aff'd*, W.Va. Sup. Ct. App. Docket No. 11-0329 (Mar. 9, 2012). Grievant is paid within the appropriate pay grade. As Grievant failed to provide argument that he is entitled to greater pay or request relief on this allegation, it will not be further addressed.

Grievant asserts that he has been intentionally worked out of his classification performing the duties of an ALJ 2 when he is classified and paid as an ALJ 1. 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 predominant duties of the position in question are class-controlling." *Carroll v. Dep't of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004) (citing *Broadbuss v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 608, 609 (Aug. 31, 1990);

*Lemley v. Dep't of Health & Human Res.*, Docket No. 04-HHR-159 (Aug. 27, 2004)).  
“Simply because one is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render [one] misclassified *per se*.”  
*Wilkins v. Dep't of Env'tl. Prot. and Div. of Personnel*, Docket No. 2011-1333-DEP (Aug. 2, 2013).

In this case, Respondent DOP reviewed Grievant's job duties and determined that the position Grievant occupies was properly classified as an ALJ 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)).

Respondent DOP determined that the predominant duties of the position Grievant occupies is to “preside over rate and certificate type cases” and to “preside over customer complaint cases,” which it found consistent with the ALJ 1 classification. The ALJ 2 classification is distinguished from the ALJ 1 classification in that an ALJ 2 works under limited supervision at an advanced level on complex cases while the ALJ 1

works under general supervision at the full-performance level on less complex cases. ALJ 2s “are considered senior examiners or specialist[s] and have responsibility for complex cases which have potential for legal precedent or significant social or economic impact on the issue being adjudicated.”

Grievant asserts that he works under limited supervision and that he was predominately assigned potentially complex cases. Respondents dispute both of these assertions. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Chief ALJ George was credible. For the majority of his testimony, his demeanor and attitude toward the action were appropriate. During cross examination by Grievant, both Grievant and Chief ALJ George became frustrated with each other and both were

argumentative and interrupting each other. Grievant and Chief ALJ George were directed not to interrupt each other. Grievant, for the most part, complied with the instruction, but Chief ALJ George had to be reminded a second time not to interrupt. Chief ALJ George's answers during cross examination were also sometimes not responsive to the specific question asked and Chief ALJ George was directed not to testify in the narrative. Chief ALJ George apologized for his lapse. On direct, his answers to questions were forthright and very detailed. Reviewing Chief ALJ George's testimony and demeanor, as a whole, it is more likely than not that Chief ALJ George's interruption and unresponsiveness to some questions was a result of frustration and natural long-windedness rather than evasiveness. Chief ALJ George has an interest in the proceeding as he has been accused of purposely working Grievant out of classification, which, if true, could subject him to discipline. Chief ALJ George's detailed testimony and obvious expertise regarding the PSC were persuasive. Chief ALJ George's testimony regarding determining the complexity of cases was corroborated on several key points by former Chief ALJ Marland's testimony.<sup>3</sup> Grievant asserts Chief ALJ George's testimony was inconsistent. Grievant's argument that Chief ALJ George's testimony was inconsistent is based on isolated statements in the testimony and Chief ALJ George's disagreement with Grievant's legal conclusions. Viewing Chief ALJ George's testimony as a whole, he admitted that he had assigned Grievant a significant

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<sup>3</sup>Grievant also asserted Chief ALJ George testified untruthfully regarding certain discussions they had regarding Grievant's assertion he was being worked out of classification and the grievance itself, which are not relevant to the determination of the grievance. It is more likely than not that Chief ALJ George and Grievant have different memories of these conversations due to miscommunication. Chief ALJ George's cross examination clearly illustrated that Chief ALJ George and Grievant do not communicate well with each other.

number of potentially complex cases, but that he was also aware that many of those cases were resolving without complex work by Grievant. Chief ALJ George's denial that he worked Grievant out of his classification was not inconsistent with his testimony. Whether Grievant was worked out of classification is a legal determination. It was simply a denial of the legal theory Grievant espouses in this matter: that the classification determination should be based on the potential complexity of the cases at the time of the assignment. Chief ALJ George disagrees with that legal theory and his denial of working Grievant out of classification is based on that disagreement, not inconsistency.

Grievant was credible. His demeanor and attitude toward the action were appropriate. As previously stated, Grievant was also directed to stop interrupting Chief ALJ George. Grievant also apologized. Grievant was also somewhat unresponsive to some questions during cross examination by Respondent PSC. As with Chief ALJ George, these lapses did not indicate a lack of credibility. Grievant has an interest in the proceeding in that he seeks greater pay through reallocation of the position he occupies. Although there was no indication that Grievant was untruthful in his testimony, Grievant's testimony was often conclusory, much less detailed than that of Chief ALJ George, and some of his assertions were contradicted by his own witness, former Chief ALJ Marland.

Former Chief ALJ Marland was credible. Her demeanor and attitude toward the action were appropriate. Former Chief ALJ Marland is retired and has no interest in this matter. Her responses were quite candid and detailed and she obviously has great knowledge and experience with the workings of the PSC. Former Chief ALJ Marland



offered detailed testimony regarding the complexity of cases that contradicted some of the potential complexity determinations asserted by Grievant. She testified that the number of protestors, even in cases with thousands of protestors, or high dollar amounts in residential complaints does not make the issues more complex, it just makes the case more time-consuming. She testified that third-party towing cases were not complex. She further testified that, although unexplained high usage cases or right of way cases can occasionally become complicated, most of the time they are resolved through the work of Commission staff, not the ALJ. Former Chief ALJ Marland also offered testimony that corroborated the testimony of Chief ALJ George in that she testified that one cannot determine the complexity of a case by simply the type of filing, that the complexity of cases can change over the course of litigation, and that many cases settle.

Assistant Director Campbell was credible. Her demeanor and attitude toward the action were appropriate. Assistant Director Campbell has no interest in this matter. Her answers to questions were direct and detailed and the explanations of her reasoning were plausible. Assistant Director Campbell's explanation of her reliance on Chief ALJ George's information in the PDF was supported by the PDF itself. Grievant's explanation of his duties was extremely brief and conclusory and provided very little actual information regarding his duties. In contrast, Chief ALJ George's response was detailed, provided thorough explanations, and included concrete examples.

In order to meet his burden, Grievant must prove that his duties more closely fit the duties of an ALJ 2. The distinguishing characteristics between the two classifications at issue in this matter are the level of supervision of the position and the

complexity of the cases decided. As a preliminary matter, some of Grievant's assertions stem from comparison to the duties of other ALJs within the Division rather than comparison of his duties to the classification specifications.

Classification determinations are not made based upon comparison to other employees, but upon which classification specification is the best fit for the employee's duties. *Harmon v. Dep't of Health and Human Res.*, Docket No. 99-HHR-432 (May 15, 2000); *Baldwin v. Dep't of Health and Human Res.*, Docket No. 99-HHR-142 (Oct. 28, 1999). The compared employee may be misclassified and the remedy in that case is not to similarly misclassify a grievant. *Kunzler v. Dep't of Health and Human Res.*, Docket No. 97-HHR-287 (Jan. 8, 1998).

*Wilkins v. Dep't of Env'l Prot. and Div. of Personnel*, Docket No. 2011-1333-DEP (Aug. 2, 2013). Also See *Bennett v. Ins. Comm'n and Div. of Personnel*, Docket No. 07-INS-299 (June 27, 2008); *Wilcoxon v. Dep't of Health and Human Res.*, Docket No. 2017-2062-DHHR (Apr. 27, 2018). Therefore, comparisons made to the duties of other ALJs are not probative and were not considered.

Grievant asserts his position operates under limited supervision. Respondent DOP determined that Grievant's position operates under general supervision. In the PDF, Grievant stated that he has total authority to issue decisions. This is clearly incorrect and was contradicted by Grievant in another statement in the PDF and by the testimony at level three. With the exception of residential billing disputes, only the Commission issues final decisions, and the decisions drafted by the ALJs are recommended decisions that the Commission can either adopt, modify, or disregard entirely. In addition, Grievant admits that, except on rare occasions when both the Chief and Deputy Chief are conflicted or unavailable, all ALJ decisions must be reviewed and approved by the Chief or the Deputy Chief. Grievant asserts the Chief's

supervision of him is limited because the Chief rarely has any substantive concerns with his work. Grievant confuses job performance with level of supervision. It is clear from Chief ALJ George's testimony that Grievant performs very well. That Chief ALJ George has not been required to exert much of his supervisory authority to correct performance because Grievant performs well does not negate Chief ALJ George's actual and substantial authority over the position. In addition, Chief ALJ George's weekly review and assignment of cases and his ability to reassign cases when he disagrees with the processing of the case by the ALJ demonstrates his general supervision over the ALJ positions. Therefore, Grievant failed to prove that the supervision of the position he occupies is limited or that Respondent DOP's determination was arbitrary and capricious.

Grievant asserts that he was assigned more potentially complex cases than any other ALJ in the Division, including the ALJ 2, the Chief, and the Deputy Chief. As stated previously, this is not probative. To prevail, Grievant must show that his duties most closely fit that of an ALJ 2. ALJ 2s "have responsibility for complex cases which have potential for legal precedent or significant social or economic impact on the issue being adjudicated." Grievant asserts that the analysis of his caseload can only be done prospectively, considering only the potential for complexity at the time of the assignment of the case, not retrospectively, considering what actual work was performed in the case. This is clearly a misinterpretation of the classification specification. The word "potential" does not appear before the word "complex" it only appears before the phrase "for legal precedent." Therefore, it is not the potential of a case that is relevant to the

classification determination, it is the actual complexity of the case that is relevant.<sup>4</sup> It was not unreasonable for Respondent DOP to rely on Chief ALJ George's retrospective analysis of the complexity of the cases assigned to Grievant.

Grievant's description of his duties in the PDF was brief and conclusory. Rather than describing how his cases were complex, Grievant simply stated that his cases were complex. Grievant's evidence at level three consisted mainly of his designation of the potential complexity of his cases at the time of assignment, his explanations why he considered those cases to be potentially complex, and his comparison of his caseload to others. Grievant presented little evidence of the actual complexity of his cases, although it is undisputed by Respondent PSC that some of Grievant's cases were complex. Both Chief ALJ George and former Chief ALJ Marland testified credibly that the complexity of cases varies widely and that one cannot determine the complexity of a case simply by the type of filing. They also both testified credibly that there are some types cases, which Grievant included as potentially complex cases, that may take more time and work but would not be considered complex.

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<sup>4</sup> Even if it was the potential complexity of cases that was relevant to the classification determination, Grievant failed to prove that he was responsible for predominantly potentially complex cases. Grievant asserted that 146 of the 400 cases he was assigned were potentially complex. However, Grievant's own witness, former Chief ALJ Marland, disagreed with Grievant's designation of certain types of cases as potentially complex. Based on former Chief ALJ Marland's testimony, Rule 42 rate proceedings and municipal appeal proceedings have the most potential to be complex. Grievant was only assigned 39 of those types of cases. Her testimony regarding the other types of cases Grievant counted as potentially complex was that, while some can be complex, they generally are not. Therefore, those types of cases should not be considered potentially complex without specific evidence of why a particular case should be considered potentially complex. Grievant did not present such evidence. Therefore, without evidence that a predominate amount of his time was spent on 39 out of 400 cases, which Grievant did not present, it cannot be said that Grievant was responsible for a predominate amount of even potentially complex cases.

Although there were some issues with Chief ALJ George's demeanor during the hearing, his explanations of the complexity of cases were detailed and plausible and mostly corroborated by the testimony of former Chief ALJ Marland. Grievant's explanation of the complexity of cases was less detailed and plausible and some explanations were specifically disputed by his own witness, Chief ALJ Marland. Chief ALJ George provided detailed testimony regarding his analysis of the actual complexity of Grievant's cases, using a methodology based on his twenty-six years of experience. Chief ALJ George's analysis showed that Grievant's cases were predominately of lesser complexity when considering the work performed, although he readily admitted Grievant had been assigned a significant number of cases that were potentially complex. Chief ALJ George was aware in his weekly review of cases that those cases were settling, which is why he continued to assign such cases to Grievant. While those cases had the potential to become complex, few of the cases assigned to Grievant actually became complex. Of the 146 potentially complex cases identified by Grievant, Chief ALJ George asserted without contradiction that 104 of the cases were resolved with orders of five pages or less. While Chief ALJ Marland disputed that one could determine that a case was not complex based on its disposition by a short order or decision, it is clear to the undersigned that the type of complex case contemplated by the classification specification could not be resolved by such an order.

Grievant's evidence of actual complex cases was limited to one instance where he was assigned to ghostwrite an analysis for an ALJ 2 and his limited testimony on cross-examination regarding a small number of specific cases. Of those cases, Grievant provided little detail on why the cases involved any complex work, Grievant

instead continued to repeat his theory that the analysis should be prospective only based on the potential complexity of the case. Of the cases where Grievant did provide some detail, several of the cases were dismissed with minimal work by Grievant and several were of the type that both former Chief ALJ Marland and Chief ALJ George had agreed were not complex. Grievant's limited evidence was not sufficient to prove that his duties more closely fit those of an ALJ 2. Respondent DOP's classification determination was not arbitrary and capricious.

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 his 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. 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 predominant duties of the position in question are class-controlling.” *Carroll v. Dep’t of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004) (citing *Broadus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 608, 609 (Aug. 31, 1990); *Lemley v. Dep’t of Health & Human Res.*, Docket No. 04-HHR-159 (Aug. 27, 2004)). “Simply because one is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render [one] misclassified *per se*.” *Wilkins v. Dep’t of Env’tl. Prot. and Div. of Personnel*, Docket No. 2011-1333-DEP (Aug. 2, 2013).

3. 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)).

4. "Classification determinations are not made based upon comparison to other employees, but upon which classification specification is the best fit for the employee's duties. *Harmon v. Dep't of Health and Human Res.*, Docket No. 99-HHR-432 (May 15, 2000); *Baldwin v. Dep't of Health and Human Res.*, Docket No. 99-HHR-142 (Oct. 28, 1999). The compared employee may be misclassified and the remedy in that case is not to similarly misclassify a grievant. *Kunzler v. Dep't of Health and Human Res.*, Docket No. 97-HHR-287 (Jan. 8, 1998)." *Wilkins v. Dep't of Env'l Prot. and Div. of Personnel*, Docket No. 2011-1333-DEP (Aug. 2, 2013). Also See *Bennett v. Ins. Comm'n and Div. of Personnel*, Docket No. 07-INS-299 (June 27, 2008); *Wilcoxon v.*

5. Grievant failed to prove that his position operates under limited supervision or that he is responsible for predominantly complex cases.

6. Respondent DOP's classification determination was not 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: January 4, 2019**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**