BETTY ASHLEY,

Grievant,

v. Docket No. 99-DEP-120

DIVISION OF ENVIRONMENTAL PROTECTION/

OFFICE OF WASTE MANAGEMENT, AND

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, employed by the Division of Environmental Protection/Office of Waste Management (Respondent) as an Administrative Services Assistant III (ASA III), filed a level one grievance on August 11, 1998, in which she alleged:

Grievant will be demoted effective 8/16/98. This demotion will result in a lower classification, paygrade and reduction in pay. Grievant has also been misclassified as ASA III when grievant should have been classified as Program (ERPM I) Manager. This has also resulted in an improper reduction in paygrade. Grievant has been discriminated against in pay and classification as a result of her gender.

For relief, Grievant requested that the proposed demotion and salary decrease be negated, and that her title and paygrade be changed to ERPM I, at paygrade 16, with backpay.

The grievance evaluators at levels one and two lacked authority to grant the relief requested. Following an evidentiary hearing at level three, Director Michael P. Miano accepted the recommended decision to deny the grievance, and the matter advanced to level four on March 22, 1999. Grievant, represented by Paul M. Stroebel, Esq., Respondent, represented by Donald L. Darling, Senior Assistant Attorney General, and the Division of Personnel (Personnel), represented by Lowell D. Basford, agreed to submit thematter for decision based on the lower-level record, supplemented with proposed findings of fact and conclusions of law, filed on or before May 6, 1999. (See footnote 1)

The following facts are derived from the lower-level record which consists of a transcript of the

level three proceedings, with attached exhibits.

Findings of Fact

1. By posting dated October 18, 1996, Respondent advertised a vacancy for the position of Manager of the Core Unit of the Site Investigation and Response Section of the Office of Waste Management. The purpose of the Core Unit was to ensure the continuance and development of the Superfund support activities on a non-site specific basis. Respondent proposed that the position be classified as Environmental Resources Program Manager I (ERPM I).

2. Upon review of the position specifications, Personnel determined that ASA III, pay grade 14, was the appropriate classification for the Core Manager position.

3. Grievant applied for, and received, the position of Core Manager, effective May 1, 1997. Grievant did not question or challenge the ASA III classification until August 1998, when she was notified the position was to be reallocated.

4. Effective July 1, 1998, Grievant received a $756 across the board salary increase awarded to all state employees.

5. In Summer 1998, Respondent implemented a reorganization in its Offices of Waste Management and Environmental Remediation. This reorganization affected anumber of employees, both male and female, including Grievant.

6. By letter dated July 29, 1998, B. F. Smith, Chief of the Office of Waste Management, advised Grievant that effective August 16, 1998, her position would be transferred to the Compliance Assurance and Emergency Response (CAER) Section.

7. Personnel reviewed Grievant's revised duties and determined that her position would be reallocated to ASA II, pay grade 10. Because Grievant's salary was above the maximum for this pay grade, her salary was reduced to $30,072.

8. Grievant no longer supervises other employees, a distinguishing characteristic between the positions of ASA II and ASA III.

Discussion

Grievant raised four issues at the level three hearing: (1) she was initially misclassified as an ASA III, and should have held the classification of ERPM I; (2) following the reorganization she is misclassified, and should hold the classification of ASA III; (3) she was deprived of the $756 across the board salary increase to be awarded to all state employees; and, (4) the classification and

compensation disparities are a result of gender discrimination. As 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 W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6.

Initial Classification

___In order for Grievant to prevail upon a claim of misclassification, she must prove bya preponderance of the evidence that her duties for the relevant period more closely match another cited Personnel specification than that under which she is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, Captain v. W. Va. Div. of Health, Docket No. 90-H- 471 (Apr. 4, 1991); for these purposes, the "Nature of Work" section of a classification specification is its most critical section. Atchison v. W. Va. Dept. of Health, Docket No. 90- H-444 (Apr. 22, 1991); see generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievant's current classification constitutes the "best fit" for her required duties. Simmons v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. Personnel Administrative Rule, §4.04(a); Coates v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-041 (Aug. 29, 1994). Even though a job description does not include all the actual tasks performed by a grievant, that does not make the job classification invalid. Personnel Administrative Rule, §4.04(d) Finally, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993).

Grievant does not address the classification specifications of ERPM I, but arguesthat both Chief Smith and Assistant Chief Pamela Hayes had proposed the position to be an ERPM I, at paygrade 16, based upon their close observation and knowledge of the duties and responsibilities of the position. Grievant asserts that Respondent's administrators were in a better position than Personnel

to determine the class title and pay grade. Grievant also argues that two other unit managers in her section, Site Assessment and Emergency Response, and Site Remediation, performed similar work and were classified as ERPM I's.

Mr. Smith and Ms. Hayes confirmed at the level three hearing that they had proposed the position be classified as an ERPM I, along with the Remediation and Site Assessment sections, but that Personnel had determined ASA III to be the correct classification. Personnel cited the job posting for the position, noting that the incumbent's work would be “in support of the administrative and financial functions of the State Superfund Program and [she] will supervise CORE Unit personnel.” Other duties included administering cooperative agreements, coordinating financial record keeping, budget preparation, financial reporting, and procurement, and the position was generally viewed as providing administrative support duties.

The classification specification for ASA III, in the Nature of Work section provides that the incumbent performs complex administrative and/or supervisory work in providing support services such as fiscal, personnel, payroll or procurement, or serves in a specialty role of a complex support program with extensive federal oversight. The work includes supervision of subordinate professional, technical or office support staff.

By comparison, the ERPM I class specification provides that the incumbentcompletes professional work at the managerial level over a formally designated “specialized environmental resources program or subsidiary environmental resources program under the direction of an administrator, manager or agency head. . . .” The Distinguishing Characteristics section of the ERPM I specification further defines the work as requiring knowledge of specific scientific or technical theory and principles of an environmental specialty area.

Although Respondent's administrators had anticipated Grievant's position would be an ERPM I, and it is evident that she was in charge of the unit, it cannot be determined that Personnel was clearly wrong in finding the duties and responsibilities of the position were not consistent with the description of an ERPM I, or in allocating the position to the ASA III classification.

As a related issue, Grievant argues that her position was directly and solely funded by the federal government, and that Respondent had obtained funding for a position of ERPM I to manage the Core program. Further, she asserts that Respondent reallocated her position without obtaining written permission in violation of federal regulations, and beyond the scope of Respondent's authority.

Respondent concedes that written permission was not obtained prior to the reallocation of Grievant's position, but asserts that federal officials had been made aware of the reorganization through meetings and discussions, and had not disapproved. Chief Smith opined that the federal agencies were concerned with changes in grants rather than individual personnel.

40 C.F.R. §31.30 states in pertinent part:

(a) General. Grantees and subgrantees are permitted torebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency .

* * *

(d) Programmatic changes. Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(3) Changes in key persons in cases where specified in an application or a grant award. . . .

Neither party provided testimony from any federal official regarding this issue, but the record reflects that Respondent had provided EPA officials verbal notification of the reorganization. The plan was not verbally disapproved, and funding was not withdrawn as a consequence of noncompliance. It appears then, that the federal agency waived providing written approval for the reorganization, including the reallocation of Grievant's position.

Present Classification

Grievant next argues that she is presently misclassified as an ASA II, and would be correctly classified as an ASA III.

The personnel classifications at issue are reproduced as follows:

Administrative Services Assistant II

Nature of Work: Under limited supervision, performs administrative and supervisory work in providing support services such as fiscal, personnel, payroll or procurement in a state agency or facility or serves as the assistant supervisor in a major administrative support unit of a large state agency. Develops policies and procedures for resolving operationalproblems and for improving administrative services. Supervises the work of office support staff in rendering required services.

Work is typically varied and includes extensive inter- and intra-governmental and public contact. Has some authority to vary work methods and policy applications and to commit the agency to [an] alternative course of action. Performs related work as required.

Distinguishing Characteristics: Positions in this class are distinguished from the Administrative Services Assistant I by the supervisory nature of the work performed, by the size of the unit served and by the independence of action granted. Positions in this class are responsible for a significant administrative component in a medium size agency or state facility or serves as an Assistant Director of a major administrative support component of a large state agency. Authority to vary work methods and to commit the agency to alternative course[s] of action is granted.

Examples of Work:

Confers with inter- and intra- agency personnel to transact business, gather information, or discuss information; may be in a position with public or federal government contact.

Conducts performance surveys and reviews agency methods of operation; devises flowcharts and graphs; may conduct cost analysis studies.

Gathers and compiles information for state records; writes reports, balances tally sheets, and monitors inventories, purchases, and sales.

Updates records and contacts employees to gather information; represents the agency in the area of assignment in both internal and external meetings.

Maintains files of information in hard copy files or electronic format; runs reports for regular or intermittent review.

Determines the need for changes in procedures, guidelines and formats; devises a solution; monitors the success of solutions by devising quantitative/qualitative measures to document the improvement of services.

Writes manuals in the area of assignment; clarifies the wording and describes new procedures accurately.

Supervises the work of Office Assistants, Accounting Assistants or other support staff.

Knowledge, Skills and Abilities

Knowledge of regulations, processes and procedures in the area of assignment.

Knowledge of general office practices and procedures.

Knowledge of state and federal laws and regulations related to the area of assignment.

Ability to collect and compile accurate information.

Ability to conceptualize the nature of service difficulties and devise appropriate work methods, tools, and configurations to correct the problem.

Ability to prepare flowcharts, graphs and status reports. Ability to communicate with a wide variety of people, both orally and in writing.

Ability to perform basic arithmetic.

Ability to supervise the work of others.

Minimum Qualifications

Training: Graduation from an accredited college or university. Preference may be given to candidates with a major in the area of public or business administration, accounting, industrial relations, communications or related field.

Substitution: Additional qualifying experience as described below may be substituted on a year-for-year basis for the required training.

Experience: Two years of full-time or equivalent part-time paid employment in a technical or professional position providing administrative services such as accounting, budgeting, project monitoring and reporting, personnel, or procurement and property.

Substitution: Successful completion of graduate study in an accredited college or university in one of the above fields may be substituted for the required experience on a year-for-year basis.

ADMINISTRATIVE SERVICES ASSISTANT III

Nature of Work: Under general direction, performs complex administrative and/or supervisory work in providing support services such as fiscal, personnel, payroll or procurement on statewide basis or serves in a specialty role of a complex support program with extensive federal oversight. Responsible for the development and implementation of policies and procedures for the work unit; for the monitoring and evaluation of the specialized functional area. Works within general statute and regulatory parameters, but has considerable latitude to vary work methods, [and] policy applications to achieve desired results. The work includes supervision of subordinate professional, technical or office support staff. The work is typically complex, varied and requires considerable interaction with local, state and federal agencies and the general public. Performs related work as required.

Distinguishing Characteristics: Positions in this class are distinguished from the Administrative Services Assistant II by the responsibility for unit operation and results obtained. Positions in this class are typically responsible for a complex, statewide administrative support program or function in a specialized role of considerable difficulty and complexity involving sensitive and controversial issues and the lack of standard procedures and/or precedent for programmatic guidance. Has considerable authority to vary work methods and may be assigned responsibility to commit the agency to alternative courses of action.

Examples of Work: Develops technical procedures for the effective implementation of the work of the unit, to include forms, operating procedures, and proposed policies; confers with unit management and other staff regarding revisions to budgetary, purchasing, and other administrative services, policies, and procedures.

Develops operating manuals necessary for the instruction and training of unit staff, agency officials, and other state officials; conducts periodic training sessions for new initiatives and procedures in the area of responsibility.

Analyzes the budget document and appropriate enabling legislation to determine the need for revised operational procedures for the budgetary cycle.

Prepares or supervises the preparation of required fiscal and budgetary reports in the area of responsibility.

Monitors the expenditures of state agencies and higher education systems to ensure compliance with budgeted appropriations; confers with state officials and budget specialists in the resolution of expenditure level problems; advises on the transfer and reallocation of funds to resolve such problems; briefs management on potential areas of appropriation level difficulties.

Prepares or assists in the appropriation of grant proposals and budgetary recommendations for the agency; monitors the execution of appropriations throughout the fiscal year.

Develops procedures, forms, and controls necessary for the effective operation of the unit.

Within State Purchasing Rules and Regulations, examines purchasing requests for conformity to specifications and budgeted amounts; may negotiate contracts and agreements for the procurement of equipment, supplies and services.

Supervises other professional, technical and clerical employees in the unit.

Knowledge, Skills and Abilities

Knowledge of the functions and objectives of the agency.

Knowledge of the laws and regulations relating to the agency.

Knowledge of the principles and techniques used in the assigned technical function or specialty area.

Ability to coordinate the unit activities with other units within and outside state government.

Ability to establish and maintain effective working relationships with others.

Ability to analyze and interpret budgetary and technical data related to the area of assignment.

Ability to supervise the work of others.

Minimum Qualifications

Training: Graduation from an accredited college or university with a degree in the area of assignment.

Substitution: Additional qualifying experience as described below may be substituted on a year-for-year basis. Experience: Three years of full-time or equivalent part-time paid experience in a professional, administrative, technical, or supervisory position related to the area of assignment.

Substitution: Graduate study in the area of assignment may be substituted on a year-for-year basis for up to two (2) years of the required experience.

Grievant argues that her current position description contains thirteen examples of the work she performs. Of those examples, numbers 1, 2, 3, 4, 5, 7, 8, 9,12, and 13, are taken from a description of ASA III duties. Duties designated as numbers 6, 10, and 11, are additional to those of an ASA III. Personnel argues that the reallocation of Grievant's position to ASA II was proper because she is assigned to the Administrative Services Unit of the CAER Section of the Office of Waste Management, and she no longer has the responsibility of supervising other employees. Grievant reports to an ASA III, who defined Grievant's responsibilities as the “preparation and management of the CAER Section's grants and cooperative agreements . . . [and] training coordinator for [the] section.” At level three, Mr. Basford testified that Grievant is no longer a supervisor, but is part of a unit, engaging in hands on activities.

Grievant's reliance on a listing of specific duties performed by ASA III's is misplaced. As previously noted, Grievant must prove that her duties more closely match another classification

specification than that under which she is currently assigned. Further, the “Nature of Work” section of the classification specification is the most critical section; Grievant is no longer in charge of a unit, and does not engage in supervisory work. Although she may perform many of the same duties as those listed on the ASA III specification, that does not mean her classification as an ASA II was incorrect. Personnel has established that Grievant's duties have changed significantly, particularly in that sheno longer has supervisory responsibilities. It cannot be determined that Personnel's reallocation of Grievant's position was erroneous.

$756 salary increase

Grievant argues that because of the timing of the reorganization she was denied the salary increase provided to all state employees. Respondent asserts that Grievant received the increase, effective July 1, 1998, but her salary was reduced effective August 16, 1998, when it was adjusted to the maximum salary level for pay grade 10.

Personnel Administrative Rule, §5.06, provides that “[t]he pay of an employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification shall be reduced to at least the maximum pay rate of the new classification. The employee's salary may remain the same if his/her pay is within the pay range of the new classification, or his/her pay may be reduced to a lower pay rate in the new range.” Because Grievant's reallocation placed her in a position assigned a lower pay grade than she previously held, she was administratively demoted. There is no dispute that her salary was adjusted to the maximum pay rate for the ASA II classification. The record does not reveal the amount of salary Grievant lost, but her current supervisor, Sandra Kee, estimated it to be between $400 and $600. Grievant perceives the reduction in her salary to have been a withdrawal of the salary increase granted to all state employees in July 1998; however, that is not the case. Grievant does not dispute that she benefitted from the salary increase from July 1 through August 16, 1998. The reduction in her salary was not the same as the across-the-board increase, and was determined based solely upon the pay scales for the ASA classifications.

Discrimination

___Grievant argues that the original classification of her position as an ASA III was the result of gender discrimination as evidenced by the fact that while she performed similar work, the other two units within the section were headed by males who were classified as ERPM I's. (See footnote 2) Respondent denies that the classification determination was made on the basis of gender. Mr.

Basford specifically testified that the decisions made regarding classification are based upon the duties and responsibilities of the position and the classification specifications.

The Grievance Board does not review gender discrimination specifically, but addresses such claims under W. Va. Code §29-6A-2(d), which generally defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

An employee seeking to establish unlawful discrimination must first establish a prima facie case by demonstrating the following:

(a)that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c)that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant has failed to establish a prima facie case of discrimination. Although she was similarly situated to other employees, i.e., a unit manager, and was treated differently by being assigned a lower classification, she did not prove that the difference in treatment was unrelated to their actual job responsibilities. On the contrary, the testimony of Mr. Basford establishes that the duties of the two male unit managers were engaged in professional work at the managerial level over a formally designated specialized environmental resources program or subsidiary environmental resources program, requiring specific scientific or technical theory and principles of an environmental specialty area. By comparison, Grievant's duties were defined as support of the administrative and financial functions of the Superfund Program, and included administering and revising cooperative

agreements, financial record keeping, budget preparation, financial reporting, and procurement for the section. In summary, Grievant failed to prove that her position of ASA III was misclassified, and more closely fit the classification specifications of ERPM I, that she is currently misclassified as an ASA II, was deprived of a $756 salary increase, or that she was subject to discrimination.

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. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6.

2. In order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely match another cited Personnel specification than that under which she is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88- 038 (Mar. 28, 1989). The key to the analysis is to ascertain whether Grievant's current classification constitutes the “best fit” for her required duties. Simmons v. W. Va. Div. of Human Services, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

3. Class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. Personnel Administrative Rule, §4.04(a); Coates v. W. Va. Dept. of Health and Human Resources, Docket No. 94- HHR-041 (Aug. 29, 1994).

4. Personnel's interpretation and explanation of the classification specificationsat issue should be given great weight unless clearly erroneous. See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993).

5. Grievant has failed to prove by a preponderance of the evidence that she was misclassified as a ASA III from May 1, 1997, through August 16, 1998.

6. Grievant has failed to prove by a preponderance of the evidence that she is presently misclassified as an ASA II.

7. Grievant has failed to prove that Respondents were prohibited by the federal EPA from reallocating her position.

8. Grievant has failed to prove that she was denied a $756 across-the-board salary increase granted to all state employees effective July 1, 1998.

9. W. Va. Code §29-6A-2(d) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

10. An employee seeking to establish unlawful discrimination must first establish a prima facie case by demonstrating the following:

(a)that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c)that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 11. Grievant failed to prove by a preponderance of the evidence that her classification as an ASA III was the result of discrimination.

Accordingly, the grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 28, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The matter was transferred to the undersigned for administrative reasons on May 10, 1999.

Footnote: 2

During the level three hearing Grievant appeared to assert that her demotion and salary reduction were also the result of gender discrimination; however, those matters were not addressed in her proposed findings of fact and conclusions of law, and are deemed abandoned.