**RAMONA DICKSON,**

**Grievant,**

**v.** **DOCKET NO. 03-DEP-381**

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

**Respondent.**

## DECISION

Grievant Ramona Dickson filed this grievance against her employer, the Department of Environmental Protection (DEP) on March 26, 2003, stating: "Sufficient documentation was provided in support of reclassification to Chief Financial Officer, classified and covered position 8325. [Division of Personnel] denied formal appeal and advised that further formal redress should be sought through state employees grievance procedure per W. Va. [§] Code 29-6A-4(a)." Grievant seeks reclassification to Chief Financial Officer, back pay from 15 days prior to February 10, 2003, interest and attorney's fees. The Division of Personnel [DOP] was joined as an indispensable party.

Having been denied at all lower levels (See footnote 1) , a level four hearing was held in the Grievance Board's Charleston office on February 24, 2004. Grievant was represented by counsel, Philip Stowers, DEP was represented by counsel, Ronald Reece and KarenWatson, and DOP was represented by its Assistant Director of Classification and Compensation Lowell Basford. This matter became mature for decision on March 26, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant has been employed by Respondent DEP for approximately six years. In January, 2003, she completed an updated Position Description Form and submitted it to DOP for consideration of reclassifying her position, then Administrative Services Manager III (ASM III). She requested reclassification to Chief Financial Officer (CFO), pay grade 23.

2. Because of significant changes to her position since it was originally classified, DOP determined it should be reclassified. DOP determined that the CFO classification was not available to Grievant because it was restricted to the Workers' Compensation Division, and therefore the Administrative Services Manager IV (ASM IV), pay grade 22, was the “best fit” for the position.

3. The DOP classification specification for Chief Financial Officer, under “Nature of Work” and “Examples of Work” states:

**Nature of Work**

> Under administrative direction, at the advanced level, is responsible for the fiscal management of the Workers' Compensation Section of the Bureau of Employment Programs. Responsible for the establishment and operation of internal accounting and auditing systems for claims disbursements, revenue collection and administrative budgeting; oversight of the fund assets;development of short and long-term strategies to insure fiscal solvency for the fund; and liaison with the funds actuary and the external agencies in the management of the funds assets. Performs related work as required.

**Examples of Work**

> Establishes accounting and internal auditing systems to review all aspects of claims disbursements, revenue collection and administrative budgeting of Workers' Compensation and Coal Workers Pneumoconiosis funds. Determines the amount of revenues needed to guarantee solvency for the funds. Acts in a liaison capacity with the funds actuary regarding actuarial reports and premium rate-setting. Oversees the management of fund assets by the Treasurer's Office. Oversees and designs employer account auditing processes and calculates security for self-insured employers and other aspects of revenue generation. Advises the Commissioner regarding the determination of premium rates in accordance with statutes. Develops divisional budgeting and oversees the operations of the fund to insure compliance with administrative budgets. Conducts regular analysis of revenue collections and administration and claims disbursements to develop short and long-term strategies to insure fiscal solvency for the funds. Oversees all other fiscal aspects of the funds operation.

(Emphasis added.)

4. In the CFO class specification, references to “the fund” are references to the Workers' Compensation Fund.

5. Grievant is not employed by the Bureau of Employment Programs.

6. In March, 2003, the Department of Health and Human Resources (DHHR) requested the DOP to approve a posting for a CFO position at Welch Emergency Hospital. (See footnote 3)

7. Mr. Basford gave Welch Emergency Hospital Human Resources Director Kathy Addair permission to post the position as CFO because the Hospital was experiencing severe recruitment problems and needed to be able to offer a higher paygrade for the position than would be available otherwise. 8. The hospital was still unable to fill the position as a CFO, and the position was ultimately filled as an ASM IV. There is only one CFO currently employed in the state, and that position is in the Workers' Compensation Commission.

## DISCUSSION

In non-disciplinary matters such as this, Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). In a misclassification grievance, the Grievant must prove that the work she is doing is a better fit in a different classification than the one her position is currently in. *See* Hayes v. W. Va. Dep't of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989); Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement, Docket No. 00-HHR-361 (Apr. 5, 2001).

Grievant contends the Chief Financial Officer (CFO) classification is not limited to the Workers' Compensation Division, and is a better fit for her position than its current classification of Administrative Services Manager IV. DEP contends that if it had a Chief Financial Officer, the position would not be in the classified service and would be within the discretion of the Secretary to fill. DOP maintains that the CFO classification is limited to one position in the Workers' Compensation Division, and the specification was written with that position in mind. Grievant's position is based on the fact that DOP permitted Welch Emergency Hospital to post a position that would be classified as CFO. She points to this as clear evidence that the CFO position is not limited to Worker's Compensation as DOP asserts. With that position open to her, she claims the duties and responsibilities of her position are a better fit in the CFO position than in the ASM IV position.

An issue that was argued in various ways by the parties that is irrelevant to the outcome is the nomenclature of Grievant's position at DEP. In what has become arecurring problem in many

misclassification grievances, both Grievant and DEP confuse the functional title of CFO with the name of the CFO classification as determined by DOP. The two names are not interchangeable, and have little to do with each other. Grievant testified that many outside agencies send correspondence to her addressed to the CFO of DEP, and she signs her name to many documents using the CFO title. There was no evidence that any of the outside agencies that refer to Grievant's position as "CFO" do so because they compared it to the DOP specification for that title.

Secretary Timmermeyer denied this grievance because she felt DEP did not need a CFO. In none of these cases does the CFO functional title correspond to the CFO classification title. They are two separate and distinct things, and what an agency or anyone but DOP calls a position has nothing to do with the position's classification. Nowhere in the CFO classification specification is there a reference to what the agency calls the position being classified. Accordingly, any evidence concerning what Grievant or anyone else calls the position will not be considered as supporting any party's position. (See footnote 4) A plain reading of the classification specification for CFO would appear to confirm DOP's position, notwithstanding the Welch posting. The specification states in its most important section that a CFO "is responsible for the fiscal management of the Workers' Compensation Section of the Bureau of Employment Programs." Grievant is not employed by that agency. Grievant argues she is nevertheless entitled to that classification because the class specification cannot restrict eligibility for the classification the way it does. She cites the DOP Administrative Rule, 143 C.S.R. 1 § 4.4(a), which states: "Classspecifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned."

Mr. Basford testified that one of the reasons DOP did not approve the CFO classification for Grievant's position when it evaluated her Position Description Form was that Grievant did not work in the Workers' Compensation Division. He also stated the situation with Welch Emergency Hospital was extraordinary due to its severe recruitment and retention problem. Mr. Basford was vacillant on the question of whether the CFO position could be considered for Grievant's position. At the level three hearing, he variously testified that CFO was within the realm of possibilities that the position could be reallocated to, (See footnote 5) and that it wasn't available to DEP because it was restricted to Workers' Compensation. (See footnote 6) He then testified that if Grievant had applied for the Welch job, she could have been classified as CFO. Later, he admitted that a CFO position could exist

outside the Bureau of Employment Programs, Workers' Compensation Division, but that Grievant's position was a “best fit” in the ASM IV classification according to the duties and responsibilities assigned to the position by DEP.

Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. *See*, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 398, 431 S.E.2d 681, 687 (1993). In this case, Mr. Basford's interpretation of the CFO specification as open to Grievant is clearly wrong. It is apparent his concession in this regard is simply the product of skillful examination by Grievant's attorney, coupled by his reluctance to admit that permitting DHHR to post a CFOposition was a mistake. When asked directly whether the CFO position was available to Grievant, his “Yeah, whatever.” answer was hardly a ringing endorsement of the proposition. In any event, “[n]o interpretation or construction of a term used in a job description is necessary where the language is clear and unambiguous. Watts v. Dept. of Health and Human Resources, 465 S.E.2d 887 (W. Va. 1995).” Young v. Dep't of Health and Human Resources and Div. or Personnel, Docket No. 96-HHR-177 (Feb. 26, 1998). *See also* Moore v. Div. of Rehab. Serv. and Div. of Personnel, Docket No. 96-RS-031 (June 27, 1996). In this case, the CFO class specification unambiguously restricts itself to Workers' Compensation, and Mr. Basford's interpretation cannot make it say something different. The Grievance Board has interpreted 143 C.S.R. 1 § 4.4(a) as meaning that “[i]n reading the class specifications, 'mention of one quality or requirement does not exclude others,” and that “[e]ven though a job description does not include all the actual tasks performed by a grievant it does not make that job classification invalid.” Lee v. W. Va. Dep't of Admin./General Services Div. Docket No. 02-ADMN-014 (May 30, 2002). In other words, a class specification need not explicitly list each and every duty or responsibility of a job in order to define it and distinguish it from others. In the CFO specification, the disputed language is, on its face, exclusive. To reconcile this with the admonition that “[c]lass specifications are descriptive only and are not restrictive,” a base rule of statutory construction is useful.

Read as Grievant would argue it should be, the language of 143 C.S.R. 1 § 4.4(a) would no doubt produce unintended results. “'Where a literal interpretation of a statutory provision would not accord with the intended purpose of legislation, or produce an absurd result, courts must look beyond the plain words of the statute.' N.L.R.B. v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir., 1971). Our West Virginia Supreme Court has also held that 'Itis the duty of a court to construe a statute according to

its true intent, and give to it such construction as will uphold law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.'" Martin, et al., v. Raleigh County Bd. of Educ., Docket No. 02-41-212 (Sep. 13, 2002); Lasure v. Tyler County Bd. of Educ., Docket No. 90-48-330 (Mar. 26, 1992).

If expressly exclusionary or restrictive language were not read as delimiting certain class specifications, and "ABCA Enforcement Agent" could be employed by BEP, an "Assistant Commissioner - Highways" could be employed by DHHR, and the Grievance Board could have a position classified as "Assistant Fire Marshal-In-Training." Clearly, some class specifications are written with specific positions and agencies in mind, and this is evidenced, as in the case of the CFO specification, by language in the specification directly restricting the specification to those positions or agencies. The CFO specification, by its plain meaning, "is responsible [only] for the fiscal management of the Workers' Compensation Section of the Bureau of Employment Programs," Mr. Basford's testimony to the contrary notwithstanding.

Since it was clearly contrary to the plainly-written specification of the classification, the approval Mr. Basford gave Ms. Addair to post a CFO position was *ultra vires*. (See footnote 7) "'*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts.'" Adkins v. Dep't of Transp./Div. of Highways, Docket No. 02-DOH-020 (Apr. 1, 2002). Even if Welch Emergency Hospital had filled the position as a CFO, that example would not support Grievant's contention that she should be similarly classified, because she would be comparing her position to one that was misclassified. "When a grievant compares [herself] to others who are employed in a higher classification and are performing similar work, but the others are misclassified, the remedy is not to similarly misclassify the grievant." Weaver v. Preston County Bd. of Educ., Docket No. 03-39-129 (Aug. 28, 2003).

A review of Grievant's duties and responsibilities, although well evidenced in the record, is not necessary. Grievant's burden was to prove those duties were a better fit in a classification other than her current one, and the only classification she chose to compare them to _ CFO _ is unavailable to her. She presented no evidence of any alternate classifications that might also be a better fit than ASM IV, so the undersigned cannot find she has met her burden of proof.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH- 287 (Jan. 22, 1996). In a misclassification grievance, Grievant must prove that the work she is doing is a better fit in a different classification than the one her position is currently in. *See* Hayes v. W. Va. Dep't of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989); Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement, Docket No. 00-HHR-361 (Apr. 5, 2001). 2. Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. *See*, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 398, 431 S.E.2d 681, 687 (1993).

3. Normally, in reading class specifications, 'mention of one quality or requirement does not exclude others," and that "[e]ven though a job description does not include all the actual tasks performed by a grievant it does not make that job classification invalid." Lee v. W. Va. Dep't of Admin./General Serv. Div. Docket No. 02-ADMN-014 (May 30, 2002). The general rule that "[c]lass specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned" in 143 C.S.R. 1 § 4.4(a) does not apply to language in class specifications that are explicitly exclusive or restrictive. To read such language otherwise would lead to absurd results.

4. "No interpretation or construction of a term used in a job description is necessary where the language is clear and unambiguous. Watts v. Dept. of Health and Human Resources, 465 S.E.2d 887 (W. Va. 1995)." Young v. Dep't of Health and Human Resources and Div. or Personnel, Docket No. 96-HHR-177 (Feb. 26, 1998). *See also* Moore v. Div. of Rehab. Serv. and Div. of Personnel, Docket No. 96-RS-031 (June 27, 1996).

5. "'Where a literal interpretation of a statutory provision would not accord with the intended purpose of legislation, or produce an absurd result, courts must look beyond the plain words of the statute.' N.L.R.B. v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir., 1971). Our West Virginia Supreme Court has also held that 'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold law and further justice. It is as well the duty of a court to

disregard a construction, thoughapparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.' Pristavec v. Westfield Ins. Co., 400 S.E.2d 575 (W. Va. 1990), citing Syl. Pt. 2, Click v. Click, 98 W. Va. 419, 127 S.E.2d 194 (1925)." Martin, et al., v. Raleigh County Bd. of Educ., Docket No. 02-41-212 (Sep. 13, 2002); Lasure v. Tyler County Bd. of Educ., Docket No. 90-48-330 (Mar. 26, 1992).

6. "'*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts.' Franz v. Dep't of Health and Human Resources, Docket No. 99-HHR-228 (Nov. 30, 1998). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991)." Adkins v. Dep't of Transp./Div. of Highways, Docket No. 02- DOH-020 (Apr. 1, 2002); Roncaglione v. W. Va. Bureau of Employment Programs /Fiscal and Admin. Management Div., Docket No. 99-BEP-498 (Apr. 28, 2000).

7. Mr. Basford's permission to DHHR to post a CFO position did not set a precedent for allowing other agencies to use the CFO classification, because it was contrary to the express restriction contained in that specification, hence it was an *ultra vires* act.

8. "When a grievant compares [herself] to others who are employed in a higher classification and are performing similar work, but the others are misclassified, the remedy is not to similarly misclassify the grievant. Akers v. W. Va. Dep't of Tax and Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995); Kunzler v. Dep't of Health and Human Serv., Docket No. 97 HHR-287 (Jan. 18, 1996)." Weaver v. Preston County Bd. of Educ., Docket No. 03- 39-129 (Aug. 28, 2003).

9. Grievant did not establish by a preponderance of the evidence that her position should be classified as something other than ASM IV. For the foregoing reasons, this grievance is hereby **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, and 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: April 14, 2004** _____

**M. Paul Marteney**

**Administrative Law Judge**

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Footnote: 1

*The level three Grievance Evaluator recommended granting the grievance, but DEP Secretary Stephanie Timmermeyer nevertheless issued a level three decision denying the grievance.*

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Footnote: 2

*No brief was received from DOP.*

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Footnote: 3

*Now Welch Community Hospital.*

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Footnote: 4

*The same issue invalidates Secretary Timmermeyer's reasoning for denying this grievance at level three, however, since that decision, which she made contrary to the findings of the Grievance Evaluator. Since her decision was made completely failed to compare the position's duties and responsibilities to the classification specification, and to reach conclusions based on that comparison, it was entirely improper anyway.*

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Footnote: 5

*Level three trans., day 2, p. 11.*

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Footnote: 6

*Level three trans., day 2, p. 13.*

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Footnote: 7

*"Ultra vires" is a Latin phrase that means "beyond the powers." Black's Law Dictionary, 5th ed., West Publishing Co., St. Paul 1979. In plain English, it refers to something that a person does not have the power to do.*