THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHELLE L. FALQUERO,

Grievant,

v. **Docket No. 2008-1902-DEP**

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND DIVISION OF PERSONNEL,

Respondent.

DECISION

Grievant Michelle Falquero has been employed by the Department of Environmental Protection ("DEP") for more than five years. She is assigned as a Secretary 2 for the Public Information Office of the DEP. On May 15, 2008, Ms. Falquero filed a grievance stating the following:

> 1) No Employee Performance Appraisals (EPAs) for four (4) years.
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> 2) Mandatory functional demotion under threat of termination as of 06/15/08.
>
> 3) Title and pay is inconsistent with past and present duties performed and taken on from two different Administrative Secretaries that left the agency. I have performed all of these duties in addition to my original duties for the Public Information Office.
>
> 4) Forcing me to write a letter regarding a reported hostile work environment situation saying that they had taken care of the problem. No action was taken to resolve the problem after it was reported. I also believe that the rescinding of my resignation was denied due to the reporting of the situation. As with the signing of the new EPA, if I do not write this letter, I must leave the agency on 06/15/08.

The remedy Grievant seeks is "to be made whole, including reclass [sic] as Administrative Secretary."

On June 9, 2008, a level one hearing was held in this matter. On July 28, 2008, the DEP Chief Administrator, Randy Huffman signed an Order adopting the Recommended Order of his Designee which denied the grievance. A level two mediation was held and the matter was subsequently appealed to level three. The first level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on October 16, 2008. At the outset of this hearing, it was noted that part of the remedy sought by Grievant was reallocation to a different job classification. In such matters, the Division of Personnel ("DOP") must be a party. The parties agreed to limit the first hearing to issues related to Grievant's resignation and allegations of constructive discharge. A second hearing would be held related to the request for reallocation, if necessary.

A decision was rendered related to the resignation and the constructive discharge issues on December 16, 2008.[1] An Order was issued the next day joining the DOP as a party for the second level three hearing on the sole issue of the Grievant's request for reallocation. A level three hearing on the reallocation issue was held at the Charleston office of the West Virginia Public Employees Grievance Board on October 29, 2009. Grievant was present at the hearing and was represented by Gordon J. Simmons, UE Local 170, WVPWU.[2] Respondent DEP was represented by Raymond S. Franks II, DEP General Counsel and Respondent DOP was represented by Karen O'Sullivan Thornton, Senior Assistant Attorney General. Following the presentation of evidence and closing arguments, the parties waived the submission of Proposed Findings of Fact and

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[1] *Falquero v. Dep't of Envtl. Prot.*, Docket No. 2008-1509-DEP (Dec. 16, 2008).

[2] West Virginia Public Workers Union.

Conclusions of Law. Consequently, this grievance became mature for decision at the close of the level three hearing on October 29, 2009.

Synopsis

Grievant seeks to have her position reallocated from the classification of Secretary 2 to the classification of Administrative Secretary. She argues that she was given additional duties as employees retired or transferred and with the addition of those duties the classification of Administrative Secretary best fits her position. DOP reviewed Grievant's detailed Position Description Form as well as other information pertinent to making a classification determination for the position. DOP staff determined that the predominate duties for the position fit in the Secretary 2 classification and that classification remained the best fit for the position. Grievant was unable to prove that DOP's determination was arbitrary and capricious; accordingly, the grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Following the issuance of an Order joining DOP as a party for the issue of reallocation, Grievant filed a Position Description Form ("PDF") with the DOP seeking a reallocation of her position to classification Administrative Secretary. Grievant signed the PDF on March 26, 2009, it was signed by her supervisors on April 24, 2009, and it was stamped as received by the DOP on April 28, 2009. Respondent's Exhibit 1.

2. Grievant Michelle Falquero began working for the DEP Public Information Office ("PIO") on October 1, 2002. Her position was classified as an Office Assistant 2 and her supervisor was Richard Carter, a Public Information Specialist.

3. In March of 2004, Grievant's office was moved upstairs where the DEP Executive Office suite is located. The Chief Communications Officer, Jessica Greathouse, became Grievant's direct supervisor.

4. In conjunction with this move, Grievant was given the additional responsibility of assisting with the clerical duties of the other executive offices when the need arose. In 2005 an employee who had been classified as an Administrative Secretary retired and her duties were absorbed by the remaining support staff in the executive offices, including Grievant.

5. Grievant's position was reallocated to a Secretary 1 in 2006. Her position was again upgraded through the reallocation process to the Secretary 2 classification in the Spring of 2007. These reallocations were in recognition of the additional duties she was assigned upon moving to the executive suite.

6. In May 2008, when the original grievance seeking reallocation was filed, Grievant's main responsibility was to process and track the Freedom of Information Act ("FOIA") requests that came into the DEP by taking the following steps:

- Receive and log in the requests which arrive in various ways including e-mail, fax and US-mail;
- Forward the request to the appropriate offices that held the information necessary for a proper response; and,
- Track the request until the response was received by the requester.[3]

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[3] The DEP receives approximately fifteen hundred (1500) FOIA requests annually.

7. In addition to her FOIA responsibilities Grievant prepared budget reports for the PIO, processed some P-card and purchasing documents, and posted Mining Air and Water Permit notices on the DEP website.

8. In February of 2008, Kathy Cosco became the Chief Communications Officer for the DEP and Grievant's new supervisor. Ms. Cosco reorganized the duties of the employees in the PIO and Grievant's duties were changed more than any other employee's duties were changed, though her predominate duty remained processing the FOIA requests.

9. On the PDF Grievant signed on March 26, 2009, she listed her duties and the percentage of her time that she spent on each duty as follows:

- Processing FOIA requests as previously described. (60%);
- Check and Publish all Mining and Reclamation mining permits and public hearing notices to the DEP website. (10%);
- Publish all Division of Air Quality and Office of Water Resources permits and public hearing notices to the website. (9%);[4]
- Compose letters in response to letters received in the Public Information Office, mostly received from citizens regarding environmental issues. Mail out PIO brochures/information sheets/environmental reports and promotional items to citizens and governmental officials. Provide any needed secretarial support for the Chief Communications Officer and Public Information Office. (6%); and,
- Ten other various clerical duties, none of which takes more than two percent of Grievant's overall time on the job. (Total of 15% for all ten duties).

10. The staff of the Classification and Compensation Section of the DOP reviewed Grievant's position after the PDF was submitted. On May 5, 2009, DOP

[4] The website posting duties had previously been removed from Grievant but they were reassigned to her by Ms. Cosco.

determined that the best fit for the duties and responsibilities contained in Grievant's position remained Secretary 2 and the request for reallocation was not approved.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts her position is misclassified, and she has requested her position be reallocated to an Administrative Secretary and placed in a higher pay grade. The DOP Legislative Rule defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.75. To receive a reallocation a grievant must demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties does not necessarily establish a need for reallocation. *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997). "The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id*. Additionally, 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 Division of Personnel classification specification than the one under which she is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989). *See Campbell v. Dep't of Transp./Div. of Highways,* Docket No. 05-DOH-385 (May 26, 2009).

The goal of the reallocation analysis is to ascertain whether a grievant's current classification constitutes the "best fit" for the required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). *See Hart v Dep't of Health & Human Res. & Div. of Pers,* Docket No. 2008-0641-DHHR (Feb. 19, 2009).

Grievant has been assigned various duties during her employment at the DEP. As a result of the changing nature of Grievant's job, her position has been reallocated from an Office Assistant 2 to a Secretary 2 between 2002 and 2007.[5] Grievant's main argument for seeking the classification of an Administrative Secretary is that two Administrative Secretaries have left the offices where she works and Grievant has absorbed many of their duties. However, in assessing a position for reallocation the sole issue is the predominate duties performed by Grievant, not duties that are, or were, performed by other employees. *See Hart supra.*

Grievant listed her duties in the PDF she prepared in March 2009. Her main duty for the past few years has been processing FOIA requests. Under her present assignment,

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[5] The reallocations have resulted in Grievant's pay grade increasing four levels from a pay grade 5 to a pay grade 9.

that duty takes 60% of her time. This job requires her to receive, log and sort the requests so that they may be distributed to the appropriate offices for a response. Grievant also tracks the responses until they are sent to the original requester. This is clearly an important assignment but the nature of the work is generally clerical. Another 19% of Grievant's time is dedicated to posting permit and public hearing notices to the DEP website. These duties combined account for 79% of Grievant's job and are undoubtedly her predominate duties.

Debbie Anderson is employed in the Classification and Compensation Section of the DOP as a Senior Personnel Specialist. She has been in that section since the Division was established. Ms. Anderson has reviewed thousands of requests for reallocations to make determinations regarding where positions best fit within the West Virginia classification system. Ms. Anderson reviewed Grievant's PDF and other documents related to Grievant's position which included Grievant's description of her duties. She determined that the predominate duties for Grievant's position were clerical in nature and they had not changed significantly since her last reallocation. Therefore, it was the DOP's determination that the Secretary 2 classification remained the best fit for Grievant's position.

The Division of Personnel's interpretation and explanation of the classification specifications should be given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993). The clearly wrong standard requires the reviewing authority to presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W. Va.

458, 655 S.E.2d 204 (2007). DOP's determination that Grievant's position fits better in the Secretary 2 classification is supported by the evidence. Grievant did not prove by a preponderance of the evidence that DOP's classification determination was not accurate. Consequently, the grievance must be DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. The goal of the reallocation analysis is to ascertain whether a grievant's current classification constitutes the "best fit" for the required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). *See Hart v. Dep't of Health & Human Res.,* Docket No. 2008-0641-DHHR (Feb. 19, 2009).

3. The Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993). The clearly wrong standard requires the reviewing authority to presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

4. The DOP determined that the best fit for Grievant's position was the Secretary 2 classification based upon the predominate duties that Grievant is required to perform. Grievant did not prove by a preponderance of the evidence that the DOP's determination was clearly wrong.

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* 156 C.S.R. 1 § 6.20 (2008).

DATE: FEBRUARY 3, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE