THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ALAN NEASE,

Grievant,

v. **Docket No. 2008-0420-DOC**

WEST VIRGINIA DIVISION OF NATURAL RESOURCES AND DIVISION OF PERSONNEL,

Respondent.

DECISION

Alan Nease ("Grievant") was employed by the West Virginia Division of Natural Resources ("DNR") as an Information Systems Assistant from August 16, 2000 through October 16, 2007.[1] On July 31, 2007, Mr. Nease filed a grievance alleging that he had been performing duties outside of his classification and that his requests for reallocation had been denied. As relief, Grievant stated, among other things, "I would like to be granted the position I had applied for." Grievant originally sought to waive the lower levels and advance his grievance directly to level three. Respondent DNR declined to waive levels one and two and a level one hearing was held on September 27, 2007. A level one decision denying the grievance was issued on October 9, 2007.

Grievant appealed the level one decision and the West Virginia Division of Personnel ("DOP") was joined as a party to the grievance since the grievance contested Grievant's job classification. All parties waived level two and the grievance was set for a

[1] In October 2007, Grievant voluntarily took a position with the West Virginia Office of Technology.

level three hearing.[2]

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on December 13, 2009. Grievant appeared at the hearing and was represented by Gordon Simmons, UE Local 170, WVPWU.[3] Respondent DNR was represented by William R. Valentino, Assistant Attorney General, and Respondent DOP was represented by Karen O'Sullivan Thornton, Senior Assistant Attorney General.

At the beginning of the level three hearing, the issues were clarified. Grievant was initially employed as an Information Systems Assistant ("ISA"). During his employment, Grievant sought to have his position reallocated to the Information Systems Specialist 1 ("ISS 1") classification on three[4] separate occasions. Grievant was transferred to a new classification when he received the job with the Office of Technology. Following Grievant's transfer, the only remaining issue is whether Grievant's position at DNR should have been reallocated. If so, Grievant seeks backpay for the increased pay grade he would have received due to the reallocation from the time he requested reallocation until he transferred to the Office of Technology.

At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received by the West Virginia Public

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[2] At the time this grievance was processed the parties could agree to waive level two mediation. Since that time, the statute has changed to require mediation except in specific circumstances set out in W. VA. CODE § 6C-2-4 (a) (4).

[3] West Virginia Public Workers Union

[4] Grievant submitted two Position Description Forms to the DOP and filed one request for reconsideration from an unfavorable classification determination.

Employees Grievance Board on February 1, 2010. This grievance became mature for decision on that date.

Synopsis

Grievant seeks to have the position he held while he was employed by the DNR reallocated from an ISA to an ISS 1 and to be paid the difference between the salary he earned and what he would have earned as an ISS 1. DOP evaluated Grievant's position on more than one occasion and consistently found that his position was properly classified. Grievant did not prove that the determination made by DOP was arbitrary and capricious and the grievance must be 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. Grievant was employed by the DNR as an Information Systems Assistant ("ISA"), on August 16, 2000. The ISA classification is paid at Pay Grade 9.

2. A job description for the ISA position that Grievant was hired to fill was included in the job posting. The specific tasks which were assigned to the position were listed as follows:

- Assists with managing network; monitors and reads the system; responds to prompts;
- Installs network clients and software on new machines;
- Maintains current virus-checking software on user machines;
- Installs printing services on users;
- Troubleshoots basic hardware and software problems and resolves these problems;
- Performs back-up and recovery procedures; keys in commands; loads tape into the drive;

- Assists with training new users in equipment operations, use of network and e-mail;
- Maintains email directory and accounts;
- Installs computer equipment, printer and other equipment;
- Provides assistance in purchasing of hardware and software;
- Maintain logs of equipment and software problems and solutions;
- Maintain inventory of hardware and software;
- Creates spreadsheets, electronic calendars and database files.

Respondent DOP Exhibit 3.

3. At the end of January 2006, Grievant completed a Position Description Form[5] ("PDF") and submitted the form to the DOP for a classification determination.[6] Grievant was seeking to have his position reallocated to the Information Systems Specialist 1 ("ISS 1") classification which is paid at Pay Grade 17.

4. In the PDF, Grievant described his duties and the percentage of his time it took to perform each duty as follows:

- Troubleshooting issues with [computer] users 70%
- Install new machines 15%
- Install software 10%
- On-line support requests 5%

In the area that requests the employee to "describe what duties have been added to or deleted from the position since the last review," Grievant wrote: "None." Respondent DOP Exhibit 1.

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[5] The Position Description Form is a document which describes the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a position. This document is the basic source of official information utilized by the DOP to allocate the position to the proper classification. *See* 143 C.S.R. 1 § 3.70.

[6] The DOP is the State Agency charged with classifying positions in the West Virginia Classified Service. W. VA. CODE § 29-6-1 *et seq*.

5. By Memorandum dated February 14, 2006, the DOP determined that the duties and responsibilities of Grievant's position were consistent with the ISA classification and declined to reallocate the position. Respondent DOP Exhibit 1.

6. Grievant requested a reconsideration of the February 14, 2006 DOP determination. The request for reconsideration was denied by the DOP Acting Director, William Farley, by letter dated March 6, 2006. Respondent DOP Exhibit 4.

7. On May 16, 2007, the DOP received a second PDF from Grievant requesting that his position be reallocated from an ISA to an ISS 1.[7] On this PDF the Grievant listed his duties and the percentage of time he normally spent on each duty as follows:

- Set up hardware: including printers, monitors and updates 30%
- Trouble shooting: software and hardware 25%
- Contact and Coordinate with Tech Support 15%
- Set up software: connect to network and software updates 15%
- Set up email to connect with the server 4%
- Remove and store hardware 2%
- Follow up visits 8%
- Communicate with supervisor 1%

In the area that requests the employee to "describe what duties have been added to or deleted from the position since the last review," Grievant wrote: "None." Respondent DOP Exhibit 2.

8. On May 21, 2007, the Manager of the DOP Classification and Compensation Section, Lowell Basford, sent a memorandum denying Grievant's renewed request for a reallocation. Mr. Basford noted that the predominated duties listed in the new PDF were

[7] Grievant completed and signed the PDF on February 9, 2007 and it was signed by the DNR Director on May 9, 2007. At that point the PDF was submitted to DOP for consideration.

the same primary duties listed in the prior PDF. He concluded that there was no significant change in the duties and reallocation was not warranted. Respondent DOP Exhibit 5.

9. The Classification Specifications adopted by the DOP for the ISA classification state, in part, the following:

> **INFORMATION SYSTEMS ASSISTANT**
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> **Nature of Work**
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> Under general supervision, performs full-performance level technical work in assisting a systems administrator or technical specialist with maintaining office automation equipment and software. Assists technical staff in purchasing, installing and monitoring a computer system. Troubleshoots basic software and hardware problems and pulls cable. May set-up spreadsheets and database applications, produce complex documents and reports, and enter data. May be on a 24-hour on-call schedule. Performs related work as required.
>
> **Distinguishing Characteristics**
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> This class is intended to function in a support role for a technical staff requiring a working, broad knowledge of computer hardware and software. The predominant portion of the work is maintaining personal computer, office automation equipment, not creating spreadsheets and database files and/or manipulating data.

10. The Classification Specifications adopted by the DOP for the ISS 1 classification state, in part, the following:

> **INFORMATION SYSTEMS SPECIALIST 1**
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> **Nature of Work**
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> Under direct supervision, performs entry level technical work in installing, implementing and maintaining multiple platforms and multiple applications and/or assists in the development of a computer literacy curriculum and training for a large agency or multiple agencies. Depending upon the assignment, may specialize primarily with Local Area Network/Wide Area Networks. Troubleshoots hardware and software problems which occur in various networked micro and mini computer systems. Evaluates overall effectiveness, strengths and weaknesses of software systems and compatibility with the

> hardware and software of current installations. May specialize in an area of technical expertise such as networking technologies, data communications, hardware support, software support, training or information technology forensic examinations and conducting investigations of computerized accounting or other computerized records systems. Performs related work as required.
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> **Distinguishing Characteristics**
> This is entry level work where the incumbent is given less complex assignments and the work is reviewed regularly. However, as skills are demonstrated, the incumbent advances to less routine assignments and performing independently. This class series is distinguished from the Information Systems Coordinator in that Information Systems Specialist plans, installs and maintains network components for the entire department(s) and provides technical support to network users. May include full performance information technology forensic examinations of computer hardware, software or records systems. NOTE: Promotion from this class may occur only if and when the job duties and responsibilities change significantly enough to make a higher level classification more appropriate.

11. The amount of work Grievant performed increased significantly over time while he was employed by DNR. Grievant's duties did not routinely perform network functions other than installing software to connect users to the network. Occasionally, there would be no network administrator and Grievant helped with network administration during those times. Those instances were very infrequent and did not exceed 90 days at any time.

Discussion

Grievant bears the burden of proving his 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 claims that his duties increased significantly over time while he was employed by the DNR and that he occasionally was required to perform network administration duties. Grievant noted that the volume of work kept him from taking annual leave and required him to work long hours. He noted that Respondent DNR never prohibited him from taking leave but he felt the need to keep up with the work so that the computer users could do their jobs.

Respondent DOP notes that the predominate duties performed by Grievant were always consistent with the duties listed in his original job posting and the Classification Specification for the ISA classification. DOP argues that a change in the volume of work performed does not alone warrant a reallocation. One of the distinguishing factors for the ISS 1 classification is that an "Information Systems Specialist plans, installs and maintains network components for the entire department and provides technical support to network users."[8] DOP points out that Grievant was generally not required to perform any network duties and the time he spent doing those duties was occasional and sporadic. Given Grievant's predominate duties, DOP has determined that the ISA classification remained the best fit for Grievant's position.

W. VA. CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as the DNR, which utilize such positions, must adhere to that plan in

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[8] *See* the Distinguishing Characteristics section of the Classification specifications for the ISS 1 classification. Finding of Fact 10 *supra.*

making their employees' assignments. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994). When an employee believes he is performing the duties of a classification other than the one to which he is assigned, DOP must determine whether reallocation is appropriate. *Hart v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009). The key to the analysis is whether a grievant's current classification constitutes the "best fit" for the duties the grievant performs. *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 are class-controlling. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990). DOP's interpretation and application of the classification specifications at issue are given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) *per curiam*; *See also* Syllabus Point 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981), *appeal dismissed,* 454 U.S. 1131, 102 S. Ct. 986, 71 L.Ed.2d 284. Syllabus Point 1, *Dillon v. Bd. of Ed. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588 (1983).

Grievances contesting a grievant's current classification are therefore decided under rules of law which give DOP's interpretation of classification specifications great weight unless that interpretation is shown to be clearly erroneous. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). It is fair to say that a

grievant challenging his classification has an uphill battle. *Bennett v. Insurance Comm'n and Div. of Pers.* Docket No. 07-INS-299 (June 27, 2008).

Grievant asserts his position is misclassified. He has requested his position be reallocated to an ISS 1 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, an employee must demonstrate "a significant change in the kind or level of duties and responsibilities." Additionally, Grievant must prove by a preponderance of the evidence that his duties 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).

Section 26 of the standard Position Description Form requests that the employee "describe what duties have been added to or deleted from the position since the last review." This information is critical because a reallocation is defined as follows:

> Reallocation: Reassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position.

143 C.S.R. 1 § 3.75. An examination of the PDFs submitted by the Grievant when he requested his reallocations reveal that the predominate duties of his position did not significantly change from the time he took his position at DNR until he transferred to the

Office of Technology. On both of the PDFs, Grievant indicated in section 26 that no duties had been added to or deleted from his position.[9] Since predominate duties assigned to his position did not significantly change, a reallocation of the position was not consistent with the DOP rules.

Additionally, the Classification Specifications for the ISS 1 position list network administration assignments as predominate duties. Grievant performed these functions only on rare occasions when no network administrator was available. Network administrative assignments were never predominate duties for Grievant's position.

Respondent DOP's determination that the ISA classification was the best fit for Grievant's position was not arbitrary or capricious. Consequently, the grievance is DENIED.

Conclusions of Law

1. Grievant bears the burden of proving his 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).

2. The key to the reallocation analysis is whether a grievant's current classification constitutes the "best fit" for the duties the grievant performs. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28,

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[9] *See* Findings of Fact 4 and 7 *supra*.

1991). The predominant duties of the position are class-controlling. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990).

3. DOP's interpretation and application of the classification specifications at issue are given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) *per curiam*; *See also* Syllabus Point 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981), *appeal dismissed,* 454 U.S. 1131, 102 S. Ct. 986, 71 L.Ed.2d 284. Syllabus Point 1, *Dillon v. Bd. of Ed. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588 (1983).

4. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

5. Grievant did not prove by a preponderance of the evidence that the DOP's classification determination regarding his position 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: JULY 21, 2010

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE