THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DIANA K. SMITH,

Grievant,

v. **Docket No. 2009-1532-DEP**

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant Diana K. Smith is employed by the West Virginia Department of Environmental Protection ("DEP") and is classified as an Office Assistant 3. She works in the DEP Office of Explosives and Blasting. On May 12, 2009, Diana Smith filed a grievance contesting the denial of her request for a reallocation. As a remedy, Grievant seeks "[t]o be made whole, including reallocation and back pay." Grievant believes that she should be reallocated to the Secretary 2 classification. Pursuant to WEST VIRGINIA CODE § 6C-2-4 (a)(4), the parties waived levels one and two and proceeded directly to level three.[1] Upon motion by the DEP, an Order was entered joining the Division of Personnel ("DOP") as a party to the grievance.

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on October 7, 2009. Grievant was present at the hearing and was represented by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent DEP was represented by Kristen Boggs, DEP Associate

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[1] Respondent's *Waiver to Level Three and Motion to Join Division of Personnel*, was filed on June 18, 2009.

General Counsel, and Respondent DOP was represented by Karen O'Sullivan Thornton, Senior Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law to be postmarked no later than November 16, 2009. Grievant's representative hand delivered fact\law proposals on November 16, 2009, and Respondent DOP's proposals were received by mail the next day. The grievance became mature for decision on November 16, 2009.[2]

Synopsis

When Grievant was originally hired in the Office of Explosives and Blasting as an Office Assistant 2, there were other employees in the office performing secretarial and clerical work including an Administrative Secretary and a Secretary 2. The office went through a series of changes including eliminating the Secretary 2 position. Grievant's duties were changed during the course of these moves and she requested a reallocation to a Secretary 2 classification in recognition of her new duties. While Grievant's duties did change over time, her predominate duties, as reflected in her Position Description Form, remain clerical and fall within the Office Assistant series. DOP concluded that the best fit for Grievant's position is the Office Assistant 3 classification which she now holds. Grievant did not prove that DOP's classification decision was clearly wrong. The grievance is denied.

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[2] DEP deferred to DOP's decision on the issue of appropriate placement of Grievant's position in the classification system and did not submit separate fact/law proposals.

Findings of Fact

1. Grievant was hired by the DEP in April 2001. She was classified as an Office Assistant ("OA") 2 and worked in the DEP's Office of Explosives and Blasting.

2. The Office of Explosives and Blasting regulates blasting for surface coal mining and administers the training and certification process required for blasters by federal law.

3. During the nearly nine years Grievant has been employed in the Office of Explosives and Blasting, there have been a number of changes in the way the secretarial and clerical work was distributed among the staff in the office.

4. At one point, there was an Administrative Secretary and a Secretary 2 employed in the Office, in addition to Grievant. There has been turnover in both positions and the DEP decided to eliminate the Secretary 2 position. The Administrative Secretary position remained vacant for an extended period of time.

5. Grievant was assigned most of the duties which had been previously performed by the Secretary 2 and the Administrative Secretary.

6. Grievant received a temporary upgrade to the Administrative Secretary classification for the period of May 2008 through March 2009.

7. DEP decided to post and fill the Administrative Secretary position and hired a new employee into that position in February 2009.

8. Grievant did not apply for the Administrative Secretary position because she did not want to work the schedule that was required for that position. Grievant helped train the new employee and was returned to her OA 3 classification when her temporary upgrade expired in March.

9. Once the Administrative Secretary was hired and trained, the duties performed by the office staff were adjusted once again. In addition to the duties she has always performed, Grievant was assigned some duties that were previously performed by three previous employees: a Secretary 2, Administrative Secretary and an Environmental Research Specialist 3.[3] Some of the duties which had been performed by the prior employees were distributed to the new Administrative Secretary as well.

10. Grievant completed a Position Description Form[4] ("PDF") on November 20, 2008, and submitted it to the DOP for consideration. Grievant and her supervisor, James Ratcliff, signed the PDF certifying that the duties and responsibilities listed for Grievant's position on the PDF were accurate and complete. Respondent's Exhibit 1.

11. DOP reviewed the PDF and made a determination that the duties and responsibilities described in the PDF best fit in the OA 3 classification. Therefore, no reallocation was allowed. That determination was dated February 29, 2009. Respondent's Exhibit 1.

12. By letter dated March 11, 2009, Grievant requested that the director of DOP reconsider the decision to deny a reallocation of her position to the classification of

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[3] It is clear that the duties Grievant received were duties performed by employees in these classifications. It was not proven that the duties were peculiar to those classifications and could not be performed by an employee in a different classification.

[4] 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.

Secretary 2. Grievant stressed that when the Secretary 2 in the office retired on October 31, 2008, the duties from that postiion were assigned to Grievant. Grievant's Exhibit 8.

13. Acting DOP Director Tari Crouse denied the request for reconsideration in a letter to Grievant dated April 22, 2009. Director Crouse gave the following explanation for her decision:[5]

> . . . We compared the current duties [for Grievant's position] with those listed on the position description form completed in February 2003. The general role of your position as described on the position description form[6] dated November 2008, is as follows:
> - perform office support for the supervisor and the section members;
> - assist the receptionist answering OEB phone lines;
> - back up for blasting fees;
> - use the tracking system to receive, process, enter and disseminate claims of damage and complaints for action by the appropriate personnel;
> - assist in compiling data needed for personnel to investigate claims;
> - assist program manager with Blasting Certification program; and,
> - assist in other conference functions as needed.
>
> These duties are within the scope of the Office Assistant 3 classification. The duties listed on question #26[7] of the November 2008 position description form are as follows:
> - backup blasting damage claim processing, routing and tracking;
> - blaster's certification program;
> - back-up for conducting all purchasing, equipment tracking, FIMS;
> - back-up for processing and tracking of blasting affidavits, fees and coding;
> - assist in auditing of blasting and field data.
>
> The position description form serves as the official record of duties and responsibilities assigned to the position. The duties listed on question # 26

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[5] The format of Acting Director Crouse's letter is altered to separately list each duty, but the content is quoted as it was written.

[6] These are the duties that Grievant and her supervisor certified as accurately describing Grievant's position.

[7] Question # 26 of the PDF asked the applicant to list duties that have been added or deleted to the position since the last review.

are not more difficult and complex than the primary duties of the position and as such, cannot be the basis for reallocation to a higher classification.

Respondent's Exhibit 2.

14. The duties listed by Grievant as making up the majority of her time required the following types of activities:

- Reserving rooms and acquiring refreshments for training sessions;
- Processing forms, applications and fees;
- Tracking and recording data related to the blasting, training, test scores and seismographs;
- Preparing and signing correspondence, requisitions and other documents as directed by her supervisor;
- Scheduling appointments and making travel arrangements for her supervisor;
- Responds to inquiries where knowledge of unit policy, procedures and guidelines is required;
- Verifying information from out of state blasters;
- Back-up duties for the Administrative Secretary.

Respondent's Exhibit 1.

15. The Classification Specifications for the OA 3 position in pertinent part read as follows:

Nature of Work
Under general supervision, performs advanced level, responsible and complex clerical tasks of a complicated nature involving interpretation and application of policies and practices. Interprets office procedures, rules and regulations. May function as a lead worker for clerical positions. Performs related work as required.

Distinguishing Characteristics

Performs tasks requiring interpretation and adaptation of office procedures, policies, and practices. A significant characteristic of this level is a job inherent latitude of action to communicate agency policy to a wide variety of people, ranging from board members, federal auditors, officials, to the general public.

Examples of Work

Analyzes and audits invoices, bills, orders, forms, reports and documents for

accuracy and initiates correction of errors.
Maintains, processes, sorts and files documents numerically, alphabetically, or according to other predetermined classification criteria; researches files for data and gathers information or statistics such as materials used or payroll information.
Types a variety of documents from verbal instruction, written or voice recorded dictation.
Prepares and processes a variety of personnel information and payroll documentation.
Plans, organizes, assigns and checks work of lower level clerical employees.
Trains new employees in proper work methods and procedures.
Answers telephone, screens calls, takes messages and complaints and gives information to the caller regarding the services and procedures of the organizational unit.
Receives, sorts and distributes incoming and outgoing mail.
Operates office equipment such as electrical calculator, copying machine or other machines.
Posts records of transactions, attendance, etc., and writes reports.
Files records and reports.
May operate a VDT using a set of standard commands, screens, menus and help instructions to enter, access and update or manipulate data in the performance of a variety of clerical duties; may run reports from the database and analyze data for management.

16. The Classification Specifications for the Secretary 2 classification in pertinent part read as follows:

Nature of Work

Under general supervision, at the full-performance level, provides clerical and administrative relief, exercising discretion and independent judgment. May sign supervisor's name to routine memorandums, correspondence and forms. Attends meeting in the supervisor's absence or on the supervisor's behalf. Necessity for dictation, familiarity with word processor and other special requirements vary depending upon supervisor's preference.

Distinguishing Characteristics

Work at this level is characterized by the level of administrative support performed. Typically, duties such as researching a variety of sources (library, division archives, past-practice documents, outside private sources, etc.), attending meetings for supervisor where interpretation of information gathered is necessary, and coordinating the activities of section, unit, etc., are characteristic of this level.

At this level, the work requires the application of specific knowledge necessary to complete complex procedural or unusual assignments. Incumbent determines appropriate procedures from among various and variable methods, resources, and processes, or devises innovative methods to accomplish assignment. Incumbent is responsible for his/her own work, and may assign, direct, or supervise the work of others. Although some tasks are defined and self-explanatory, the incumbent works closely with supervisor to set objectives, priorities, and deadlines; may independently set goals and time frames for individual work assignments. Work is typically reviewed randomly upon completion for adherence to guidelines. Contacts at this level are frequent, typically varied and non-routine. Incumbent answers procedural or program inquiries, whenever possible, or refers. Contacts are frequently of a confidential or sensitive nature and require tact.

Examples of Work

Coordinates activities associated with the functions of the division/section/unit, planning and implementing office procedures.
Researches basic statistical work in the compilation of reports involving the activities of the division/section/unit.
Responds to inquiries where considerable knowledge of unit policy, procedures, and guidelines is required.
Answers telephone, screens calls, and places outgoing calls.
Screens mail and responds to routine correspondence.
Schedules appointments and makes travel arrangements and reservations for supervisor.
Signs, as directed, supervisor's name to routine correspondence, requisitions, and other documents.
Attends meetings with or on behalf of supervisor to take notes or deliver basic information.
Takes and transcribes dictation, or transcribes from dictation equipment.
Composes form letters, routine correspondence, and factual reports requiring judgment and originality.
Gathers, requests, and/or provides factual information, requiring reference to a variety of sources.
Types, using standard typewriter or word processing equipment, reports, manuscripts, and correspondence; proofreads and corrects to finished form.
May delegate routine typing, filing, and posting duties to subordinate clerical personnel.
May maintain bookkeeping records for grants, contract or state appropriated funds or related departmental accounts.
May prepare payrolls, keep sick and annual leave records, act as receptionist, and perform other clerical duties as needed.
May assign and review the work of others.

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).

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 Department of Environmental Protection, which utilize such positions, must adhere to that plan in 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 she is performing the duties of a classification other than the one to which she 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).

Grievant asserts her position is misclassified. She has requested her position be reallocated to a Secretary 2 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." An increase in the number the 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 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 an employee'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 supra; Falquero v. Dep't of Envtl. Prot.,* Docket No. 2008-1902-DEP (Feb. 3, 2010).

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 in 1989, and has been working with personnel issues for the State for more than thirty years. 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. Upon reviewing the relevant information, Ms. Anderson noted that Grievant's duties did not fit the Secretary 2 classification because she is not required to exercise discretion and independent judgements, which are major components found in the Nature of Work section of the classification specifications for the Secretary 2 classification. *See* Finding of Fact 16 *supra;* Greivant's Exhibit 3. Rather, Grievant's responsibilities were routine in nature and were dictated by set policies and procedures. Based upon Grievant's detailed description of her duties in her testimony, as well as her PDF, Ms. Anderson noted that nearly all of her duties were clerical in nature. Some of Grievant's duties were complex clerical tasks which justified the classification of OA 3, which is the highest classification in the OA series.

Grievant's duties have changed over the years and her position has absorbed many of the duties that were performed by other employees who held higher classifications. However, a change of duties is not sufficient to qualify for a reallocation. There must be a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.75. All of the new duties assigned to Grievant's position were clerical in nature so there was no significant change in the kind of duties she was performing.

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 regarding the classification of Grievant's position is supported by the evidence and Grievant was unable to prove that determination was clearly wrong. Consequently, the grievance is 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. In order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her 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).

3. To receive a reallocation, a grievant must demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in the 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*.

4. The goal of the reallocation analysis is to ascertain whether an employee'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 supra; Falquero v. Dep't of Envtl. Prot.,* Docket No. 2008-1902-DEP (Feb. 3, 2010).

5. 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).

6. DOP performed the required examination of Grievant's position and determined that the best fit for the position is the OA 3 classification. DOP's determination regarding the classification of Grievant's position is supported by the evidence and Grievant was unable to prove that 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: APRIL 26, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE