THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMMY R. PATTON,
Grievant,

v. **Docket No. 2010-0882-DOA**

CONSOLIDATED PUBLIC RETIREMENT BOARD, DEPARTMENT OF ADMINISTRATION, and DIVISION OF PERSONNEL,
Respondents.

DECISION

_____Grievant, Tammy R. Patton, is employed by the West Virginia Consolidated Public Retirement Board ("CPRB") as an Information Systems Specialist II ("ISS II"). Ms. Patton filed the original grievance on January 5, 2010, stating as follows: "I am currently performing duties over and above my current classification as an Information Systems Specialist II. See attached."[1] As relief, Ms. Patton seeks reallocation to the position of ISS III.[2]

On January 29, 2010, a decision was issued at level one of the grievance process by Anne Werum Lambright, Esq., Executive Director of the Consolidated Public Retirement Board, asserting that she was without the ability to grant the grievance. Thereafter,

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[1] Grievant attached to her grievance form a two-page, single-spaced statement specifying her grievance. Such is part of the record in this matter and it is hereby incorporated herein by reference, as if stated in its entirety.

[2] At the level 3 hearing, presiding Administrative Law Judge ("ALJ") Wendy A. Elswick noted that Grievant used the word "reclassification" in her Grievance. ALJ Elswick confirmed on the record that Grievant is seeking to be moved from the position of ISS II to ISS III. ALJ Elswick explained that such would not be a "reclassification," but rather a "reallocation." ALJ Elswick further noted that as these words are terms of art, the grievance would be interpreted as seeking a reallocation.

Grievant timely appealed to level two of the grievance process. A level two mediation was conducted on June 17, 2010.

Grievant timely appealed to level three of the grievance process. On October 15, 2010, a level three grievance hearing was held at the West Virginia Public Employees Grievance Board's Charleston office. Grievant appeared in person, *pro se*. Respondent CPRB was represented by Jeaneen Legato, Esquire. Respondent Division of Personnel ("DOP") was represented by Karen O'Sullivan Thornton, Esq. The Department of Administration ("DOA") was represented by Stacy DeLong, Esq. Also appearing was Erica M. Mani, Executive Director of CPRB, as the agency representative.

At the conclusion of the hearing, the parties agreed to submit proposed Findings of Fact and Conclusions of Law by November 19, 2010. On or about November 3, 2010, Counsel for the DOA and the DOP filed a joint Motion for Extension of Time with the Board seeking additional time to file their proposed Findings of Fact and Conclusions of Law. This joint motion was granted by ALJ Wendy A. Elswick[3] on December 6, 2010. In the Order granting the joint motion, ALJ Elswick set December 30, 2010, as the new deadline for the parties to submit proposed Findings of Fact and Conclusions of Law to the Board.

Grievant submitted proposed Findings of Fact and Conclusions of Law to the Grievance Board by hand-delivery on December 30, 2010. Respondents DOP and DOA submitted joint proposed Findings of Fact and Conclusions of Law to the Board by letter dated December 30, 2010, which was received by the Board on January 3, 2011.

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[3] ALJ Wendy A. Elswick left the employment of the West Virginia Public Employees Grievance Boad in February 2011. Thereafter, the undersigned was assigned to this case to render a decision.

Respondent CPRB submitted proposed Findings of Fact and Conclusions of Law to the Board by letter dated January 6, 2011, which was received by the Board on January 10, 2011.[4] This matter became mature for decision on January 6, 2011.

Synopsis

Grievant is employed at the Consolidated Public Retirement Board as an ISS II. Grievant alleges that her position should be classified as an Information Systems Specialist III ("ISS III") because her duties and responsibilities have expanded beyond those of an ISS II. As such, Grievant seeks a reallocation of her position. Respondents[5] assert that Grievant's position is properly classified as an ISS II, and that any additional duties Grievant may have assumed do not constitute a significant change in Grievant's duties and responsibilities.

Grievant was unable to demonstrate that her duties and responsibilities had changed significantly, so as to warrant a reallocation. Further, Grievant failed to demonstrate that the classification of ISS III was a better fit for her duties. Respondents demonstrated that the best fit for the Grievant's position is the classification of ISS II. Therefore, the grievance is DENIED.

Findings of Fact

The following Findings of Fact are based upon a complete and thorough review of

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[4]It is noted that in its proposed Findings of Fact and Conclusions of Law, the CPRB stated for the record that it concurs in the Findings of Fact and Conclusions of Law submitted by Respondents DOA and DOP. No additional proposed findings or conclusions were submitted by the CPRB.

[5]The record indicates that, initially, the CPRB agreed that the Grievant's position should be reallocated to that of an ISS III. However, the CPRB's position on this issue appears to have changed during the course of the litigation of this grievance.

the record created in this grievance:

1. Grievant, Tammy R. Patton, is employed by the CPRB as an ISS II in its Networking Section. Grievant is an at-will employee and is not in the classified service.[6]

2. The classification specification ("class spec") for ISS II states as follows[7]:

> **Nature of Work**
> Under general supervision, performs full-performance level work in selecting, installing, implementing and maintaining multiple platforms and multiple applications, in particular that associated with Local Area Network/Wide Area Networks, mid-range systems and/or large systems. Depending upon the assignment, may function as a resource for software support and/or develop a computer literacy curriculum and training, for a large agency or multiple agencies. Toubleshoots [sic] problems which occur in various networked micro, mini and mainframe computer systems. Trains users on proper procedure and usage of computer hardware and software and/or assists in development of customized user training. Evaluates and recommends software and upgrades. 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 position requires advanced training or experience in a technical specialty. The Information Systems Specialist 2 is primarily assigned to installations involving complex communication needs or integrated solutions involving multiple applications and multiple platforms. Tasks may include hardware and software selection, implementation planning and

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[6] See testimony of Grievant.

[7] It appears that the two classification specifications cited herein have not been updated since 2006, or at least since IS&C was dismantled and the Office of Technology was created. These specifications make repeated reference to IS&C. From a review of the evidence, it appears that the parties understand that IS&C no longer exists, and the undersigned is fully aware of the same.

installation, training one-on-one and in a classroom environment, and providing on-going support. Incumbents work in projects involving complex connectivity between departments, multiple locations and multiple platforms. May include full-performance information technology forensic examinations of computer hardware, software or records systems.

Examples of Work

Supports end-users via telephone and/or site visit regarding system problems such as access and/or security, printer access and operations (through LAN, mid-range computer or IS&C system control units), server based and PC standalone applications and /or general system(s) problems on LAN, mid-range system, and/or access to other systems (for example IS&C's mainframe, federal systems), internet access, private time-sharing computer services, or external dial-up/dial-in access to various systems.

Uses diagnostic and/or monitoring software to identify problems and takes appropriate corrective action, either by repairing unit or contacting appropriate vendor.

Participates in the review and/or production of automation plans; information technology and networking requests for hardware/software; hardware/software; reviews needs analysis and determines applications which could streamline the process; may meet with users to clarify work flow or procedures; researches alternative hardware/software which could further enhance the system; reports to supervisors any problems with recommended course of action.

Plans, conducts or assists in group and one-on-one training of computer applications and operations software and proper use of hardware.

Develops training modules and instructional materials.

Reviews and evaluates vendor training packages to determine benefit to the training system and provides technical support in its use.

Coordinates with users, management and vendors the local and remote installation of personal computers, local area networks, terminals, printers, communication controllers and other information processing equipment, including identifying requirements and coordinating other associated activities such as data cabling and electrical upgrades.

Trains co-workers on networking setup and operations and develops and maintains current LAN documentation.

Maintains current knowledge level by researching technical literature and attending classes/seminars, contact technical staff in other state, federal, and private agencies for information; may write or supply users with information to complete requisition requests or specifications.

Tests new hardware or software supplied by vendors to determine the scope of capabilities, accuracy of functions, and level of user literacy required to operate the system; writes documentation on hardware and software which have been tested in-house.

Serves as a forensic examiner responsible for planning, coordinating and directing forensic activities; inventories and examines computer-related evidence such as magnetic media storage devices, floppy/hard disks, optical disks, memory cards and magnetic strip cards.

Provides technical guidance and assistance to investigators to prevent data and equipment damage.

Trains federal, state, and local law enforcement personnel on computer examination/investigation techniques.

May be required to testify in court on the procedures and methods used to obtain data.

Knowledge, Skills, and Abilities

Knowledge of capabilities and limitations of computers and related devices.

Knowledge of local area and wide area networking, information processing and communications concepts and standards.

Knowledge of the operations of LAN management software and/or operating systems software, application software and PC tools.

Knowledge of PC, mini and mainframe operating systems.

Knowledge of computer hardware, software, and its terminology.

Knowledge of proper methods of evidence handling and storage.

Ability to analyze and evaluate work environments, computer systems, user requirements and information processes.

Ability to evaluate complex information systems and understand their structure, component parts and inter-relations.

Ability to clearly report activities and identify potential problem

areas to manager.

Ability to communicate clearly, both orally and in writing.

Ability to analyze information problems and apply technical information solutions.

Ability to compile information and interpret technical information in user friendly formats.

Ability to perform computer forensic examinations.

Ability to duplicate and preserve digital evidence.

Minimum Qualifications

Training: Bachelor's degree from an accredited college or university.

Substitution: Three years of full-time or equivalent part-time paid personal computer or server support experience may be substituted for the required training. Successful completion of twelve credit hours or the equivalent thereof of industry recognized authorized/certified LAN administration, network service/support and/or network technologies training may substitute for one year of the required training.

Experience: Three years of full-time or equivalent part-time paid experience in information processing field, one year of which is experience in local area network administration support and/or networking of standalone, mainframe, minicomputer, and LAN connected microcomputers and two years of which is experience in installation of hardware and software, support and/or training.

Substitution: Twelve hours of computer science or data processing may substitute for one year of information processing experience excluding PC and LAN administration support.

<u>FOR FORENSIC IT SPECIALIST POSITIONS</u>

Training: Bachelor's degree from an accredited four-year college or university with at least 20 semester hours in computer science, information technology, information systems analysis, information management, mathematics, computer engineering, electrical/electronic engineering or other directly related field.

Substitution: Bachelor's degree from an accredited four-year college or university and two years full-time or equivalent part-time paid law enforcement investigative experience involving the recovery of evidence from computers or other storage media may be substituted for the 20 semester hours in the specific disciplines.

Experience: Three years of full-time or equivalent part-time paid experience in information technology forensic investigations or in computer systems analysis of accounting/auditing systems.

Substitution: Possession of one of the following certifications may substitute for the experience: A+ Certification Personal Computer Hardware Course; Network+ Certification; FBI Computer Analysis Response Team (CART) Field Examiner Certification Court; or basic computer forensic training from a recognized training facility.[8]

3. The class spec for ISS III states as follows:

Nature of Work
Under limited supervision, performs advanced professional/technical consulting tasks in designing, selecting, installing, implementing and maintaining complex network system office automation equipment, software and communications. Depending upon the assignment, develops course materials and curriculum for computer literacy and software classes. Trains users and support staff in basic operations and applications. Evaluates and documents system performance and compatibility. Specializes in broad based complex network installations (multi-platform, multi-site, multi-applications systems). Works on projects involving connectivity between various locations and systems and projects involving connectivity to various federal, state or other external systems. May coordinate and/or lead day-to-day activities of staff members engaged in information system activities, including trouble-shooting various systems and networks, consulting, user and operations support, planning and procurement activities. Performs related work as required.

Distinguishing Characteristics
This is an advanced level technical and/or lead work position where familiarity with the department and a recognized specialty allows the incumbent significant latitude in making recommendations to management relating to technical matters and in setting agency-wide standards for hardware, software, and communication networks. May provide guidance to lower level technical specialists.

Examples of Work
Coordinates the activities involved in meeting implementation objectives with management, users, and Information Services and Communications Division (IS&C) in

[8] See Respondents' Exhibit 3.

determining user requirements, configuring systems based on those requirements and other pertinent factors, planning for installation requirements, preparing justifications, working closely with IS&C, posting bids based on prepared specifications, receiving and reviewing bids for compliance with minimum specification, preparing final purchase documents for purchase, reviewing final recommendations with management of appropriate office.

Coordinates activities of staff members in support of complex networks - Local/Wide Area Networks, mid-range systems, PC and mainframe operations.

Provides activity, status, and feasibility reports to management.

May train subordinates in hardware and communications protocols.

Monitor system(s) operations through field staff reports and by on-site visits via management software systems and hardware monitoring.

Supports end-users via telephone and/or site visit regarding communication, printer, security, applications, and/or general systems (s) problems on LAN to LAN, LAN to Wide Area Networks, (for example IS&C's mainframe, federal systems), internet access, private time-sharing computer services, or external dial-up/dial-in access to various systems.

Participates or individually conducts user needs analysis; meets with users to determine environment and system requirements; discusses hardware/software/connectivity options.

Operates diagnostic and/or monitoring equipment/software to identify problems and takes appropriate corrective action, either by repairing unit or contacting appropriate vendor.

Reviews requests for hardware and software for compatibility with established systems, assigning research to subordinates.

Meets with users to discuss automation plans, technology and networking plans, provides systems and related costs analyses to planning staff, discusses alternatives to arrive at cost and time effective solutions to user needs.

Writes major procurement documents and related justifications to obtain competitive bids, receives and reviews bid [sic] for compliance with specifications and cost effectiveness, makes recommendation to user contact as to award and/or prepares purchase documents for

process.

Designs wiring plans for computer, network and telecommunications, installing and testing cabling and equipment (including installation of upgrade cards, memory and other devices to improve existing equipment as well as assembly, initial testing and final installation of new computer equipment and related devices), planning, installation, monitoring and maintenance of LAN and Wide Area Network (WAN).

Calculates load requirements, prepares specifications and develops installation plans and installs Uninterruptable [sic] Power Supplies (UPS) units.

Plans, conducts or assists in group and one-on-one training of computer applications and operations software and proper use of hardware.

Develops training modules and instructional materials.

Maintains current knowledge level by researching technical literature and attending classes/seminars, contact technical staff in other state, federal and private agencies for information.

Installs and configures hardware and software.

Evaluates new computer features and devices, revises basic specifications to keep current with industry advances and ensures compliance with state and federal standards and requirements and makes recommendations to superiors for purchase.

Knowledge, Skills and Abilities

Knowledge of capabilities and limitations of computers and related devices.

Knowledge of networking, information processing and communications concepts and standards.

Knowledge of PC, mini and mainframe operating systems.

Knowledge of computer hardware, software and its terminology.

Knowledge of data communications, theory, protocols, industry standards and terminology.

Knowledge of electronics and electricity, and communications technology and terminology.

Ability to analyze and evaluate work environments, computer systems, user requirements and information processes.

Ability to evaluate complex information systems ad understand their structure, component parts and inter-relations.

Ability to diagnose and resolve technical problems, which may be of a highly complex nature.

Ability to establish and maintain effective working relationships with subordinates, superiors, user community.
Ability to clearly report activities and identify potential problem areas to manager.
Ability to communicate clearly, both orally and in writing.
Ability to analyze information problems and apply technical information solutions.
Ability to compile information and interpret technical information for non-technical staff in a user friendly format.

Minimum Qualifications

Training: Bachelor's degree from an accredited college or university.

Substitution: Three years of full-time or equivalent part-time paid personal computer or server support experience may be substituted for the required training. Successful completion of twelve credit hours or the equivalent thereof of industry recognized authorized/certified LAN administration, network service/support and/or network technologies training may substitute for one year of the required training.

Experience: Five years of full-time or equivalent part-time paid experience in information processing field, one year of which is experience in local area network administration support and/or networking of standalone, mainframe, minicomputer, and LAN connected microcomputers and two years of which is experience in installation of hardware and software, support and/or training.

Substitution: Twelve hours of computer science or data processing may substitute for one year of information processing experience excluding PC and LAN administration support.[9]

4. Grievant began the process to seek reallocation of her position to that of an ISS III in or about June/July 2009. In doing so, Grievant submitted a Division of Personnel Position Description Form ("PDF") to DOP detailing her job duties with the CPRB.

5. As was documented in her PDF, Grievant has no supervisory duties and no

[9] See Respondents' Exhibit 4.

signature authority.

6. Grievant's supervisors[10], Tami Reed (CPRB Assistant Manager) and Barbara Haddad (CPRB Chief IT / Information Officer), have given Grievant a "lead role" within the agency, and have assigned her to work/maintain the agency's Information Technology ("IT") "to do list." Grievant was described as the "lead" and the "go-to person".[11] Further, Grievant's supervisors have permitted Grievant to give assignments from the list to the other "network technician" and/or IT staff members at the CPRB, as needed.[12]

7. Grievant's supervisors have encouraged Grievant to take more initiative in her position and to work more independently.[13]

8. Over time, Grievant has assumed additional duties and responsibilities in her ISS II position as the CPRB has expanded and as new needs have arisen. Further, Grievant works independently, with limited supervision.

9. Grievant's position requires her to maintain the agency's server, as well as requiring her to perform many other IT functions for the CPRB. However, Grievant's position does not require her to work on a state-wide network, or WAN.[14] Grievant works on the local area networks (LAN) for the CPRB and with the various computers, hardware,

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[10] It is unclear from the evidence presented who actually supervises Grievant. Both Haddad and Reed claimed to be Grievant's supervisors. As it appears likely that their supervisory duties pertaining to Grievant overlap, the undersigned is addressing both women as Grievant's supervisors.

[11] See testimony of Barbara Haddad.

[12] See testimony of Barbara Haddad and Tami Reed.

[13] See testimony of Barbara Haddad and Tami Reed.

[14] See the testimony of Barbara Jarrell and of Barbara Haddad.

and software at her place of employment.

10. The ISS III classification requires working on wide area networks (WAN), or the state-wide network.

11. Grievant and the other network technician at the CPRB provide various IT training for CPRB staff members. Grievant and the other network technician prepare some of the training materials, and also prepare simplified reference sheets for the staff members to use at their desks. These simplified reference sheets are commonly referred to as "cheat sheets" by those in the IT section of the CPRB. However, Grievant does not develop training modules in her position.

12. As part of her job, Grievant regularly performs purchasing functions for the CPRB with respect to computer hardware and software. The purchasing aspect of her job has grown over the years.[15]

13. In her position of ISS II, Grievant has assumed the new duty of working with her office building's security system, both computer hardware and software. However, the building security component of Grievant's position is only a small part of her job.

14. After reviewing Grievant's PDF, DOP determined that new duties[16] were identified in Grievant's PDF, and that DOP Administrative Rule, Section 9.5(a) required these new duties be posted.[17]

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[15] See Grievant's testimony.

[16] Barbara Jarrell testified that from the PDF submitted, it appeared that the CPRB had added duties to a classification which required those new duties to be posted.

[17] See Memoranda dated July 2, 2009 and July 23, 2009 from Barbara Jarrell to Anne Werum Lambright, part of Grievant's Exhibit 1.

15. Despite these duties being characterized as being "new," Grievant had been performing each of those duties except for the building security component since 2001.[18]

16. Further, Grievant has been performing all of her identified duties, except the security component, since she began working at the CPRB in 2001.

17. By letter dated August 17, 2009, Anne Werum Lambright, former Executive Director of the CPRB, informed Barbara Jarrell, DOP Senior Personnel Specialist, that the required posting was completed, and that she and Grievant's direct supervisor recommended Grievant for this position.

18. As stated in a Memorandum dated October 28, 2009, from Barbara Jarrell at DOP to Anne Werum Lambright, DOP completed its review of Grievant's duties and responsibilities and determined that Grievant's position was correctly classified as an ISS II.

19. By letter dated November 5, 2009, to Sara P. Walker, Executive Director of DOP, Anne Werum Lambright, on behalf of the CPRB, stated as follows: "[p]lease accept this as Ms. Patton's and the agency's joint request for reconsideration. We would also jointly request a desk audit so that the Division of Personnel can better understand the additional duties and management responsibilities the agency has required of Ms. Patton to assume."[19]

20. DOP reconsidered its classification decision regarding Grievant's position and conducted a desk audit as Grievant and the CPRB had requested. In reconsidering its

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[18] See testimony of Grievant.

[19] See letter dated November 5, 2009, part of Grievant's Exhibit 4.

classification decision, DOP's specialists reviewed Grievant's PDF, her supervisor's comments, the information provided in the desk audit, and class specifications.[20]

21. DOP identified the following as the predominant duties of the position of ISS II: "1) coordinate and provide daily customer support to agency personnel regarding telecommunications and computer hardware and software needs; 2) maintain agency's four servers, two HD storage systems and internal network connectivity; 3) recommend information technology needs to management to include writing procurement documents; and, 4) act as agency liaison with the West Virginia Office of Technology."[21]

22. Following its review, DOP affirmed its decision to classify Grievant's position as an ISS II, determining that "[t]he duties described on Ms. Patton's Position Description Form as well as the information provided during the desk audit are full performance level work of an Information Systems Specialist 2."[22]

Discussion

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health and 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

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[20] See Respondent's Exhibit 2 (letter dated December 11, 2009, from Sara P. Walker, Director of DOP, to Anne Werum Lambright, former Executive Director of CPRB).

[21] See Respondent's Exhibit 2.

[22] See Respondent's Exhibit 2.

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 and classified-exempt services. W. VA. CODE § 29-6-10(1). State agencies that utilize such positions, such as the CPRB, must adhere to the position classification 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 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).

Grievant asserts that her position at the CPRB is misclassified alleging that she performs duties that are assigned to a higher job classification. She has requested that her position (ISS II) be reallocated to ISS III, and that she be placed at a higher pay grade. Grievant further contends that the "Executive Director of the CPRB, has the independent authority within the guidelines set forth by the CPRB to hire, fire, determine salary levels and/or job classifications."[23]

It is noted that Grievant's employer, the CPRB, is an exempt state agency. W. VA. CODE §29-6-4(c)(5). As such, Grievant is not employed within the classified service of state government. Instead, Grievant is a classified-exempt employee. W. VA. CODE § 29-6-2. Even though Grievant is a classified-exempt employee of an exempt agency, DOP is still

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[23] See Grievant's Grievance Form attachments.

responsible for determining whether Grievant's position is classified properly. W. VA. CODE §§ 29-6-1; 29-6-5; 29-6-10.

DOP is charged with the duty of formulating a classification plan for classified service positions *and* classified-exempt service positions within state government. W. VA. CODE §§ 29-6-1; 29-6-5; 29-6-10; *See also,* 143 C.S.R. 1 § 4.9. Under the classification plan for the classified-exempt service, all positions that are sufficiently similar with respect to type, difficulty, and responsibility of work are to be included in the same class. W. VA. CODE § 29-6-10; *See also,* 143 C.S.R. 1 § 4.9(a). Further, the classification plan is to be based on an analysis of the duties and responsibilities of each position, and each position is to be allocated by the Director of Personnel to its proper class in the plan. *Id.*

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 assigned to the position." *Keys v. Dep't of Environmental Protection*, Docket No. 06-DEP-307 (April 20, 2007); *Kuntz/Wilford v. Dep't of Health and Human Res.,* Docket No. 96-HHR-301 (Mar. 26, 1997); *Siler v. Div. of Juvenile Serv.,* Docket No. 06-DJS-331 (May 29, 2007); *See also,* 143 C.S.R. 1 § 4.7. An increase in the number of duties does not necessarily establish a need for reallocation. *Kuntz/Wilford, supra.* "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also

does not require reallocation." *Id.*

Personnel job specifications generally contain the five sections as follows: Nature of Work; Distinguishing Characteristics; Examples of Work; Knowledge, Skills and Abilities; and, Minimum Qualifications. These specifications are to be read in a "pyramid fashion," meaning, 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 the classification specification is the most critical section. *See generally, Dollison v. W. Va. Dep't of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

In order for Grievant to prevail upon a misclassification claim, she must prove by a preponderance of the evidence that her duties more closely match another cited DOP 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 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).

Further, 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.*

Blakenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993). 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 *Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

It is noted that at the level three hearing, an incident occurred which called in to question the credibility of witnesses Barbara Haddad and Tami Reed. Counsel for DOA informed the presiding ALJ, Wendy A. Elswick, that following her testimony and despite clear instructions from the ALJ, Barbara Haddad apparently spoke to Tami Reed about what had occurred in the hearing prior to Ms. Reed being called to testify. On the record, the ALJ and the three lawyers for the respective Respondents questioned Tami Reed about her conversation with Ms. Haddad. Ultimately, ALJ Elswick found that Ms. Haddad's speaking to Tami Reed about the proceeding, despite clear instructions to refrain from doing so, relates to the credibility of Ms. Haddad as a witness. Accordingly, ALJ Elswick ruled that such would be considered when assigning any weight to Haddad's testimony. The undersigned has considered the same and has abided by the ruling of ALJ Elswick in assigning weight, if any, to the testimony of Barbara Haddad. It is further noted that both Reed and Haddad have reallocation grievances pending before the Board.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-

066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/ W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

It is noted that the undersigned was not present at the level three grievance hearing held in this matter. Therefore, the undersigned did not have the opportunity to observe the witnesses' demeanor. However, demeanor is only one of the factors that may be used to assess a witness's credibility.

It is not disputed that Grievant's supervisors have placed Grievant in charge of maintaining and working the agency's IT "to do list." As part of this duty, Grievant assigns work to another network technician and to other IT staff members as needed. Additionally, Grievant has been given a "lead role" at the agency, has started to work more independently under her current supervisors, and has taken on more of a role in purchasing for the agency in the last few years. Also, Grievant has assumed the responsibility of working with/maintaining the security camera and software for the agency's

building. However, the evidence presented establishes that Grievant has been doing all of these job duties for over three years. Further, Grievant's supervisor, Barbara Haddad, ultimately testified that other than Grievant's duties regarding building security, Grievant's additional duties were more of the same duties she has always performed. Grievant also admitted during her testimony that she has been essentially performing the same job, aside from her building security duties, since she began working for CPRB in 2001.

The undersigned does not doubt that Grievant is a valued employee of the CPRB, and that the agency relies on her work. However, the only new duty, or responsibility, specifically identified by the Grievant in this proceeding is the security component. The security component is, admittedly, a very small portion of the Grievant's position. The undersigned does not doubt that Grievant's duties and responsibilities have evolved as the agency expanded, and as new needs have arisen. However, expansion, or evolution, of duties does not necessarily warrant a reallocation. The undersigned is not persuaded by Barbara Haddad's testimony that Grievant is working more in the realm of an ISS III. All of Grievant's duties and responsibilities fall squarely within the ISS II position class spec. Further, the testimony of Haddad, Reed, and Grievant concerning the "new duties" identified on the PDF, as well as the PDF's preparation makes the undersigned somewhat question the accuracy of all the statements made on the PDF.

Grievant did not demonstrate that her duties and/or responsibilities as an ISS II have significantly changed. Grievant testified that she has been doing all of her identified duties, except for the security component, in some form since she began working at the CPRB in 2001. Grievant did not demonstrate that any additional, or new, duties she has assumed in her position are the predominant duties of her position. The record establishes that

since becoming an ISS II, and as the agency has grown, Grievant's job requirements have expanded, and she has assumed additional duties. However, these additional duties, such as dealing with the building security system, are *not* outside the class spec of an ISS II, and they are not her predominant duties. Further, building security is only a small component of Grievant's position. As Grievant contends, there appears to be some overlap between the duties of the two positions. However, the focus must be on the predominant duties of the classification. Grievant's predominant duties, as identified in the PDF, clearly fall within the class spec of an ISS II.

Barbara Jarrell, Administrative Services Manager, with the Classification and Compensation section of DOP, testified that the ISS III position is distinguished from the ISS II position in that the ISS III works on the state-wide network, or wide area network (WAN). Ms. Jarrell testified that an ISS II works on local area networks for agencies (LAN), as opposed to the state-wide network (WAN). In comparing the classification specs for the two positions, the ISS III classification requires working with/on wide area networks (WAN).[24] It is noted that it appears Grievant performs some duties that appear in the ISS III class spec, along with those identified in the ISS II class spec. Therefore, there is some overlap. However, when looking at the predominant duties, the evidence demonstrates that the best fit for Grievant's position is as an ISS II. Grievant appears to contend that as she works with her agency connecting to the wide-area network through "Blue Zone" she is working with the WAN. However, this was refuted by the testimony of Barbara Haddad. Haddad testified that Grievant did not work on the state-wide network, or WAN.

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[24] See Respondent's Exhibit 4.

Lastly, the undersigned should note that Barbara Jarrell testified that the ISS III position is to be used only at the Office of Technology, and that there is *nothing* additional Grievant could do to change Grievant's position classification to an ISS III. The undersigned is not persuaded by this. Nowhere in the class spec for the ISS III does it state that the ISS III position is limited for use *only* at the Office of Technology, nor is there anything in the language of the class spec that supports this interpretation. In fact, the words "Office of Technology" never appear in the class spec for ISS III. With the daily advances in technology, the ever-changing organization of our state governmental agencies, and with the changing needs of all agencies within state government, it is not out of the realm of possibilities that an IT person working in an agency office could or would need to work on the state-wide network, or WAN. If DOP is attempting to limit the use of the ISS III position only to those working at the Office of Technology, DOP needs to rewrite their classification specifications, or at least provide some rational basis for the limitations based upon the existing class specs.

For the reasons set forth herein, Grievant has not met her burden in ths matter. Therefore, the grievance shall be **DENIED**.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving their 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 and 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. 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 and classified-exempt services. W. VA. CODE § 29-6-10(1). State agencies that utilize such positions must adhere to the position classification plan in making their employees' assignments. *Toney v. W.Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994).

3. DOP is charged with the duty of formulating a classification plan for classified service positions and classified-exempt service positions within state government. W. VA. CODE §§ 29-6-1; 29-6-5; 29-6-10; 143 C.S.R. 1 § 4.9. Under the classification plan for the classified-exempt service, all positions that are sufficiently similar with respect to type, difficulty, and responsibility of work are to be included in the same class. W. VA. CODE § 29-6-10; 143 C.S.R. 1 § 4.9(a). Further, the plan is to be based on an analysis of the duties and responsibilities of each position, and each position is to be allocated by the Director of Personnel to its proper class in the plan. *Id.*

4. 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.

5. 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).

6. To receive a reallocation, an employee must demonstrate "a significant change in the kind or level of duties and responsibilities assigned to the position." *Keys v. Dep't of Environmental Protection*, Docket No. 06-DEP-307 (April 20, 2007); *Kuntz/Wilford v. Dep't of Health and Human Res.,* Docket No. 96-HHR-301 (Mar. 26, 1997); *See, Siler v. Div. of Juvenile Serv.,* Docket No. 06-DJS-331 (May 29, 2007); *See also,* 143 C.S.R. 1 § 4.7. An increase in the number of duties does not necessarily establish a need for reallocation. *Kuntz/Wilford, supra.* "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id.*

7. Personnel job specifications generally contain the five sections as follows: Nature of Work; Distinguishing Characteristics; Examples of Work; Knowledge, Skills and Abilities; and, Minimum Qualifications. These specifications are to be read in a "pyramid fashion," meaning, 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 the classification specification is the most critical section. *See generally, Dollison v. W. Va. Dep't of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

8. In order for Grievant to prevail upon a misclassification claim, she must prove by a preponderance of the evidence that her duties more closely match another cited DOP 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).

9. The goal of 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).

10. 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. Blakenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993). 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 *Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

11. Grievant has failed to prove by a preponderance of the evidence that her predominant duties most closely match those of an ISS III. Further, Grievant has failed to prove that there has been a significant change in her duties. The one new duty Grievant has identified is not a predominant duty of her position, and this new duty falls within the class spec of an ISS II.

12. DOP's classification determination that Grievant's position is properly

classified as an ISS II is supported by substantial evidence.

Accordingly, this 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 12, 2011.

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CARRIE H. LEFEVRE
ADMINISTRATIVE LAW JUDGE