WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA ANN CROSSAN,
Grievant,

v. **Docket No. 2012-0647-DOT**

DIVISION OF HIGHWAYS and
DIVISION OF PERSONNEL,
Respondents.

D E C I S I O N

Barbara Ann Crossan, Grievant, filed a grievance against her employer, the Division of Highways ("DOH"), Respondent, on December 16, 2011, seeking generally an increase in her salary. Grievant's statement of grievance reads as follows:

> Grievant has been worked out of her job position for the past two years; she was unaware that she could file a grievance. Barbara's position in the Department of Highways District II Huntington WV, as Office Assistant 3, she was given the job duties of the Telephone Operator position (9004) (see attached position descriptions) a position that has never been filled. She was also given the duties of Secretary 2 (9016) position for Dis-Force. She has not had an evaluation in the last four years of employment at the DOH. She has not received an increase in pay that was not mandatory in the last four years. She was ordered to be the United Way Coordinator when she told her supervisor (Ed Armbruster) she did not have time to participate as the coordinator.

Relief sought states:

> Increase in rate of pay she would have received with regular evaluations. Back pay for the work performed in the other two positions she has worked. To be assigned in one job position. Evaluation will be done every year.

A conference was held at level one on January 6, 2012. Grievant had the opportunity to present information and exhibits she and/or her union representative deemed relevant. The grievance was denied at level one on January 30, 2012. Grievant

appealed to level two on February 6, 2012, and a mediation session was held on August 22, 2012. Grievant appealed to level three on August 27, 2012. The West Virginia Division of Personnel ("DOP") was joined as an indispensable party, after the level two mediation, by Grievance Board Order dated August 29, 2012.[1]

A level three hearing was set for December 13, 2012. DOP requested a continuance as a Position Description Form ("PDF") had not been submitted to the DOP for review and determination of the appropriate classification of the position Grievant occupies. The undersigned Administrative Law Judge held a telephone conference with the parties on December 10, 2012. An Order of Continuance, setting a new hearing date for April 2, 2013, was entered on January 25, 2013. Prior to the April 2013 hearing, Respondent DOH requested a continuance because the necessary paperwork still had not been provided to DOP. Grievant objected to this continuance and was of the belief that Respondents' actions created further undue delay. Grievant's representative is of the stated belief that Respondents' actions warrant a summary decision in the favor of Grievant. Such a decision is not proper in the circumstances of this grievance. Ultimately a level three hearing was convened before the undersigned Administrative Law Judge (hereinafter "ALJ") on September 9, 2013, at the Grievance Board's Charleston office. Grievant appeared with her union representative Patty Nash, AFGE Local 2344. Respondent DOH appeared and was represented by Robert Miller, Legal Division, DOH. Respondent DOP was represented by counsel, Karen O'Sullivan Thornton, Assistant

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[1] WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel (DOP) to establish and maintain a position classification plan for all positions in the classified service. Respondent DOP's involvement in this grievance is with regard to classification and the issues relating to classification of the position Grievant occupies.

Attorney General. This matter became mature for consideration on October 7, 2013, upon receipt of the last of the parties' proposed findings of fact and conclusions of law. All parties submitted fact/law proposals.

Synopsis

During the time period of Grievant's regular full-time employment with Respondent, she has not received any salary adjustments other than statewide pay increases granted to all state employees. Grievant seeks generally an increase in her salary. Grievant contends that if Respondent had regularly performed Employee Performance Evaluations, she would have received merit salary increases. Grievant further seeks back pay for the performance of duties averred to be recognized as tasks of a separate and distinct job classification. Grievant contends Respondent has been working her out of classification.

During the time period relevant to this grievance, a state-wide moratorium on discretionary salary increases was in place, and such raises were restricted with regard to state employees. The lack of an annual Employee Performance Appraisal had little impact, if any, on Grievant's inability to receive a merit raise in the last seven years. Further, simply because Grievant performs some duties that were previously performed by an employee in another classification does not *per se* demonstrate unlawful work assignment, nor establish misclassification . Grievant is being paid within the pay range of the pay grade assigned by the Division of Personnel to her classification. Grievant failed to establish she was unlawfully denied discretionary salary adjustments and/or that Respondent(s) are required to grant her an increase in salary.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is classified as an Office Assistant 3 ("OA 3") in Organization 0280, District Two (D-2) with the Division of Highways (DOH) and has been a full-time employee since October 24, 2007. Prior to becoming a full-time employee, Grievant was classified as an exempt employee in Organization 0280 and assisted with clerical duties in Organization 0267.

2. Grievant started working in a permanent position at $1,977.00 per month and received limited salary adjustments to bring her current salary to $2,079.00 per month. DOH Ex. 1. Grievant's salary is within the pay range of her job classification, pay grade 7.

3. In addition to her responsibilities for Organization 0280, Grievant assists with clerical duties for Organization 0267. Duties for Organization 0267 (Disforce) are shared with other Office Assistant 3s throughout the District. These are the same duties Grievant had when she applied for the permanent position as an Office Assistant 3 in 2007. Additionally, Grievant assists with the switchboard duties for District Two Headquarters.[2]

4. Edward Armbruster is a Maintenance Highway Engineer in D-2 and has been employed with DOH since March 7, 1994. Mr. Armbruster was Grievant's supervisor until June 16, 2013, when he transferred to the Bridge Engineer position.

5. Raymond Scott Eplin is the District Engineer/Manager in D-2. He has been employed with DOH since September 7, 1990. Mr. Eplin has been the District Manager

[2] Grievant testified that sometime in 2008, after an employee retired, she was assigned the duties of a telephone/switchboard operator. Grievant is of the opinion that said job duties are not a part of her organizational unit within DOH and that she should not have been assigned the duty.

for District 2 for about four years. Grievant asked him if he could provide her with an increase in compensation in light of all the work she had been performing. Manager Eplin discussed with Grievant the salary adjustments given to other employees, and informed her that there were no merit raises available.

6. Grievant was appointed to be the United Way designee for the 2011 season. This is a one-year responsibility and requires minimal duties. A district-wide email has to be sent to all employees with instructions and forms on how to donate by payroll deduction.

7. A state-wide moratorium on discretionary salary increases was in place during a time period relevant to this grievance.[3] A memorandum from Larry Puccio, former Chief of Staff for Governor Joe Manchin, dated April 29, 2005, banned all discretionary salary adjustments. Commonly referenced as the Puccio Memorandum or the Governor's Office Directive, discretionary salary increases for a significant time period were effectively removed from state agencies' purview. DOH Ex. 3.

8. Division of Personnel Policy DOP-17 establishes a standardized performance appraisal system for State employees that is characterized by clearly-defined performance goals and objectives and increased employee involvement. Respondent DOH uses the DOP's Employee Performance Appraisal Policy to evaluate its employees.

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[3] During the Manchin administration, the Governor's office established a moratorium on discretionary salary increases in a memorandum to all West Virginia Cabinet Secretaries dated April 29, 2005. The Governor's Chief of Staff, Larry Puccio, advised that "merit or salary advancements" should not be granted until further notice, but nondiscretionary increases should continue, which would include pay increases associated with promotion, pay differentials, reclassification, reallocation, increment increases, and temporary upgrades. The undersigned does not rule on the legal weight of the much discussed Governors' Office directives but recognizes and finds that the issuance and moratorium effect of the Puccio and Alsop Memorandums have effectively halted the granting of discretionary merit increases by state agencies under the Governor's purview.

9. In relevant part, the "*Employee Performance Appraisal Policy,"* Policy DOP-17, specifies that it is the policy of the State of West Virginia to tell employees what is expected of them during the performance rating period (which shall not exceed 12 consecutive months in length), provide feedback to employees and to formally rate employees at the end of each performance rating period. See Policy DOP-17 § II.

10. Historically, employee performance evaluations were instrumental in Respondent DOH's determining potential merit raises for employees. Given the ban on discretionary salary adjustments, yearly employee performance evaluations became lax throughout District Two. Few, if any, employee performance evaluations were performed by administrative personnel throughout Grievant's assigned District.

11. A Memorandum from Rob Alsop, Chief of Staff for Governor Earl Ray Tomblin, dated March 29, 2011, lifted the prohibition on discretionary salary adjustments in part, under the Pay Implementation Policy, but continued to prohibit discretionary increases based "purely on merit." DOH Ex. 4.

12. Jeff Black, DOH's former Director of Human Resources, provided guidelines for salary adjustments on April 28, 2011, based on the directive provided by the Division of Personnel. There are many factors that the DOH considers prior to requesting a salary adjustment based on the Pay Plan Implementation Policy. Nonetheless, the decision to request a salary adjustment is strictly discretionary, and the request must be approved by DOP and the Governor's Office.

13. WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified

service. The State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service.

14. The Position Description Form ("PDF") is a document which describes the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a position. A PDF is a key document utilized by DOP for a review and determination of the appropriate classification of a position. *See* W. VA. CODE R §§ 143-1-3.70 and §143-1-4.5 *et seq*. This document is the basic source of official information utilized by the DOP to allocate the position to the proper classification.

15. "Reallocation" is defined as a 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.[4] *See* W. VA. CODE R §143-1-3.75.

16. Grievant submitted three different PDFs to the DOP for review prior to the level three hearing. The first PDF covered the period of time when Grievant was first hired and began working at DOH in 2007 up to some point in 2009. The second PDF covered the period of time from sometime in 2009 until March of 2012, and the third PDF covered the period of time from March 2012 until the present. DOP Ex. 2, 3 and 4, also DOH Ex. 5, 6 and 7.

17. Barbara Jarrell, Assistant Director and Manager of the Classification and Compensation Section of the DOP, testified at the level three hearing. Ms. Jarrell has

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[4] While the words may not be truly synonymous, it is recognized that the word "misclassification" is used interchangeably with the words reclassification and reallocation by this Grievance Board in grievance decisions.

been employed by the DOP since 1989. The Classification and Compensation section oversees the development and maintenance of the Classification and Compensation Plan for State employees. This plan covers both classified and classified exempt employees numbering approximately 21,000. She described the process the DOP goes through each time a PDF is submitted for a classification determination. PDFs are received by the DOP every day. Ms. Jarrell has reviewed and made classification determinations on thousands of PDFs during her career with the DOP.

18. On September 5, 2013, Ms. Jarrell sent a memorandum to John McBrayer, Acting Director Human Resources Division, DOH stating DOP had completed its review of the three PDFs submitted for the position Grievant occupies and indicated the classification determination for each. The first PDF was determined to be the classification of OA 2. DOP had determined that Grievant's job duties and responsibilities enumerated on the initial PDF were not those that were anticipated in the job posting under which Grievant was initially hired. It was noted that based on the job posting for the position Grievant occupies, the DOP anticipated the position would be performing at a much higher level than that which Grievant has performed at any point thus far. DOP further provided that the classification determinations for the second and third PDFs was OA 3. Ms. Jarrell clearly noted that the duties identified barely rose to the level of the OA 3 classification. *See* DOP Ex. 1 through 5 and Grievant Ex. 8.

19. There needs to be a significant change in the duties and responsibilities assigned to a position before a reallocation is warranted. DOP Administrative Rule § 4.7. The duties, activities and responsibilities described in relevant PDFs did not persuade or trigger DOP to reallocate the position occupied by Grievant.

20. DOP is required to classify positions, not employees, into the classification that is the “best fit” within the current State Classification Plan.

21. The DOP Classification Specifications for the Office Assistant 3 classification state, in part, the following:

OFFICE ASSISTANT 3

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.

22. The DOP Classification Specifications for the Secretary 2 classification state, in part, the following:

SECRETARY 2

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 has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant avers that Respondents have not adequately increased her salary over the term of her employment. There were several issues present by this grievance; however, Grievant's dispute is generally a two-pronged argument.[5] Grievant desires a salary increase and back pay with interest dating back to approximately 2010.

A highlighted concern of Grievant is that "in the last four years" of employment she has not had an increase in pay which was not a statewide pay increase for all state employees. Grievant is of the opinion and fervently believes she is entitled to be evaluated and given a yearly increase based on her performance, citing WV Division of Personnel's *Employee Performance Appraisal Policy*, DOP-17. *See* FOF 8 and 9, *infra*. Respondent acknowledges that in the past, performance evaluations were instrumental for determining merit increases. However, because of the ban on discretionary salary adjustments instituted by the Governor in 2005, District Two became lax in performing yearly evaluations. Management, for one reason or another, was of the collective opinion that doing performance evaluations were not a priority.

In relevant part Policy DOP-17, specifies that it is the policy of the State of West

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[5] At level one, Grievant alleged that she was harassed, in part, because of her association with an African-American male employee, who had filed a grievance and an EEO complaint against Respondent. Grievant assisted this individual with processing his paperwork. The level one decision addressed the harassment allegation raised by Grievant ruling the activity identified did not mount to the level of "harassment" defined by applicable statute. This Grievance Board has long held that elements or allegations of a grievance which are raised, but not pursued or developed will be considered abandoned. *Bias v. Dep't. of Transportation/Division of Highways*, Docket No. 2008-1520-DOT (Sept. 22, 2009) (citing *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987)). No evidence or testimony was presented to support a conclusion that *Respondent* DOH harasses or creates a hostile work environment for Grievant. Grievant did not address this issue at level three. It was perceived that Grievant abandoned this allegation. Thus, such argument will be deemed abandoned and not addressed further by this decision.

Virginia to tell employees what is expected of them during the performance rating period (which shall not exceed 12 consecutive months in length), provide feedback to employees and to formally rate employees at the end of each performance rating period. See Policy DOP-17 § II.

It is established and not contested that Respondent failed to perform annual performance appraisals of Grievant's performance as set forth by applicable policy, for what is recognized as several rating periods. It has been consistently held that "[a]n administrative body must abide by the remedies and procedures it properly established to conduct its affairs." *Syl. Pt. 1, Powell v. Brown*, 160 W. Va. 723 (W. Va. 1977). Respondent failed to abide by Policy DOP-17 established for evaluating the performance of State employees. However, it is also recognized that this deficiency is not necessarily, nor likely, the rationale for Grievant's inability to secure a discretionary (merit) salary increase.

While agencies have in the past had some discretion to grant confined increases in employees salaries, in limited circumstances, it is highlighted that such option was not fully available to Respondent DOH. For state agencies under the direct supervision of the Governor, discretionary pay increases are approved through the Governor's Office and during a time period relevant to this grievance such authorization was not being readily granted referencing the March 29, 2011, memorandum issued by Rob Alsop, Chief of Staff for Governor Tomblin, DOH Ex. 4 and the April 29, 2005 memorandum issued by Larry Puccio, Chief of Staff for then-Governor Manchin, DOH Ex. 3. Discretionary merit increases have been frozen by the current and former administration.

The Puccio Memorandum issued by then-Governor Manchin's Office to Cabinet Secretaries created a quandary throughout state government. The true weight of this document is much debated.[6] However, as this Grievance Board has previously noted, the former Governor's Office moratorium on discretionary salary increases effectively removed merit salary advancement from state agencies' purview. *Chapman, et al., v. West Virginia Lottery Commission*, 2010-1293-CONS (Sept. 27, 2011); *Sayre v. Dep't of Health & Human Res.*, 2010-731-DHHR (Jan. 13, 2011); *Milam v. Div. of Highways*, Docket No. 2009-0478-DOT (Dec. 31, 2009); *Celestine v. W.Va. State Police*, Docket No. 2009-0256-MAPS (May 4, 2009); *Kelly v. Dep't of Health & Human Res.,* 07-HHR-109 (Nov. 14, 2008). "[U]nfortunate as it may be, the provisions of the Governor's Office edict are clear, and discretionary salary increases are prohibited." *Saas v. Dep't of Transp.*, Docket No. 07-DOH-005 (July 25, 2007).

The Governor's Chief of Staff, Larry Puccio, advised that "merit or salary advancements" should not be granted until further notice, but nondiscretionary increases should continue, which would include pay increases associated with promotion, pay

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[6]It is noted that the Governor's Chief of Staff is an employee and not a public official with authority to require the various agencies to abstain from granting discretionary raises. It has been observed that such action would have to be made through an Executive Order by the Governor to be binding on State agencies. An authority for this proposition an *Opinion of the Attorney General* dated July 16, 2008, states in part:

> Because the Governor's freeze policy was contained only in a memorandum authored and signed by an employee, without the issuance of an Executive Order by the Governor, it is of questionable authority and effect.

Whether the Chief of Staff's Memorandum was legally binding is debatable. Nevertheless, the Puccio Memorandum expressed the position of the Governor's Office regarding the issuance of discretionary wage increases and the vast majority of state agencies adhered to the directive of the memorandum. Discretionary merit increases have effectively been removed from state agencies' purview, since approximately April of 2005.

differentials, reclassification, reallocation, increment increases and temporary upgrades. The Puccio directive has been revised somewhat by a March 29, 2011, memorandum issued from Governor Earl Ray Tomblin's Office and signed by former Chief of Staff, Rob Alsop. This memorandum, in part, states:

> "As a follow up to the Cabinet Secretaries meeting of November 10, 2010, I advised you that *we would continue the restrictions on discretionary increases imposed by the previous administration* while we evaluate the State's current financial condition and revenue projections. *We will continue to prohibit discretionary increases based purely on merit*. Until such time that I can be confident that appropriate evaluations are taking place in every agency, we cannot return to a system that was broken. Nevertheless, there are certain areas that, given our financial condition, we will return to the Pay Plan Implementation Policy, which is attached hereto and which was implemented on May 1, 1994 and last revised on July 1, 2005. Specifically, all portions of the Pay Plan Implementation Policy, *excluding the portion pertaining to merit increases*, that are being reinstated pursuant to this Memorandum…" … "Again, *you are requested not to grant merit or salary advancements until further notice.*" (Emphasis added).

No party of this grievance identified a discretionary pay raise issued in defiance of either of the Governors' Office directives. Further, DOH management does not believe that Grievant meets any of the requirements (exceptions) under the eligible salary adjustments listed in said Memorandums. Thus, it is more likely than not Grievant has not received a discretionary pay increases because such increases have effectively been removed from state agencies' purview, since approximately April of 2005, not because Respondent was derelict in performing annual employee performance appraisals as required by DOP Policy, DOP-17. "An agency's decision not to recommend a discretionary pay increase generally is not grievable." *Sayre v W. Va. Dep't of Health and Human Res,* Docket No. 2010-0731-DHHR (January 13, 2011).

The second prong of Grievant's argument challenges Grievant's classification and the duties she performs in her current position with Respondent DOH.

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 Highways, which utilize such positions, must adhere to applicable portions of the 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 determines whether reallocation is appropriate. *Hart v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009). 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 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*.

Grievant is convinced that she is working out of her classification as an Office Assistant 3. Grievant is of the stated belief that her current classification does not include the duties she performs on a routine basis. Grievant avers she is required to perform duties rightfully designated to another job classification, and is of the opinion she is being required to unjustly work beyond her classification. Grievant seeks additional compensation for the performance of these tasks.

Grievant testified that her duties have been the same and have not changed since March 5, 2012, when then supervisor, Edward Armbruster, provided her with a list outlining her duties. Grievant testified that her duties are those of an OA 3 and have been all along.

However, she claims she was assigned excessive duties and never received additional compensation she believed should have been given. Providing an example of the extra duties she was asked to take on, Grievant stated, "I answer the phone for everyone, not just my organizational unit." When asked what she does that is outside her job description, Grievant referred to the Secretary 2 classification specification, but only to the "Examples of Work" section. She looked down the list of examples and verbally indicated the duties she claimed to perform as follows: respond to inquiries, answer phones, screen calls, place calls, and do time keeping. All of these examples of work can also be found in the Office Assistant series of classifications. *See* DOP Ex. 2, 3 and 8 and Grievant Ex. 5 and 6.

Grievant testified that she has to do whatever the employee in the position classified as a Secretary 2 does not want to do. When questioned as to what it was Grievant did that she believed was secretarial in nature, Grievant responded that she entered budget, entered inventory, entered time, etc. It was noted that this was basically taking information that was provided to her by individuals and entering it into a computer. This is data entry.

Mr. Armbruster, who was Grievant's supervisor from approximately 2007 to early 2012, testified that Grievant's duties were basic clerical work, e.g. answering the phone, payroll, training summer help, screening calls, etc. He stated that Grievant has never worked as a telephone operator but, has helped with that responsibility and with answering the radios for the office. He explained that he believed her job duties primarily consisted of the work typically associated with Office Assistant type work.

Barbara Jarrell, Assistant Director and Manager of the Classification and Compensation Section of the DOP, testified at the level three hearing. Ms. Jarrell talked

about the classification specifications explaining the documents are intended to be general rather than specific descriptions; meaning they do not encompass every single job duty and responsibility that a particular position might be responsible for on any given day. Ms. Jarrell has a sum total of more than 30 years experience in State government personnel work. She also explained how the specifications are interpreted in pyramid fashion with the "Nature of Work" section being of the greatest importance and setting the framework for everything written beneath it. *See generally* DOP Ex. 6, 7, 8, 9 and Grievant Ex. 4,5 and 6. Ms. Jarrell testified that the telephone operator duties Grievant performed were not the primary duties of Grievant's position and therefore would not determine to which classification her position would be assigned. She also stated that had the telephone operator duties been the predominant duties of the position Grievant occupies, the position would have been demoted downward to the Telephone Operator classification which is assigned to pay grade 4 as opposed to paygrade 7 to which the Office Assistant 3 classification is assigned. *See* DOP Ex. 11. Ms. Jarrell explained that if an employee is given an additional duty that is lesser level, in terms of the pay grade assigned to the classification expected to perform the duty, an individual would not be paid additional compensation for taking on the duty.

DOP determined, and Ms. Jarrell testified, that the "best fit," in terms of the appropriate classification, for Grievant's position from 2007 to 2009 was OA 2. The "best fit" for the position from 2009 to March 2012 was OA 3 and from March 2012 to present, while admittedly stretching it to make it so, the "best fit" is OA 3. The Office Assistant 3 classification is the classification and pay grade that Grievant currently possesses.

"State employees are hired into positions that are expressly, though somewhat generically, described by the WV Division of Personnel's classification specifications." However, according to Administrative Rule, "the position description shall not be construed in any way to limit the express or implied authority of the appointing authority to prescribe or alter the duties of any position." *See 143 C.S.R §1(4.5)(d).* The Grievance Board has determined that an employer may change the duties of a position to meet the employer's needs, assign duties outside the class specification, as long as the duties do not change the predominant, class-defining duties such that the employee's position is then misclassified. *Hall v. Div. of Nat. Res.*, Docket No. 00-DNR-053 (Apr. 28, 2000); *Hager v. Dep't of Health and Human Res.*, Docket No. 95-HHR-241 (Sep. 29, 1995); *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996).

DOP is required to determine that a significant change in the work performed by a position has occurred when determining whether or not a reallocation is appropriate. *See* DOP Administrative Rule § 4.7. The change has to be significant enough that it would cause the scope and nature of the position's work to fit or match another job classification. The goal of the classification 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 v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009); *Falquero v. Dep't of Envtl. Prot.,* Docket No. 2008-1902-DEP (Feb. 3, 2010). While Grievant's duties

have undergone some alterations since she first took on the position, the new activities did not raise the level of complexity of the job beyond the predominant duties associated with the position's current classification.

It is not forgotten that Ms. Jarrell testified that Grievant's PDF's indicate not a higher but a lower job classification. Lastly, Ms. Jarrell testified she heard nothing new in the testimony or evidence presented at the hearing that would cause her to believe Grievant's being required to work out of classification. 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). Grievant has failed to show by a preponderance of the evidence that the position she occupies falls more closely within any other classification, including the Secretary 2 classification, than the Office Assistant 3 classification to which it has been assigned. Just because an employee is required to undertake some responsibilities generically associated with another classification, does not necessarily render her entitled to a new 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. Consequently, the grievance is denied.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In a non-disciplinary case, a Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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. Respondents' actions of not granting Grievant a discretionary salary increase during a time period in which a state-wide moratorium on discretionary salary increases was in effect was not arbitrary and capricious conduct.

3. Grievant is paid within the salary range applicable to her classification. Grievant has failed to establish by a preponderance of the evidence that her salary is in violation of any mandatory rule, regulation or law.

4. In a misclassification grievance, the focus is upon whether the Grievant's duties for the relevant period of time more closely match those of another cited classification specification than the classification to which she is currently assigned. *See generally*, *Hayes v. W. Va. Dep't of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989). The key to the analysis is to ascertain whether Grievant's current classification constitutes the "best fit" for their required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). In order to prevail upon a claim of misclassification, a Grievant must prove by a preponderance of the evidence that his duties for the relevant period of time more closely match those of another

cited classification specification than the classification to which he is currently assigned. *See generally*, *Hayes v. W. Va. Department of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989).

5. The key in seeking reallocation is to demonstrate a significant change in the kind or level of duties and responsibilities. *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96- HHR-301 (Mar. 26, 1997).

6. Employees who simply perform some duties normally associated with a different classification are not necessarily considered misclassified *per se*. *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (April 15, 1996).

7. The Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. *W. Va. Dept. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (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).

8. Grievant has failed to show by a preponderance of the evidence that the position she occupies falls more closely within any other classification than the Office Assistant 3 classification to which it has been assigned.

9. 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, 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: November 1, 2013

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Landon R. Brown
Administrative Law Judge