CHARLES CAROTHERS,

Grievant,

v. **Docket No. 05-WCC-235**

WEST VIRGINIA WORKERS' COMPENSATION

COMMISSION and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant Charles Carothers is employed as a Premium Auditor 3 by the West Virginia Workers' Compensation Commission ("Workers' Compensation"). The record does not reveal when this grievance was originally filed, but the following is the Statement of Grievance submitted at Level IV:

> As a result of a classification project the Grievant remained a WC Premium Auditor 3 and received a pay grade change from pay grade 14 to pay grade 16 effective December 1, 2004. The Grievant claims that the classification project has failed to address the full scope of the duties and responsibilities assigned to the Grievant and others in the same classification. The Grievant claims that the additional duties and responsibilities would amount to a reallocation of the Grievant's classification in accordance with 143CSR1, §143-1-4.7.[sic] and/or any other applicable statute or rule. The Grievant claims that the reallocation would be effective with the beginning of these additional duties and responsibilities on December 1, 2002.
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> RELIEF SOUGHT: The Grievant seeks monetary compensation for the reallocation in accordance with 143CSR1, §143-1-5.4(f)3 and §143 -1-5.5(a) and/or any other applicable statute or rule and to be made whole in every way.

This grievance was denied at all lower levels. Grievant appealed to Level IV on July 5, 2005. The parties agreed to submit the case on the record developed below, and this grievance became mature for decision on February 3, 2006, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 1) After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. Some basic data about the reclassification process was taken from another similar case about this same issue, Coutz & Hanning v. Workers' Compensation Commission and Division of Personnel, Docket No. 05-WCC-286, (Nov.

17, 2005).

Findings of Fact

1. Grievant was previously employed in the Workers' Compensation Division of the Bureau of Employment Programs ("BEP") as Employment Programs Tax Examiner, Senior before Workers' Compensation became a separate entity. This position was in Pay Grade 14.

2. When Workers' Compensation became a separate entity on July 1, 2003, Grievant was assigned to that agency and maintained his classification and pay grade.

3. After the shift to Workers' Compensation, the performance expectations for Grievant increased, and Grievant was notified about the increase in the volume of work to be produced.

4. Grievant is now expected to engage in on site decision-making, evaluate discrepancies to see if these are material, and review records for relevant information. He is also expected to enter data on permanent Workers' Compensation records, place information on a web site, and review business activity for the determination of properclassification. Grievant is to assess whether corporate officers and partners and proprietors are covered. (See footnote 2)

5. In 2003, pursuant to the Division of Personnel Administrative Rule 143 C.S.R. 1 § 4.6 (a), (See footnote 3) Workers' Compensation asked the Division of Personnel to review all current classifications for the purpose of establishing a new classification structure for Workers' Compensation and to eliminate the use of BEP titles for Workers' Compensation positions.

6. All current classifications were reviewed and new classification titles were developed specific to Workers' Compensation. Almost all positions within the agency were reclassified, and Grievant was classified as a Premium Auditor 3. Grievant's duties remained basically the same as those listed in the Tax Examiner, Senior class specification. The pay grade of Grievant's new position was assigned to Pay Grade 16. See class specifications, infra. Because Grievant was above the minimum salary for his reclassified position, he could not receive a pay increase pursuant to the Division of Personnel Administrative Rule 143 C.S.R. 1 § 5.4(f)(2)(a)(2). (See footnote 4) 7. As when he worked for BEP, Grievant received training in a variety of areas to assist him in performing his duties and understanding the duties of other employees within the unit.

8. Grievant's classification specification states under Essential Job Functions, "Any specific position in this class may not include all of the duties listed, nor do the examples listed cover all of

the duties which may be assigned."

9. On October 27, 2004, Grievant's supervisor informed him that after the completion of the reclassification project, it had been determined he was classified as a Premium Auditor 3, and his salary would remain the same.

10. The class specifications at issue are set out below, and the Tax Examiner, Senior class specification is fundamentally the same as the Premium Auditor 3 class specification. The "Nature of Work" and the "Distinguishing Characteristics" Sections are basically the same, word for word. There are minor differences in the "Examples of Work" Section.

EMPLOYMENT PROGRAMS TAX EXAMINER, SENIOR

Nature of Work

Under limited supervision, performs advanced level professional auditing duties involving on-site examination of the accounting systems, accounts, journals, invoices, and financial records of businesses and corporations to determine the proper reporting and payment of unemployment and workers compensation taxes. Performs specialized work in the development and installation of new auditing programs; assists in the development and implementation of computerized auditing applications. Performs as an audit team leader for large complex audits. Trains and reviews the work of entry level auditors. Extensive travel may be required. Performs related work as required.

Distinguishing Characteristics

This level is distinguished from the Employment Programs Tax Examiner by the responsibility for advanced level auditing duties. Complexity of audit duties at this level is defined as auditing large businesses with complex accounting systems and related types of federal and state tax returns. Positions at this level are responsible for assisting in the development and installation of new auditing programs and procedures and for the training of entry level auditors.

Examples of Work

Assists in the development and installation of auditing programs.

Functions as audit team leader on large, complex audits.

Prepares or reviews a variety of professional accounting and other reports such as they relate to policies, procedures, laws and regulations of federal and state taxing authorities and this agency.

Writes audit and/or comprehensive review programs, tests accounting records and related reconciliations, develops sampling and other techniques of evaluation of the validity of employers payroll posting systems, prepares detailed reports of findings, recommendations to employers and agency officials.

Reviews prior audit reports and financial statements of employers audited.

Analyzes complex employee/contract labor issues and documentation, deferred compensation plans, etc. and decides what compensation to be included as taxable for unemployment compensation and workers compensation coverage.

Evaluates internal controls of various payroll systems; analyzes financial records of employers for completeness and accuracy to determine compliance with state and federal law as well as with reporting and coverage requirements of this agency.

Maintains knowledge of current trends and developments in the field.

May supervise and review work completed by lower level tax examiners.

May train lower level tax examiners to prepare audit work papers, documents and reports required of employers, and in policies and procedures prescribed by the agency.

WORKERS' COMPENSATION PREMIUM AUDITOR 3

Definition of Work:

Under limited supervision, performs advanced level professional auditing duties involving on-site examination of the accounting systems, accounts, journals, invoices, and financial records of businesses and corporations to determine the proper reporting and payment of workers' compensation premiums. Performs specialized work in the development and installation of new auditing programs; assists in the development and implementation of computerized auditing applications. Performs as an audit team leader for large complex audits. Serves as a lead worker by training and reviewing the work of lower level auditors. Extensive travel may be required. Performs related work as required.

Distinguishing Characteristics

This level is distinguished from the Workers' Compensation Premium Auditor 2 by the responsibility for advanced level auditing duties. Complexity of audit duties at this level is defined as auditing large businesses with complex accounting systems. Positions at this level are responsible for assisting in the development and installation of new auditing programs and procedures and for leading and training of lower level auditors.

Essential Job Functions (Any specific position in this class may not include all of the duties listed, nor do the examples listed cover all of the duties which may be assigned.)

Conducts complex audits by examining employer's accounting records for correct premium payments in compliance with the workers' compensation law.

Assists in the development and installation of auditing programs.

Functions as audit team leader on large, complex audits.

Leads and trains lower level auditors to prepare audit work papers, documents and reports required of employers, and in policies and procedures prescribed by the agency.

Prepares or reviews a variety of professional accounting and other reports such as they relate to policies, procedures, laws and regulations.

Writes audit and/or comprehensive review programs, tests accounting records and related reconciliations, develops sampling and other techniques for evaluating the validity of employers payroll posting systems, prepares detailed reports of findings, recommendations to employers and agency officials.

Reviews prior audit reports and financial statements of employers audited.

Maintains knowledge of current trends and developments in the field.

Issues and Arguments

The issues in this case are not the typical ones found in a classification grievance, but are very similar to the issues raised in Coutz, supra. Grievant is not requesting to be placed in a different classification; he agrees his current classification is the best fit for his duties, and he agrees he is properly classified as a Premium Auditor 3. But Grievant asserts the class specification of the Premium Auditor 3 does not reflect all of his duties, and if the extra duties he is now expected to

perform were added to his class specification, these additions would result in a significant change requiring reallocation. Following thislogic, Grievant asserts his reclassification should have been a reallocation, and he should have received a ten percent pay increase because of the change in pay grade. (See footnote 5)

Respondents argue the proper action, reclassification, has been taken. Respondent Workers' Compensation states the duties of the Premium Auditor 3 identified in the class specification are basically the same as those of the Tax Examiner, Senior. Accordingly, there has been no substantial change in Grievant's duties that would warrant reallocation. Additionally, Respondent asserts the duties Grievant is currently assigned are within his class specification and are the duties normally expected of a Premium Auditor 3.

Respondent Division of Personnel notes it reviewed all of Workers' Compensation's employees after the restructuring and reorganization, and the changes from this type of review are reclassifications, not reallocations. The Division of Personnel also notes there has been no substantial change in Grievant's duties, and thus, reallocation is not justified. Although Grievant may have a greater volume of work to do and is assigned different duties, it is the same type of work contemplated by his class specification since his employment with BEP. Essentially only, Grievant's title was changed to reflect a different agency. Further, Division of Personnel notes the definition of reallocation requires the change of a position "from one classification to a different classification," and Grievant does not assert he is misclassified. Respondent Division of Personnel also notes the prior Coutz grievance and its ruling on these same issues. The issue before the undersigned Administrative Law Judge is by what process should Grievant receive his classification change: reclassification or reallocation.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug.19, 1988). "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).

The holding in West Virginia Department of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993), presents employees contesting their classifications, and the process by which it occurred, with a substantial obstacle to overcome. The West Virginia Supreme Court of Appeals stated the Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. In the instant matter Grievant has failed to demonstrate the Division of Personnel was "clearly wrong" in its interpretation of its rules governing reclassification and reallocation.

Prior to the agency's reclassification of its employees, Grievant was classified as a Tax Examiner, Senior. After the reclassification, Grievant was reclassified as a Premium Auditor 3, a classification that is basically the same as his prior classification. Grievant wasreclassified to his current positions as a result of this reclassification project, and he, like all other employees who were reclassified during this process, is only entitled to a pay increase if their salaries fell below the minimum of the new salary range. Grievant's salary did not fall below the new salary range.

The Division of Personnel's Rules define reclassification as "revision by the State Personnel Board of a class or class series which results in redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved." Division of Personnel Administrative Rule 143 C.S.R. 1 § 3.79. Reallocation is defined 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 or to correct a position misclassification." (Emphasis added). Id. at Rule 3.78. Grievant's request for reallocation to the same classification, but with a higher pay grade, ignores the clearly stated requirement of a change in classification mandated in the definition.

As for Grievant's claim there has been a substantial change in his duties that would warrant reallocation, this assertion is also incorrect. The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." Division of Personnel Administrative Rule 143 C.S.R. 1 § 3.78. "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 does not require reallocation." Kuntz/Wilford v. Dep't of Health and Human Res., Docket No. 96-HHR- 301 (Mar. 26, 1997). An examination of Grievant's duties clearly indicatesGrievant is properly classified, and he agrees. The duties he performs fall within his class specification. While Grievant's duties have increased in volume and in some instances in complexity, they still are within his classification. From Grievant's testimony, it would appear he was misclassified as an Employment Programs Tax Examiner, Senior, as the duties he says he now performs that he did not do before fall squarely within his current job description. Clearly, the necessity of completing duties that an employee should have been performing all along does not indicate a need for reallocation. Id.

Grievant also asserts his class specification should list all his duties. As stated in Division of Personnel Administrative Rule 143 C.S.R. 1 § 4.4:

> (a) Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.
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> (b) In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole. The Director shall give consideration to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the positions that the class intended to include.
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> (c) A class specification is a general description of the kinds of work characteristics of positions properly allocated to that class and not as prescribing what the duties of any position are nor as limiting the expressed or implied authority of the appointing authority to prescribe or alter the duties of any position.
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> (d) The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.

(Emphasis added).

As stated in the above cited rules, a class specification is a general job description and is not

intended to contain every duty an employee may perform. Grievant's class specification clearly states his essential job functions "may not include all of the duties listed," and "the examples listed [may not] cover all of the duties which may be assigned." Accordingly, there is no need for Grievant's class specification to enumerate each and every duty he is expected to perform, especially since Grievant agreed the duties he is now expected to perform fall within his class specification and those of an auditor. It should also be noted Grievant is not "just" an auditor, he is the auditor expected to perform complex assessments, and the duties he is now expected to perform fall within his class specification.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a classification grievance, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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. Reclassification is defined as reclassification as "revision by the State Personnel Board of a class or class series which results in redefinition of the nature of thework performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved." Division of Personnel Administrative Rule 143 C.S.R. 1 § 3.79.

3. Reallocation is defined 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 or to correct a position misclassification." Division of Personnel Administrative Rule 143 C.S.R. 1 § 3.78.

4. When the salary of a reclassified employee is at or above the pay rate in the new classification, the employee's salary remains the same. Division of Personnel Administrative Rule 143 C.S.R. 1 § 5.04(f)(2)(a)(2).

5. The Division of Personnel's interpretation and explanation of classification specifications and rules governing reclassification should be given great weight unless clearly wrong. See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

6. The increases in Grievant's duties are the type contemplated in Grievant's class specification. Kuntz/Wilford v. Dep't of Health and Human Res., Docket No. 96-HHR- 301 (Mar. 26, 1997).

7. Grievant has not met his burden of proof and established a violation of any rules or regulations, or that the reclassification of Grievant's position instead of reallocation was clearly wrong or arbitrary and capricious. Coutz & Hanning v. Workers' Compensation Comm'n, Docket No. 05-WCC-286 (Nov. 17, 2005). 8. A class specification is descriptive and is not required to contain every duty an employee may perform. Division of Personnel Administrative Rule 143 C.S.R. 1 § 4.4.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: April 27, 2006

Footnote: 1

Grievant represented himself, Workers' Compensation was represented by David Fryson, Esq., and the Division of Personnel was represented by Lowell Basford, AssistantDirector of Compensation and Classification.

On December 30, 2005, Grievant asked the undersigned Administrative Law Judge to not consider the proposals of the other parties because they failed to submit their proposals on a previously agreed upon date. This Motion is denied as their failure to submit proposals was due to a failure of communication between the parties and the Grievance Board.

Footnote: 2

Grievant is also expected to assess maritime and taxi cab employment to calculate coverage and wages. Grievant did not identify the frequency of these type of assessments.

Footnote: 3

Division of Personnel's Administrative Rule 4.6 (a) state, "Upon its own initiative, or at the request of an appointing authority, the Board may reclassify positions by the creation or abolishment of classes, or the revision of the definition of the work of the classes brought about by changing work methods, new technology or reorganization."

Footnote: 4

Division of Personnel Administrative Rule 143 C.S.R. 1 § 5.4(f)(2)(a)(2) relating to pay upon reclassification states, "[w]here the salary of the incumbent coincides with a pay rate in the new range, the salary shall remain unchanged."

Footnote: 5

Grievant also asserted Respondents had not been able "to prove reallocation was not the proper remedy in a default. . . ." This statement is incorrect. The case Grievant refers to is Hutchens v. Workers' Compensation, Docket No. 05-WCC-009D, and the default remedy hearing has not been held, much less ruled upon. Further, the burden of proof on an employer and the presumptions in a default case are different from a standard grievance such as this one.