# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MILODINE F. HOLSTEIN,**

**Grievant**,

**v.** **Docket No. 2010-0833-DOR**

**INSURANCE COMMISSION AND**
**DIVISION OF PERSONNEL,**

**Respondent.**

## DECISION

Milodine F. Holstein, Grievant, is employed by the Respondent Office of the Insurance Commission ("OIC"). Grievant Holstein was originally employed by the Workers Compensation Commission ("WCC"), but was transferred to the OIC when the WCC was privatized. As a result of the process to eliminate WCC classifications and place transferred positions into classifications consistent with the OIC, Grievant's position was reallocated. Milodine Holstein filed a level one grievance form dated December 28, 2009, contesting this reallocation. As her grievance statement Ms. Holstein wrote:

> I was reclassified from a Self Insurance Specialist 2 (pay grade 14) to an Office Assistance [sic] 3 (paygrade [sic] 7). A couple of my job duties have changed, however I have assumed additional duties since my supervisor retired in 2008. I have been demoted 7 pay grades. This demotion has greatly limited my future earnings potential.

As relief Grievant seeks the following:

> I want to be reclassified to a higher pay grade and position more suitable to my ability and working knowledge. I feel I should be compensated for additional duties I have assumed and performed since my supervisor retired in 2008. This demotion has caused me a great deal of emotional stress due to the humiliation of being demoted and made to feel unappreciated.

On the same day her grievance was filed, Grievant moved to waive level one. Respondent OIC agreed to waive level one and asked that the Division of Personnel ("DOP") be joined as party. By Order entered January 22, 2010, DOP was joined as a party Respondent to the grievance. All parties participated in a level two mediation on April 22, 2010, and Grievant made a timely appeal to level three.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on August 13, 2010. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170. WVSEU.[1] Respondent OIC was represented by OIC Associate General Counsel Gregory A. Elam and Respondent DOP was represented by Karen O'Sullivan Thornton, Senior Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit proposed findings of fact and conclusions of law . Grievant and Respondent DOP submitted fact/law proposals and Respondent OIC deferred to DOP. The later of the two fact/law proposals was received at the West Virginia Public Employees Grievance Board on September 21, 2010, and the grievance became mature for decision on that date.

**Synopsis**

Grievant contests the reallocation of her position from the WCC classification of Workers Compensation Self Insurance Specialist 2 to the Office Assistant 3 classification. She notes that the reallocation drops her position seven pay grades and feels this drop is unwarranted and humiliating. Grievant believes that her work is not clerical in nature and therefore does not fit into the Office Assistant series of classifications. Grievant avers that

[1] West Virginia State Employees Union.

the classification that best fits her position is an Insurance Policy & Rate Analyst 1 ("IP&RA 1"). Finally Grievant argues that she is being discriminated against because her position is being reallocated while other OIC employees who transferred from WCC continue to work in the WCC classifications.

Respondents first note that Grievant has suffered no loss of pay due to the reallocation of her position. DOP points out that the work performed is advanced, complicated and may involve the interpretation and application of policies and procedures. However, the nature of the work is predominately clerical. Because of the advance and complex nature of the clerical duties performed by Grievant the best fit for her position is an Office Assistant 3 which is the highest classification in the Office Assistant series. Respondents also note that all positions which retain the WCC classifications continue to have duties related to the old Workers Compensation System. Grievant's position does not have such duties and therefore she is not similarly situated to those employees.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

**Findings of Fact**

1. Grievant Milodine Holstein has been employed by the State of West Virginia since 1999 and went to work for the WCC in 2002.

2. On January 1, 2006, the WCC ceased to exist as a state agency and more than 300 employees previously assigned to that agency, including Grievant, were transferred to the OIC.

3. All positions transferred from the WCC to the OIC were initially transferred with the WCC classifications and with the same pay grade and salary. Grievant's position

was transferred to the Workers Compensation Self Insurance Specialist 2 ("WCSIS 2") classification at pay grade 14.

4. Following the transfer, the OIC, working with the DOP, has been involved in a reorganization process to integrate all of the transferred positions into appropriate duties and responsibilities within the OIC. One of the goals of this process is to eliminate all of the Workers Compensation classifications that were specifically created for use by the WCC, in an effort to ensure the appearance of a single, unified agency.

5. As part of this ongoing reclassification effort, Position Description Forms[5] ("PDF") for many of the WCC classified positions were sent to DOP for review. Grievant's position was part of that process. A PDF for Grievant's position was signed by Grievant on February 5, 2009, and signed by her supervisors on April 3, 2009. It was subsequently submitted to DOP. Respondent DOP Exhibit 1.

6. On September 30, 2009, personnel from DOP conducted a job audit[6] of the position Grievant occupies.

7. After completion of the job audit and a review of the PDF, DOP made a classification determination regarding Grievant's position on November 2, 2009. DOP

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

[6] A job audit entails a visit to the place where the duties are performed by DOP personnel trained in employment classification. The DOP staff person interviews the person holding the position regarding their duties and responsibilities, reviews work products and reports required of the position, interviews the supervisors of the position as well as any subordinates and observes the performance of a sampling of the duties performed.

determined that Grievant's position should be reallocated from the WCSIS 2 classification at pay grade 14 to the Office Assistant 3 ("OA 3") classification at pay grade 7. Respondent DOP Exhibit 1.

8. Pay grade 14 ranges from a minimum of $29,400 per year to a maximum of $54,396 per year. Pay Grade 7 ranges from a minimum of $20,472 per year to a maximum of $37,884 per year.

9. Grievant's salary is approximately $32,000 per year. Since her salary falls within pay grade 7 her salary was not changed when her position was reallocated.

10. By letter dated November 16, 2009, Grievant appealed the reallocation of her position. In her appeal, Grievant expressed her belief that the IP&RA 1 classification was a better fit for her position. Grievant Exhibit 3.

11. DOP Director Sara P. Walker responded to Grievant's appeal by letter dated December 14, 2009. Director Walker noted that the responsibilities and duties of the IP&RA 1 Classification were not within the scope of Grievant"s position. With regard to the OA 3 position, Director Walker noted that this classification included the following duties and responsibilities:

> Analyzing and auditing reports and documents for accuracy and initiating the correction of errors; researching files for data and gathering information; planning organizing assigning and checking work of lower level clerical employees, and; training employees in proper work methods and procedures.

Finally, Director Walker determined that the OA 3 classification was the best fit for the duties and responsibilities included in Grievant's position and denied the appeal. Grievant Exhibit 5.

12. Eighty percent of Grievant's duties involve Electronic Data Interface ("EDI")

Compliance reports, 60 percent, and Bankruptcy reviews, 20 percent. Respondent Exhibit 1.

13. The EDI Compliance review is an ongoing effort to detect errors in the transmission of required filing information from self insured employers, third party administrators and private carriers. Each month Grievant receives report of claims that usually exceeds twenty pages in length. Grievant saves the report to an Excel spread sheet and sorts the claims on the spread sheets by third party administrators and by self insured clients. The EDI report identified indemnity payments which have been electrically filed incorrectly by the various clients. After Grievant identifies all of the errors she makes a copy of the section of the report that applies to each client and sends that copy along with a cover letter to each client informing them of the errors. Grievant assists the clients in resolving the errors by researching documents to which she has access and by contacting appropriate people who have necessary information. Respondent DOP Exhibit 1 and Testimony of Grievant.

14. The bankruptcy reviews performed by Grievant require her to: research and document payments made by the old Workers Compensation fund on behalf of defaulted self insured employers; bill appropriate surety companies that carried the bonds for the defaulted employers; track the receipt of payments from surety companies and maintain balances of sums owed. Grievant accomplishes these tasks by compiling claims payment data on an Excel spread sheet and sorting the data according to accident dates. The payment liability is assigned to the bonding companies according to the effective dates of their coverage. The results of this audit are then sent to the appropriate surety companies for review and payment. Respondent Exhibit 1 and Testimony of Grievant.

15. 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.

Respondent DOP Exhibit 2.

16. The Nature of Work section of the Classification and Specification for the classification of IP&RA 1 states the following:

**INSURANCE POLICY AND RATE ANALYST 1**

**Nature of Work**
Under general supervision, in a training capacity performs entry level work in the examination of insurance policies, rules and rates to determine compliance with West Virginia insurance laws. Performs related work as required. Grievant Exhibit 4.

Grievant does not perform any duties related to the examination of insurance policy rules or rates. Testimony of Grievant.

17. Debbie Anderson is employed by the DOP as a Senior Personnel Specialist.[7] Ms. Anderson reviewed Grievant's PDF and conducted the job audit of Grievant's position. She noted that Grievant reviews and compiles complex data, identifies errors and initiates action with the agency's client to correct those errors. She concluded that Grievant's duties fall within the Office Assistant 3 classification and that classification is the best fit for her position.

18. More than one third of the positions reviewed during the OIC reclassification project were placed within existing classifications within the current State Classification. Others were placed in newly created classifications or classification titles were changed to more accurately reflect the job responsibilities of the positions within OIC. Additionally, some positions retained their Workers Compensation titles because the predominate duties for those positions involved dealing with accounts that have not been resolved in the Old Workers Compensation Fund.[8]

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[7] Ms. Anderson has been employed in the Classification and Compensation section of the DOP since 1989 and has over 30 years of experience in analyzing job duties and responsibilities for placement in the classification system.

[8] Testimony of Kathy Damron, OIC Administrative Services Manager.

19. The only portion of Grievant's work that relates to the old Workers Compensation Fund are the bankruptcy reviews which amounts to 20 percent of her duties. Respondent DOP Exhibit 1.

**Discussion**

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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. State agencies, such as the OIC, utilize such positions and must adhere to that plan in making their employees' assignments. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994). When an employee believes he is performing the duties of a classification other than the one to which he is assigned, DOP must determine whether reallocation is appropriate. *Hart v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009). The key to the analysis is whether a grievant's current classification constitutes the "best fit" for the duties the grievant performs. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position are class-controlling. *Broaddus v. W. Va.*

*Div. of Human Serv.*, Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990). DOP's interpretation and application of the classification specifications at issue are given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) *per curiam*; *See also* Syllabus Point 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc.,* 166 W. Va. 775, 277 S.E.2d 613 line(1981), *appeal dismissed,* 454 U.S. 1131, 102 S. Ct. 986, 71 L.Ed.2d 284. Syllabus Point 1, *Dillon v. Bd. of Ed. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588 (1983).

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). It is fair to say that a grievant challenging his classification has an uphill battle. *Bennett v. Insurance Comm'n and Div. of Pers.* Docket No. 07-INS-299 (June 27, 2008).

Grievant asserts her position is misclassified as an OA 3 at pay grade 7. She requested that the DOP reconsider that classification determination and that her position be reallocated to an Insurance Policy & Rate Analyst 1. That classification would allow her position to remain in pay grade 14. Grievant's salary was not changed as a result of the reallocation of her position but her present salary is in the upper half of pay grade 7. Grievant fears that will inhibit her chances of receiving pay increases because she will reach the maximum salary in pay grade 7 much faster than she would in paygrade 14.

The Position Description Form is completed by the employee to describe the officially assigned duties, responsibilities, supervisory relationships and other pertinent

information relative to her position. The information is then verified by the employee's supervisor and forwarded to the DOP. Pursuant to 143 C.S.R. 1 § 3.70 this document provides the basic information upon which the DOP makes a classification determination. In this case the DOP also performed a job audit to insure that all of the duties and responsibilities of Grievant's position were taken into consideration.

At least 80 percent of Grievant's time is spent in dealing with the EDI Compliance Reports and bankruptcy reviews. These are her predominate duties. Grievant generally accomplishes these duties by assembling , sorting and tracking data from files and reports. She identifies errors and notifies those entities who must correct them and she assists those entities in making those corrections. There is little doubt that these are important and complicated tasks that ensure proper payment of significant funds. These duties clearly fall within the functions identified by DOP Director Walker for the OA 3 classification; specifically:

> Analyzing and auditing reports and documents for accuracy and initiating the correction of errors; researching files for data and gathering information; planning organizing assigning and checking work of lower level clerical employees. . .

Grievant Exhibit 5.

Additionally, Grievant was unable to identify duties she performed that fell within the IP&RA 1 classification which she was seeking. Consequently, Grievant was unable to prove by a preponderance of the evidence that the DOP classification determination for her position was clearly wrong or arbitrary and capricious.

Grievant points out that some of the employees who transferred to the OIC when the WCC was privatized were able to keep the Workers Compensation Classification for

their positions. Grievant argues that these positions had similar classifications as hers. Grievant asserts that reallocating her position to a regular state classification when these employees' positions were not, constitutes unlawful discrimination.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The testimony revealed that more than one third of the positions reviewed during the OIC reclassification project were placed within existing classifications within the current State Classification. Others were placed in newly created classifications or classification titles were changed to more accurately reflect the job responsibilities of the positions within OIC. Grievant is correct that some positions retained their Workers Compensation titles. However, the predominate duties for those positions involved processing accounts that have not been resolved in the Old Workers Compensation Fund.

At most, twenty percent of the duties associated with Grievant's position relate to accounts left from the Old Workers Compensation Fund. Sixty percent of her duties relate

to the EDI Compliance report that involves self insured employers. Grievant's predominate duties do not relate to the Old Workers Compensation Fund and she is not similarly situated with those employees who have such duties and responsibilities. Additionally, the assignment of Grievant to the OA 3 classification is related to her actual job responsibilities so that assignment does not constitute discrimination as the term is defined in W. VA. CODE § 6C-2-2(d). Consequently, the grievance is DENIED.

**Conclusions of Law**

1. Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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

3. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is

supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996))

4. Grievant was unable to prove by a preponderance of the evidence that the DOP classification for her position was clearly wrong or arbitrary and capricious.

5. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant did not prove that the allocation of her position to the Office Assistant 3 classification constituted discrimination as that term is defined in W. VA. CODE § 6C-2-2(d).

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: FEBRUARY 17, 2011**.

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**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**