WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PATRICIA ANN BURKHART,
Grievant,

v. **Docket No. 2010-1303-DOR**

INSURANCE COMMISSION
and DIVISION OF PERSONNEL,
Respondents.

D E C I S I O N

Patricia Ann Burkhart, Grievant, is employed by the Office of the Insurance Commission ("OIC"), Respondent. Grievant had previously been 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. Grievant Burkhart filed a level one grievance form on or about March 31, 2010. Grievant's Statement of Grievance was two and one half pages long; however, after several discussions it was determined prior to the start of the level three hearing that generally Grievant seeks to have her position reclassified to the Insurance Program Specialist classification rather than the Office Assistant 3 classification. Grievant is protesting her classification and pay grade.

By letter dated April 5, 2010, the OIC and Grievant jointly requested to waive the level one conference and move to level two as the issue in dispute was a classification determination and the level one Chief Administrator did not possess the authority to grant the relief requested. A level two mediation session was held on June 29, 2010. Grievant appealed to level three on July 6, 2010. By Order entered July 12, 2010, the Division of

Personnel ("DOP") was joined as an indispensable Respondent party to the grievance. Subsequently, in accordance with requests of the parties and befitting administrative actions, level three hearings were held before the undersigned Administrative Law Judge on March 10 and May 25, 2011, in the West Virginia Public Employees Grievance Board's Charleston office. Grievant appeared in person and was represented by Pamela L. Ray, AFSCME.[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 were provided with the option to submit proposed findings of fact and conclusions of law documents. Grievant and Respondent DOP submitted fact/law proposals and Respondent OIC deferred to DOP. The latter of the two fact/law proposals was received at the Grievance Board on July 15, 2011, and the grievance became mature for decision on that date.

Synopsis

Grievant, an employee of the Office of the Insurance Commission, seeks to have her position reallocated from the classification of Office Assistant 3 at pay grade 7 to the classification of an Insurance Program Specialist classification at pay grade 15. The Division of Personnel is charged with making classification determinations. After reviewing the documents related to Grievant's position and performing an on-site audit, the Division of Personnel determined that Grievant's position best fit into the classification of Office Assistant 3. Grievant did not prove that Respondent DOP's classification decision was clearly wrong. Grievant did not prove that her position should be reallocated to the classification of Insurance Program Specialist. This grievance is DENIED.

---

[1] American Federation of State, County and Municipal Employees, AFL-CIO

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 employed by Respondent, Office of the Insurance Commission (hereinafter "OIC"), in a position classified as an Office Assistant 3 (hereinafter "OA 3").

2. Grievant has been employed with the Office of the Insurance Commission since January 1, 2006. Prior to the privatization and emergence with the OIC, Grievant was employed by the Workers' Compensation Commission (WCC).

3. 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. All positions transferred from the WCC to the OIC were initially transferred with the WCC classifications and with the same pay grade and salary. Following the transfer, DOP and OIC have been involved in a reorganization process to integrate all of the transferred positions into appropriate duties and responsibilities within the OIC.

4. Grievant was classified as a WC Credit Analyst Supervisor, pay grade 18, (PG) when she was transferred from the WCC to the OIC on January 1, 2006.

5. As part of the ongoing reclassification[2] effort undertaken to eliminate the Workers' Compensation classifications in the OIC, Position Description Forms (hereinafter

---

[2] "Reclassification" is defined as the revision by the State Personnel Board of the specifications of a class or class series which results in a 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. W. VA. CODE R. § 143-1-3.76.

"PDF") for the employees who transferred from the Commission were sent to DOP for review.[3]

6. Grievant submitted a Position Description Form detailing the duties and responsibilities of her position to DOP for review and consideration.

7. The DOP is the entity in State government charged by law with classifying positions in the Classified Service. On a regular basis, year in and year out, DOP reviews PDFs for positions statewide to determine their appropriate classification. *See* W. VA. CODE § 29-6-1 *et seq*.

8. Initially, based on a review of the position's PDF, the DOP determined that Grievant's position should be reclassified from the WC Credit Analyst Supervisor classification, pay grade 18, to the Accounting Technician 3 classification, pay grade 7. This determination was made based on the information provided on the PDF that the greatest percentage of duties seemed to be accounting related.

9. As a result of the DOP's review and evaluation, Grievant was reclassified on March 22, 2010 from WV Credit Analyst Supervisor, pay grade 18 to Accounting Technician 3, pay grade 7 effective April 1, 2010. (G. Ex. 3).

10. Grievant did not agree with the classification determination, and on or about March 24, 2010, requested DOP reconsider its determination. Grievant requested reconsideration of this determination. (G. Ex. 3 and R. Ex. 2).

---

[3] 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. DOP is required to use this document when classifying positions. *See* W. VA. CODE R. § 143-1-3.70 and §143-1-4.5 *et seq*.

11. Amy Rhodes, Grievant's immediate supervisor, transmitted a March 25, 2010 correspondence to DOP protesting the reclassification of Grievant's position to Accounting Technician 3. (G. Ex. 6).

12. Cheri Harpold, Director of Financial Accounting, transmitted a March 26, 2010 correspondence to DOP protesting the reclassification of Grievant's position to Accounting Technician 3. (G. Ex. 5).

13. Melinda Kiss, Assistant Commissioner of Finance, transmitted a March 26, 2010 correspondence to DOP protesting the reclassification of Grievant's position to Accounting Technician 3. (G. Ex. 4).

14. On April 15, 2010, staff from the DOP conducted a job audit[4] of the position Grievant occupies. Debbie Anderson and Natalie McBrayer, personnel specialists with DOP performed what can be generically referenced as an on-site audit of Grievant's position and duties.

15. Following the on-site audit, DOP was provided additional information pertaining to the duties performed by Grievant pursuant to a memorandum dated April 28, 2010. (R. Ex. 4).

16. Subsequent to further review of Grievant's PDF, the job audit, additional information requested by DOP and received from OIC and the Grievant, and a team meeting held in the Classification and Compensation section of the DOP to review all of

---

[4] 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.

the information gathered, Respondent DOP altered its determination regarding the reclassification of Grievant's position.

17. Pursuant to a February 17, 2011 Memorandum, DOP stated the appropriate reclassification of Grievant's position should be Office Assistant 3 (OA 3), pay grade 7, rather than the Accounting Technician 3 classification they had originally determined. (G. Ex. 2).

18. DOP indicated this subsequent determination was based on the fact that the position's duties were clerical, i.e. "office support" in nature. The position is responsible for such duties as receiving, reviewing and verifying documents and locating and obtaining data for reports. (G. Ex. 2 and R. Ex. 3, 4, 5 & 6). DOP reclassified Grievant's position from an Accounting Technician 3, pay grade 7 to Office Assistant 3, pay grade 7.

19. The February 17, 2011 Memorandum, in relevant part, stated:

> [I]n regard to your request for reconsideration of the reclassification of the position you occupy. We have taken in to consideration your request dated March 24, 2010, new information obtained in the April 15 desk audit, and the Position Description Form submitted. After much consideration, we are recommending that the position be reclassified to Office Assistant 3 (#9007).
>
> According to the Position Description Form and information obtained in your desk audit, your primary duties are: 1) preparing reports; 2) assisting in the design of reports; 3) writing system requests to IT; 4) developing processes; 5) auditing data; 6) and researching charges. We use the standard of "best fit" in allocating positions to the proper classification. Section 4.4(b) of the *Administrative Rule of the West Virginia Division of Personnel* requires that the specification as a whole be used in allocating positions. The standard of "best fit" is applied by comparing the various duties and responsibilities identified in the Position Description Form to various class specifications and the relationship to other classes in rendering an allocation decision.
>
> You have requested reallocation to Data Warehouse Specialist 1 (#8284). The Data Warehouse Specialist 1 class specification describes work as performing data processing functions related to the design, development, implementation, maintenance and support of a data

> warehouse. Although we recognize that this position has input as to what information is required for reports, this position is not responsible for programming reports to extract data. These duties and responsibilities are not within the scope of your position. The Office Assistant 3 (#9007) class specification describes work as performing advanced level, responsible and complex clerical tasks of a complicated nature involving interpretation and application of policies and practices. This includes: analyzing and auditing reports and documents for accuracy and initiating the correction of errors; posting records of transactions and writing reports; and researching files for data and gathering information

(R. Ex. 6).

20. Upon the reclassification of Grievant's position from a classification in pay grade18 to a classification in pay grade 7, Grievant's salary was not reduced. *See* DOP Administrative Rule, W. VA. CODE R. §143-5.4(f) 2 relating to pay on reclassification.

21. Grievant disagrees with DOP's classification determination.

22. After initially requesting that her position be reclassified as a Data Warehouse Specialist 1, pay grade 17, an Insurance Financial Specialist 3, pay grade 18, a Budget Analyst 3, pay grade 17, an Actuarial Analyst trainee, pay grade 16, or a Financial Reporting Specialist 2, pay grade 17, Grievant eventually decided, for purposes of the level three hearing, that she wanted her position to be classified as an Insurance Program Specialist, pay grade 15. *See* Grievant's Statement of Grievance and Level Three Transcript. Grievant is of the opinion that the "Insurance Program Specialist" is the appropriate classification for the duties she performs. (G. Ex. 7).

23. Grievant's duties require her to handle situations in association with Workers' Compensation issues. Grievant works with her immediate supervisor, Amy Rhodes on the Self Insured Fund. Further, Grievant is the only worker in the Financial Accounting Division that handles the Uninsured Fund.

24. The Uninsured Fund materialized fully after OIC took over Workers' Compensation.[5] Grievant's co-workers depict her as akin to an expert regarding the uninsured employer fund. Grievant and a committee of workers from other departments established policies and procedures after analyzing the new law that merged WCC into the OIC. It took several years to set the program up, Grievant now, among other duties, monitors the fund.[6]

25. Grievant provides administrative coordination of the Uninsured Fund as well as complex technical assistance to other departments as well as Third Party Administrators (TPA) regarding status and eligibility of employer participants.[7] Grievant has the independent authority to make corrections to errors or changes to processes due to legal decisions, law revisions (eg., Grievant has authority to adjust an employer's liability. She has the authority to put an employer in uninsured status). Grievant extrapolates information regarding an employer's coverage. Grievant does not administer or direct the operations of the Uninsured Fund.

---

[5] The uninsured employer fund is a fund to pay the claims of employees who are injured while working for an employer whose subscription to workers compensation coverage is deficient. *See* W. VA. CODE § 23-2C-2.

[6] Parameters of Grievant's 'monitoring activity' does not include administering or directing the operations of the Uninsured Fund.

[7] Responsible administrative personnel of Respondent OIC, workers, and Third Party Administrators perceive Grievant to be the "Go To" person for feasible solutions of problems. Grievant gets inquiries from other departments and TPA's regarding status and applicability of regulation. (It is represented that Grievant not only interprets policies and practices, she assisted in developing them.) A substantial portion of this information was not necessarily applicable to duties of the position but represented Grievant's exceptional performance, knowledge and capability.

26. When analyzing a classification specification and comparing it to duties and responsibilities, the position must first meet the requirements of the Nature of Work section before looking at the Examples of Work. *See* Anderson Level 3 testimony.

27. DOP interprets and applies the Insurance Program Specialist classification as being utilized specifically for positions that are in charge of, not support for, a component of an OIC program.

28. In review of Grievant's position, DOP determined that Grievant's position is not responsible for the type of work intended to be performed by a position with the Insurance Program Specialist classification. The positions in OIC that are classified as Insurance Program Specialists serve in program manager and director roles, not support staff roles.

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

30. Grievant is not directly responsible for administration and oversight of one or more programs operated within OIC. The predominant duties of the position Grievant occupies involve dealing with the accuracy of accounts for the uninsured fund and calculations for self insured liability. Primarily these duties are accomplished through the use of data system(s), data spread sheets and the internet. Grievant's job duties were consistently described as reviewing, researching and interpreting data.

31. 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.

(R. Ex. 9).

32. Pertinent sections of the DOP Classification Specifications for the Insurance

Program Specialist classification states, in part, the following:

Insurance Program Specialist

Nature of Work
Under general supervision, performs work at the advanced level by providing administrative coordination, complex technical assistance, marketing support to AccessWV the State High Risk Pool, or other program or technical area of Insurance Commission. Acts as liaison to facilitate problem resolution and assure compliance with regulations, laws, policies and procedures governing the program or technical area. Has primary

responsibility for developing standards for program operation, for monitoring and/ or evaluating program performance and marketing the program to potential members and various stakeholders. Uses independent judgment in determining action taken in administrative, operational, and marketing aspects of the area of assignment. Exercises considerable latitude in varying methods and procedures to achieve desired results. May supervise subordinate employees. Performs related work as required.

Examples of Work
Analyzes laws and regulations for program area assigned and applies them appropriately to resolve problems and assure compliance.
Interprets laws and regulations for staff, AccessWV Board of Directors, and vendors and external stakeholders.
Monitors changes in laws and regulations and advises insurance industry, staff, AccessWV Board of Directors, and vendors.
Collaborates with agency head on determining need for changes in procedures, guidelines, and formats; develops solutions, and monitors program; interacts with plan administrator to implement procedures.
Represents the program area with other agencies and outside entities.
Plans and implements program to inform and educate potential enrollees, providers, agents and other stakeholders about the High Risk Pool Program; conducts meetings and workshops.
Develops and reviews program related documents or material; such as, licensing forms and educational, informational and promotional material using a variety of media. Coordinates production and promotional campaigns.
Has contact with federal, state, local program representatives, participants and vendors serving the program.
Completes related reports; may compile special and/or statistical reports, analyzing data and interpreting results.
Reads, reviews and responds to correspondence.
May draft legislative issues, rules and regulations.
May oversee the work of support staff, specialists, or consultants in relation to the completion of specific assignments.
(G. Ex. 7).

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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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 she is performing the duties of a classification other than the one to which she is assigned, DOP must determine whether reallocation is appropriate. *Hart v. Dep't of Health & Human Res.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009). 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 her 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 another classification. Grievant prefers a classification with a higher pay grade and ultimately identified the Insurance Program Specialist classification at pay grade 15 as appropriate.[8] Grievant's salary was not changed as a result of the reallocation of her position, but her present salary exceeds the upper limit of pay grade 7.[9] Grievant is of the opinion this will inhibit her chances of receiving pay increases.

In order to prevail upon a claim of misclassification, a Grievant must prove by a preponderance of the evidence that her 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. Department of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989).

---

[8] Subsequent to the filing of the grievance, for the purpose of the level three hearing Grievant eventually identified the Insurance Program Specialist classification. This is after initially requesting that her position be reclassified as a Data Warehouse Specialist 1, pay grade 17, an Insurance Financial Specialist 3, pay grade 18, a Budget Analyst 3, pay grade 17, an Actuarial Analyst trainee, pay grade 16, or a Financial Reporting Specialist 2, pay grade 17.

[9] Pay grade 7's maximum annual salary amount is $37,884.00; Grievant currently makes above that amount. (Judicial Notice of WV DOP Schedule of Salary Grades 2-26).

Traditionally a Position Description Form is completed by the employee to describe the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a 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 be more fully informed. Additional information was specifically requested and supplied to insure that all of the duties and responsibilities of Grievant's position were taken into consideration.

DOP analyzed and focused upon the assigned duties of the position. It is imperative to focus upon a position's prescribed duties and whether they more closely match those of another cited classification specification than the classification to which Grievant is assigned. *See generally, Hayes v. W. Va. Dep't of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989). Personnel job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of Work" section of a classification specification is its most critical section. *See generally, Dollison v. W. Va. Dep't of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

In the instant grievance, Senior Personnel Specialist Debbie Anderson[10] testified at the level three hearing and explained that when analyzing a classification specification and comparing it to duties and responsibilities, the position must first meet all the requirements of the Nature of Work section before one ever looks at the Examples of Work.

Respondent DOP interprets and applies the Insurance Program Specialist classification as being utilized specifically for positions that are in charge of, not support for, a component of an OIC program. Grievant's testimony, wherein she described her daily responsibilities, as well as the testimony of Ms. Anderson, confirmed that in reality Grievant's position does not perform any of the work enumerated in the Nature of Work section of the Insurance Program Specialist classification nor does she perform any of the work anticipated to be performed by a position in that classification.

Grievant and her direct Supervisor, Amy Rhodes, both testified that the predominant duties of the position Grievant occupies involve dealing with the accuracy of accounts for the uninsured fund and calculations for self insured liability. Grievant testified that she spends the better part of her days doing calculations. Primarily these duties are accomplished through the use of data system(s), data spread sheets and the internet. Throughout testimony, Grievant's job duties were continually and consistently described as reviewing, researching and interpreting data.

When reviewing Grievant's position, DOP determined that her position is not responsible for the type of work intended to be performed by a position with the Insurance

---

[10] Debbie Anderson, Senior Personnel Specialist, has over 30 years experience in state government personnel work and has worked with DOP's Classification and Compensation section since 1989. Ms. Anderson stated DOP believes Grievant's position is now properly allocated to the OA 3 classification.

Program Specialist classification. This classification is intended to be used for positions which have been assigned responsibility for administration and oversight of programs operated within OIC, not for individuals who provide support to programs of the OIC, such as Grievant does. The positions in OIC that are classified as Insurance Program Specialists serve in program manager and director roles, not support staff roles. This is not the role Grievant's position performs nor do her responsibilities rise to this level of responsibility. *See* R. Ex. 14 and 16.

All of Grievant's supervisors, direct and indirect, testified they believed Grievant (not her position but the Grievant herself) should be in a different classification. However, none were able to really testify in regard to the specifics of her duties and responsibilities, with the exception of her direct supervisor, Amy Rhodes, and even then there seemed to be a blending of duties between the supervisor and the employee such that is was difficult at times to discern whether it was a duty of the employee or that of the supervisor. All seemed to believe that they should have been part of the classification determination process, though that is not how classification determinations are made. All also admitted they are not trained to make classification determinations and none have expertise in reviewing and interpreting job classifications. The DOP is the entity in State government charged by law with classifying positions in the Classified Service. W. VA. CODE §§ 29-6-1 *et seq*.

DOP is required to classify positions, not employees, into the classification that is the "best fit" within the current State Classification Plan. Ms. Anderson testified the "best fit" within the current State Classification Plan for the position Grievant occupies is the OA 3 classification. Ms. Anderson testified she heard nothing new in the testimony or evidence

presented that caused her to change her mind with regard to the classification determination made by the DOP. Ms. Anderson stated that the Insurance Program Specialist classification that Grievant seeks does not even come close to representing the duties and responsibilities that are performed by Grievant's position. Grievant's position does not perform the duties or work anticipated to be performed by a position in the Insurance Program Specialist classification. Grievant was unable to prove by a preponderance of the evidence that Respondent DOP's classification for her position was clearly wrong or arbitrary and capricious.

The following conclusions of law are appropriate in this matter:

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). 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 key to the analysis is to ascertain whether Grievant's current classification constitutes the "best fit" for her required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991)*; Propst v. Dep't of Health and Human Resources and Div. of Personnel*, Docket No. 93-HHR-351 (Dec. 3, 1993).

4. In order to prevail upon a claim of misclassification, a Grievant must prove by a preponderance of the evidence that her 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. Department of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989).

5. Grievant did not demonstrate that the classification she identified was a better fit for her position's duties than the classification determination of the Division of Personnel.

6. The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of DOP. *Moore v. W. Va. Dep't of Health & Human Resources*, Docket No. 94-HHR-126 (Aug. 26, 1994); *Celestine v. State Police,* Docket No. 2009-0256-MAPS (May 4, 2009); *Logdson v. Div. of Highways*, Docket No. 2008-1159-DOT (Feb. 23, 2009). Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989); *Logdson*, *supra*

7. Employees have a substantial obstacle to overcome when contesting their classification, as the Grievance Board's review is supposed to be limited to determining whether or not the agencies actions in classifying the position were arbitrary and capricious. *W. Va. Dept. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

8. The State Personnel Board and the Director of DOP have wide discretion in performing their duties although they cannot exercise their discretion in an arbitrary or capricious manner. *See, Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *Aff'd* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

9. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See, Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

10. 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)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

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

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: December 7, 2011

_____
Landon R. Brown
Administrative Law Judge