WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JENNIFER A. BUTCHER,

Grievant,

v. **Docket No. 2012-0507-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
OFFICE OF HUMAN RESOURCE MANAGEMENT AND
DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant, Jennifer A. Butcher, filed a grievance against her employer the West Virginia Department of Health and Human Resources, ("DHHR")/Office of Human Resource Management ("OHRM") alleging, "the duties of my position have substantially and permanently changed from that of a Claim Representative 2 to that of a Workers' Compensation Claims Adjuster 3. My employer has denied a discretionary pay increase of 10% plus reallocation of my position to the [sic] level of classification and salary compensation and therefore has violated section 5.4(b) and sections 4.7 and 5.4(f)3 of the Administrative Rule. My duties changed in October of 2011." Relief sought is,

> "1. Discretionary pay of 10% increase from the Claims Representative 2 Position and reallocation of my position immediately to the classification of Workers' Compensation Claims Adjuster 3 as required by section 5.4(b) and sections 4.7 of the Administrative Rule.
> 2. Adjustment of my salary immediately based on the 10% discretionary pay plus reallocation is required by section 5.5(f)3 of the Administrative Rule and in

> compliance with the salary adjustments outlined in section 5.6(a) [1] of the Administrative Rule and calculated at 5% per pay grade.
> 3. Payment to me of all the accumulated back pay, including interest from the salary resolution of this grievance."

By Order of the Grievance Board dated November 16, 2011, the Division of Personnel ("DOP") was joined as an indispensable party. Grievant filed an "Addendum to Grievance Statement" on January 4, 2012, which, *inter alia,* lists the duties for which Grievant contends she is not being compensated.[2]

The Chief Administrator waived this grievance to level two of the grievance process and requested mediation by an Administration Law Judge. A mediation session was held on January 9, 2012. Following a timely appeal, a level three evidentiary hearing was held before the undersigned Administrative Law Judge in the Charleston office of the Public Employees Grievance Board on March 28, 2013. Grievant appeared *pro se*. Michael Bevers, Assistant Attorney General, represented Respondent DHHR and Karen O'Sullivan Thornton, Assistant Attorney General, represented Respondent DOP. This matter became mature for decision at the conclusion of the hearing on March 28, 2013, when all parties waived filing of post-hearing arguments.

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[1] Administrative Rule Section 5.6(a) is not relevant to the issues raised in this grievance as it deals exclusively with demotions and the discretion of the appointing authority to reduce or not reduce the pay rate of an employee who has been demoted.

[2] Those duties are fully incorporated by reference herein.

Synopsis

Grievant asserts that since she became a Claims Representative 2 with the Disability Unit of DHHR in November of 2011, new and substantial duties have been added to the position, which are consistent with the Workers' Compensation Claims Adjuster 3 classification. She asserts that DOP must reallocate her position accordingly, with a pay increase of ten percent. Respondent DOP maintains that Grievant's present classification as Claims Representative 2 is the "best fit" and encompasses her present duties. Grievant failed to prove that her position should be reallocated as asserted, because the nature and characteristics of her work most closely resemble those described by the Claims Representative 2 classification. Grievant did not demonstrate that any of the changes or additions in her duties are such that she should be reallocated to the requested classification or that it was a better "fit" for her position.

Grievant further avers that she is entitled to a discretionary pay increase under the Internal Equity provisions of the Pay Plan Implementation Policy ("PPI Policy") of DOP at III.D.3. Grievant cannot be eligible for the Internal Equity salary increase unless there are "comparable" employees in her organizational unit and job class who earn twenty percent more than she. Grievant is the only employee in her job classification in the Disability Unit and, therefore, there is no one with whom she can be compared. The internal equity pay provision cannot be implemented under these circumstances. In addition, even when all of the criterion of the Internal Equity provisions are met, the salary increase thereunder

is entirely discretionary. Respondent is not obligated to grant a discretionary pay increase. Therefore, this grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant is currently employed as a Claims Representative 2 assigned to DHHR in the Disability Management Unit dealing with Workers' Compensation claims. She has held this position since November 1, 2011. The individual who previously occupied that position retired.[3]

2. Grievant requested a discretionary pay increase, which was approved for submission to DOP by Human Resources Manager, Mr. Harold Clifton, on September 14, 2011.[4]

3. Ms. 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 testified at the level three hearing.

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[3] Grievant's job classification prior to November 2011 was ASA I.

[4] DOP Exhibit No. 1-The request for a pay increase was not based upon the Grievant's acquisition of "Additional duties/Responsibilities," but rather, was submitted/requested under the "Internal Equity" provision of the policy. Ms. Debbie Anderson, Senior Personnel Specialist at DOP, testified that the requesting Agency is supposed to tell DOP what type of discretionary pay raise it is requesting.

4. Typically, the Agency decides which employees may be eligible for a discretionary pay increase and to which increase they may be entitled. The Agency then requests DOP's review and approval of the salary increase. However, in this instance, Grievant initiated the request for a discretionary pay increase.

5. The Workers' Compensation Systems Specialist 2, now Claims Representative 2, used to be a Workers' Compensation Commission position, which, due to reorganization, now falls under the Office of the Insurance Commission ("OIC"). This title has been approved only for the OIC since it is still administering workers' compensation old fund claims.[5]

6. Director of Personnel, Ms. Sara Walker, denied Grievant's request for an Internal Equity salary increase by letter dated September 29, 2011, to DHHR Secretary Michael J. Lewis on the basis that the DOP's PPI Policy requires a comparison with other employees in the same job class and Grievant is the only employee at DHHR in her job classification. Thus, no comparison was possible.

7. Grievant requests reallocation of her position from Claims Representative 2 to Workers' Compensation Claims Adjuster 3.

8. The relevant portions of the classification specifications for these classifications are set forth below:

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[5] DOP Exhibit No. 2-Memorandum from Sara Walker, Director of DOP, to Jane Cline, Commissioner of OIC, dated January 10, 2010, explaining DOP Director's intention to eliminate all existing Workers' Compensation titles except those used solely and specifically for the administration of Workers' Compensation Claims.

Claims Representative 2

Nature of Work: Under general supervision, reviews, evaluates, and processes an assigned caseload of Workers [sic] Compensation claims. Responsible for caseload involving lost time claims with less than 104 weeks of indemnity benefits. Caseload will include hearing loss, and occupational disease (e.g., repetitive motion, carpal tunnel, chemical exposure, dermatitis, etc.) and claims requiring surgery. Performs related duties as required.

Distinguishing Characteristics:
The Claims Representative 2 is distinguished from the Claims Representative 1 by the responsibility of claims assigned. Claims Representative 2 is responsible for caseload involving lost time claims with less than 104 weeks of indemnity benefits. Caseload includes hearing loss, and occupational disease (e.g., repetitive motion, carpal tunnel, chemical exposure, dermatitis, etc.) and claims requiring surgery.

Examples of Work

Analyzes assigned new claims and reopening applications: determines applicability of coverage and charge ability.

Contacts claimants, employers, physicians, witnesses, and others to gather and verify information; secures salary information and determines compensation rate.

Determines claim compensability.

Identifies claims needing vocational rehabilitation for referral to rehabilitation specialists and monitors progress of rehabilitation services rendered within assigned authority.

Identifies subrogation opportunities; initiates recovery procedures.

Requests treatment plans from physicians and other clinical providers; reviews and develops the case management plan under general supervision.

Reviews requests for treatment, diagnostic studies, change of physicians, surgery, payment of medical expenses and payment of indemnity benefits.

Evaluates hearing loss claims and determines employer allocations/charge ability; evaluates audiograms and determines impairment rating based on current accepted guidelines.

Consults with medical management nurse on complex medical issues.

Requests independent medical examinations; reviews treatment plans in relation to established treatment guidelines.

Explains basis for and results of decisions and appeal rights to physicians, attorneys, government officials, other clinical providers and other interested parties.

Reviews request for settlement to determine that related payments are made in accordance with agency policies and procedures.

Works with injured worker, physician and employer to identify return to work opportunities through modified alternate job duties or trial return to work.

Assists attorneys in litigated claims.[6]

Workers' Compensation Claims Adjuster 3

DEFINITION OF WORK: Under limited supervision, performs complex specialized work in the review, evaluation and processing of workers' compensation claims in the Workers' Compensation Commission. May perform in a lead work role with responsibility for training and mentoring new employees and assisting the supervisor in the operation of the work unit or team. Manages a caseload typically involving claims of indemnity benefits with 104 weeks or more lost time, fatalities, catastrophic/traumatic injury, permanent total disability, medical only issues or claims of similar complexity. Performs related work as required.

DISTINGUISHING CHARACTERISTICS: This level is distinguished from the Workers' Compensation Claims Adjuster 2 level by the greater complexity and difficulty of the claims adjudicated

[6] DHHR Exhibit No. 4.

and/or by the lead work and assistant supervisor assigned role.

ESSENTIAL FUNCTIONS:

Reviews and evaluates new claims and claim reopening applications at the assigned level; assures accuracy of claim data such as name, social security number, medical codes, policy number, injury date, etc. Reviews injury type against diagnosis; consults with medical or rehabilitation resource personnel on more difficult diagnoses.

Determines applicability of coverage in charge ability [sic] of claim; determines compensability of claim.

Contacts claimant, employer[,] physicians or other medical providers, or witnesses to gather or verify claim or injury information.

Secures salary information and determines compensation rate according to established guidelines.

Requests treatment plans from clinical providers; reviews requests and processes requests for treatment or allowed services using established medical guidelines and codes and Commission policies and procedures.

Requests independent medical examinations (IME); reviews IME reports against established medical guidelines: consults supervisor or medical professionals or rehabilitation specialists on unusual or highly complex medical rehabilitation issues.

Awards indemnity benefits according to established guidelines and statute.

Consults with medical and rehabilitation professionals and employer to develop return to work opportunities through modified job duties or trial return to work.

Develops and issues protestable and non-protestable orders related to assigned claims.

Explains claims decisions and appeal rights to claimant, attorneys, employers, clinical providers, or government agency; issues protestable or non-protestable orders related to the claim.

Maintains current and accurate claim diaries and related documentation.

Maintains claims adjudication competencies through successful completion of available training.

> Acts as a claims resource specialist on intra-agency project teams or studies.
>
> Trains or mentors new employees on claims procedures and unit operations.[7]

9. In response to Grievant's request for reallocation, she was asked to complete a Position Description Form ("PDF")[8] that requires the employee to list, in order of importance, the various duties she performs.[9] Grievant complied, submitting a PDF for review by DOP, dated March 4, 2013.[10] Human Resources Manager Clifton certified that the contents of that PDF were accurate on March 12, 2013. The PDF set forth the percentage of time Grievant spent on various tasks and detailed her responsibilities, in significant part, as follows:

> "25% Manage and oversee the process of lost time Workers' Compensation Claims to ensure every effort is being made to return those employees to work at either pre-injury physical demand or in a temporary less-than-full duty position. Contact is made with the injured employee, work-site supervisor/HR Personnel, medical providers, claims adjuster to rehabilitation professionals to facilitate a safe, timely return-to-work for the injured worker.

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[7] DHHR Exhibit. No. 5-It is noted that this classification has an effective date of March 16, 2004.

[8] DHHR Exhibit No. 2-The Position Description Form is a document that 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* W. VA. CODE §§ 143-1-3.70 and 143-1-4.5 *et seq.*

[9] The level three hearing in this matter was scheduled and continued pending completion of the PDF and DOP's review of same. As soon as it was feasible, after DOP had opportunity to review the PDF and make a decision as to whether reallocation was appropriate, the level three hearing was held.

[10] DHHR Exhibit No. 2-The above listed duties are not exhaustive, and the remainder are fully incorporated herein by reference.

25% Gather employee information to process work-site injury, hearing loss, occupational pneumoconiosis claims and reopening applications while assuring that personally identifiable information is correct to compensable issues and clear for initial claim processing. Compare diagnosis codes to the type of injury for accuracy, review personal information provided on the employers' report of injury to employee and physician report of injury to confirm validity of the information with the injured employee as well as the initial medical provider. Electronically file claims and forward all pertinent type of injury filing date to return-to-work date.

2% Ensure the safety and loss control specialist is aware of unsafe situations or behaviors that may have led to an injury. Follow-up with the bureaus and health facilities to ensure that unsafe situations or behaviors have been corrected.

10% Evaluate claim decisions for accuracy for temporary total disability benefits, ensuring that follow-up with work-site to ensure injured employee has returned to work, whether or not return-to-work full duty or modified duty, ensure that no duplication of TTD wages has occurred in order to be in compliance with the Canfield decision. Notify claims adjuster of any changes [sic] have occurred since initial filing of the claim that may change the status of their system. Request independent medical evaluations, rehabilitation services, surveillance and services from compensation insurance provider.

10% Maintain the accuracy of the access database to track the number of employees off work due to an on-the-job injury. This data is used to compile monthly reports, fiscal year reports and other graphs/charts to show trends in DHHR's compensation claims activity …

5% Consult with and advise the Safety to Loss Specialist regarding employees whose claims are closed but who remain on restricted duty or off work …

> 10% Work as the liaison with the Office of the Insurance Commission and the Agency's Workers' Compensation carrier to ensure correct procedures are taken when dealing with workers' compensation.[11]

10. Mr. Andrew Garretson is the Safety and Loss Control Specialist for the Disability Management Section of DHHR and Grievant's immediate supervisor. Grievant and Mr. Garretson have worked together for seven years.[12] Mr. Garretson completed Section 26 of Grievant's PDF, describing duties that have been added to Grievant's position since her last review. They are, in significant part, as follows:

> "Assist as back-up for the Agency's Safety and Loss Control Specialist.
>
> Approve and resolve complex return-to-work issues of employees who remain of [sic] work due to Workers' Compensation, medical leave of absence, restricted duty … Work with Agency's directors and HR personnel, medical providers, rehabilitation case managers, employment services and employees to ensure proper leave is being granted and steps are taken to ensure a successful return-to-work.
>
> Work closely with the Safety and Loss Control Specialist to resolve safety issue [sic] and conduct safety audits for DHHR's bureaus and facilities. Consult with the Agency's property manager to ensure that safety issues have been resolved.
>
> Oversee the process of DHHR's restricted duty program … Track restricted duty employees by entering current request into an access database to ensure accuracy … "

[11] DHHR Exhibit No. 2-The above listed duties are not exhaustive, and the remainder are fully incorporated herein by reference.
[12] It was unclear how long Mr. Garrett had been Grievant's supervisor.

11. Grievant has taken on new duties related to the Agency's safety and loss control efforts. Grievant indicated on her PDF that she spends 7% of her time on these specific new/additional duties. The remainder of her new duties relate to oversight and management of the Workers' Compensation Program.

12. Grievant handles all Workers' Compensation claims on behalf of the agency, by filing workers' compensation claims and "answering any questions about them." Grievant contacts the State's insurance carrier and the OIC in connection with all workers' compensation claims. Mr. Garrett described Grievant as, "Our face for workers' compensation, managing claims, keeping track of restricted duty folks on compensation … " [13]

13. Grievant accompanies Mr. Garrett to work sites for meetings and safety audits.

14. When a new PDF is sent to DOP for review, a Personnel Specialist is assigned to make a determination as to whether reallocation is proper. The Personnel Specialist gathers personnel files, previous job specifications, the class specifications for the positions at issue, compares the employee's current duties with his/her previous duties and considers the comments of the agency to make its decision as to whether reallocation is appropriate.[14]

15. DOP did not conduct a desk audit of Grievant's work.

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[13] Testimony of Mr. Andrew Garrett.
[14] Testimony of Ms. Debbie Anderson.

16. Based upon DOP's examination of the foregoing information related to Grievant's request for reallocation, DOP believes that Grievant's position is properly allocated to the Claims Representative 2 classification.[15]

17. By memorandum dated March 18, 2013, from Ms. Barbara Jarrell, Assistant Director of the Classification and Compensation Section of the DOP, to Mr. Harold Clifton, the DOP stated that it had determined that Grievant was correctly classified as a Claims Representative 2.[16]

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.*

Grievant asserts that DOP improperly denied her request for a discretionary pay increase of ten percent pursuant to the Internal Equity provisions of the PPI Policy of DOP at III.D.3. "[T]he granting of internal equity pay increases is a decision that is within the discretion of the employer to make,

[15] *Id.*
[16] DHHR Exhibit No. 3.

and such increases are not mandatory or obligatory on the part of the Respondent." *Harris v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res*., Docket No. 07-HHR-141 (May 14, 2008). An employee is not eligible for the Internal Equity salary increase unless there are comparable[17] employees in his/her same organizational unit and job class who are making 20% or more than he/she. Grievant is the only employee in her job classification in the Disability Unit and, therefore, there is no one with whom she can be compared. The internal equity pay provision cannot be implemented under these circumstances. Moreover, even assuming that all of the foregoing criterion were met in this instance, this raise is not mandatory, but purely discretionary.

Grievant further asserts that she should be reallocated to a Workers' Compensation Claims Adjuster 3 from a Claims Representative 2. W. VA. CODE § 29-6-10 authorizes the DOP to establish and maintain a position classification plan for all positions in the classified service. State agencies 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). The DOP Administrative Rule provides in Section 4.4(b) as follows: "In determining the class to which any position shall be allocated, the specifications

[17] The "Internal Equity" provision of the policy defines a comparable employee as one with, "comparable training and experience, duties and responsibilities, performance level, and years of state/classified service."

for each class shall be considered as a whole. The Director shall give consideration to the general duties, specific tasks, responsibilities required, and relationships to other classes as affording together a picture of the positions that the class intended to include." 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).

This grievance must first be evaluated pursuant to the DOP's rule on reallocation at 143 C.S.R. 1 § 3.75. This rule defines "Reallocation" as "[r]eassignment 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." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." *Keys v. Dep't of Environmental Protection*, Docket No. 06-DEP-307 (Apr. 20, 2007); *Kuntz/Wilford v. Dep't of Health and Human Res*., Docket No. 96-HHR-301 (Mar. 26, 1997); *See, Siler v. Div. of Juvenile Serv*., Docket No. 06-DJS-331 (May 29, 2007). An increase in the number of duties and the number of employees supervised does not necessarily establish a need for reallocation.

Kuntz/Wilford, supra. The undersigned necessarily relied heavily on the documentary evidence submitted by Grievant to determine what her present job duties entail.[18] Grievant's PDF noted new duties concerning safety and loss control, for example, ensuring the Safety and Loss Control Specialist is aware of unsafe situations or behaviors that may have led to an injury and following up with the bureaus and health facilities to ensure that unsafe situations or behaviors have been corrected. However, Grievant estimated that she spent only 7% of her time on these tasks. This component of Grievant's responsibilities constitutes an admittedly small portion of her work and, as such, does not constitute a significant change in the "kind" or level of her duties and responsibilities. The remainder of Grievant's additional duties related to the oversight and management of the Agency's Workers' Compensation Program.

Ms. Anderson explained that, in many instances, employees in new positions gradually take on the full duties encompassed in their classification. They do not necessarily perform all of the duties of their classification specifications from "day one" but rather, as the employees learn the position,

[18] Other than the information contained in Grievant's original Statement of Grievance and the Addendum to same, Grievant offered little evidence to substantiate her assertion that she is performing the work of the Workers' Compensation Claims Adjuster 3. At hearing, Grievant did not detail/explain how the duties and responsibilities of the Workers' Compensation Claims Adjuster 3 position match her current responsibilities. Nor did she ask Ms. Anderson to explain, with specificity, how Respondent DOP substantiated its opinion that the Claims Adjuster 3 position was not the "best fit" to describe Grievant's position. She did not ask why DOP did not perform a desk audit to more fully ascertain the nature of her work and its essential functions. When her supervisor, Mr. Garretson, testified, Grievant did not question him to ascertain whether he has observed her performing the work of a Claims Adjuster 3.

they take on additional responsibilities and duties within their classification. Many of the responsibilities undertaken by Grievant fall under the category of an increase in the type of duties contemplated in the class specification for the Claims Adjuster 2 position. The relatively minor expansion or evolution of Grievant's duties does not necessarily warrant a reallocation. These additions do not amount to a "significant change" requiring reallocation of Grievant's position.

In addition, in a grievance alleging misclassification, Grievant must prove that her duties more closely match another cited personnel classification specification than the one under which she is currently assigned. *Kyte v. W. Va. Dep't of Health & Human Res.,* Docket No. 94-HHR-030 (Sept. 21, 1994). *See generally, Hayes v. W. Va. Dep't of Natural Res.,* Docket No. NR-88-038 (Mar. 28, 1989). Personnel 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). *See generally, Dollison v. W. Va. Dep't of Employment Security,* Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievants' current classification constitutes the "best fit" for their required duties. *See Simmons, supra.*

In reviewing the classification specifications for the Workers' Compensation Claims Adjuster 3, Grievant did not demonstrate that she performs the supervisory work at the "top of the pyramid" for that classification. Specifically, Grievant did not offer evidence that she "performs in a lead work role with responsibility for training and mentoring new employees and assisting the

supervisor in the operation of the work unit or team." Under the next tier of the pyramid, "Distinguishing Characteristics," Grievant demonstrated that she handles complex cases, but did not provide evidence that she does "lead work" or operates in the assigned role of an assistant supervisor. Finally, progressing to "Essential Functions," the third tier of the "pyramid," Grievant did not show that she acts as a claims resource specialist on intra-agency project teams/studies or trains or mentors new employees on claims procedures and unit operations. In fact, Grievant's PDF at "Part 3 – Supervisory Duties" indicates that she has no supervisory duties whatsoever. She does not "assign or distribute work to others, check the work of others, train subordinate employees, evaluate performance, establish unit policy/procedure." Nor does she "hire new employees, terminate employees, promote employees, demote employees, discipline employees, authorize leave or authorize pay increases." Clearly, the class specifications for Workers' Compensation Claims Adjuster 3 contemplate some supervisory responsibilities as part of the position, which Grievant has not undertaken.

Finally, DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. *See W. Va. Dep't of Health & Human Res. v. Blankenship,* 189 W. Va. 342, 347, 431 S.E.2d 681, 686 (1993). 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. DOP provided evidence and testimony through Ms. Anderson that Grievant's PDF, prepared in

March 2013, had been carefully analyzed and compared against the pertinent classifications. Based upon the foregoing, DOP believes Grievant's position is properly allocated to the Claims Specialist 2. While there are some duties common to both of the pertinent job classifications at issue in this matter, the issue is not whether there is a mere "fit," but rather what is the "best fit." *See Simmons, supra.* Upon examining the Grievant's job duties, the Claims Representative 2 classification is the "best fit."

The Workers' Compensation Claims Adjuster 3 position description, from its most critical to its more general requirements, indicated that the employee occupying that position must have supervisory authority/responsibilities. Grievant did not establish that she had supervisory responsibility commensurate with that required under the Workers' Compensation Claims Adjuster 3 specifications, nor did she establish by a preponderance of the evidence that the classification of Workers' Compensation Claims Adjuster 3 is the "best fit" for her duties and responsibilities. *See Captain, supra; Simmons, supra.* More significantly, although Grievant had some additional duties added to her position during her tenure as Claims Representative 2, these duties are not of the magnitude or quantity to meet the "significant change" standard for reallocation of a position as required by DOP's Administrative Rule. *See Keys, supra.*

In order to prevail in her grievance, Grievant must meet the significant legal standard of demonstrating that the determination of DOP, as the agency responsible for making classification determinations for state employees in the classified service, was "clearly erroneous." *See Blankenship, supra.* 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/her classification has an uphill battle. *Bennett v. Insurance Comm'n and Div. of Pers.,* Docket No. 07-INS-299 (June 27, 2008). Grievant undoubtedly performs a variety of significant and important duties within her agency. However, Grievant failed to establish by a preponderance of the evidence that "significant changes" had taken place in her duties and responsibilities, or that DOP's determination that Claims Supervisor 2 was the proper class for her positions was clearly wrong.

The above discussion is supplemented by the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the 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). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997). 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. "[T]he granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent." *Harris v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). *Also see Morgan v. Department of Health Human Resources,* Docket No. 07-HHR-131 (June 5, 2008). An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res*., Docket No. 07-HHR-141 (May 14, 2008). Grievant has not identified any rule, policy, statute, or regulation that Respondents violated by not granting this pay increase, as an internal equity raise was discretionary on the part of the agency, and not an entitlement.

3. 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 the Division of Personnel. *Moore v. W.Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). 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).

4. The DOP's interpretation of classification specifications are entitled to great weight unless clearly erroneous. *W. Va. Dep't 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. West Virginia Department of Education*, 210 W. Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007); Bennet *v. Insurance Comm'n and the Div. of Personnel*, Docket No. 07-INS-299 (June 27, 2008).

5. The key to the analysis is whether the classification Grievant seeks constitutes the "best fit" for the duties that she 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).

6. In order to prevail upon a claim of misclassification, a grievant must prove by a preponderance of the evidence that his/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).

7. 143 C.S.R. 1 § 3.75 defines "Reallocation" as "[r]eassignment 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." The key in seeking reallocation is to demonstrate "a

significant change in the kind or level of duties and responsibilities." *Keys v. Dep't of Environmental Protection*, Docket No. 06-DEP-307 (Apr. 20, 2007); *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301(Mar. 26, 1997); *See, Siler v. Div. of Juvenile Serv.,* Docket No. 06-DJS-331(May 29, 2007).

8. An increase in the number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *Kuntz/Wilford, supra*.

9. The changes or additions to Grievant's duties have not resulted in the Workers' Compensation Claims Adjuster 3 classification being a better fit for her position.

10. Grievant has failed to meet her burden as she has not shown that her duties have significantly changed, that her duties and responsibilities are a better fit for the position sought, or that DOP's determination to classify her as a Claims Representative 2 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 (eff. July 7, 2008).

DATE: MAY 9, 2013

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE