

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CARMELA ERNESTINE NEWHOUSE,**  
Grievant,

v.

**Docket No. 2016-0104-CONS**

**INSURANCE COMMISSION and**  
**DIVISION of PERSONNEL,**  
Respondents.

## **DECISION**

Grievant, Carmela Newhouse, is employed by Respondent, Offices of the Insurance Commissioner (“OIC”), in the Office of Judges. (“OOJ”). By form dated July 8, 2015, Ms. Newhouse filed a grievance contesting the June 12, 2015, decision of the Director of the Division of Personnel (“DOP”) to affirm the DOP’s determination that Grievant’s position best fits the Paralegal classification.<sup>1</sup> As relief, Grievant seeks;

Position classification decision overturned, or most appropriately, reclassified as a Claims Deputy in uniformity with other positions within my agency requiring the same kind and level of work.

A level one decision dated July 15, 2015, waived consideration of the grievance stating the Offices of the Insurance Commissioner lacked authority to grant any relief in the matter and therefore the grievance was denied at level one. An Order joining the Division of Personnel (“DOP”) was entered on July 24, 2015.

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<sup>1</sup> The statement of grievance is summarized and the complete statement is part of the record and considered as if fully set out herein. Additionally, Grievant noted in her statement of grievance that she did not receive a copy of the DOP Director’s letter and filed her grievance as soon as she became aware of the decision.

A second grievance was filed dated August 3, 2015, stating the following:

This grievance is filed in response to Commissioner Riley's letter dated July 21, 2015, advising that pursuant to the classification determination of the West Virginia Division of Personnel, my position has been reallocated from the classification of Hearing Examiner in pay grade 15 to Paralegal in pay grade 10, effective July 16, 2015.

A copy of the letter from Insurance Commissioner Riley was attached to the grievance as well as a certification of service noting that the letter was mailed on July 22, 2015. Grievant made the same request for relief previously set out on the July 8, 2015, grievance form.<sup>2</sup> Upon receipt and examination of the grievances they were consolidated at level two by Order dated August 14, 2015. A mediation was conducted on August 28, 2015. Grievant filed an appeal to level three dated September 1, 2015.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board ("Grievance Board") on February 19, 2016.<sup>3</sup> Grievant appeared personally and was represented by David S. Clark. Mr. Clark is employed in the Office of Judges but is not a supervisor for Grievant. Respondent, OIC was represented by Jonathon T. Osborne, Assistant Attorney General, and Respondent DOP was represented by Karen O'Sullivan Thornton, Senior Assistant Attorney General. This

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<sup>2</sup> This grievance deals with the same classification determination as the original grievance and was filed within the statutory time line for an appeal from the initial level one decision.

<sup>3</sup> The level three hearing was originally convened on November 16, 2015. Grievant appeared with a representative who is in her direct line of supervision (supervisor of Grievant's supervisor). Respondent DOP objected based upon W. VA. CODE § 6C-2-2 (n). Upon motion of Grievant's representative, the matter was continued to "allow Grievant's counsel to provide authority related to whether she was barred by statute from representing Grievant, or for Grievant to procure a different representative," if Grievant choose to do so. No additional authority was provided and Grievant appeared at the next level three hearing with a different representative.

matter became mature for decision on March 22, 2016, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.<sup>4</sup>

### **Synopsis**

Grievant contends that DOP's determination that the Paralegal classification is the best fit for her position was clearly wrong as well as arbitrary and capricious. She pointed to a long history of similar positions being classified in the Employment Programs Claims Deputy classification to support her contention that her position would best fit in that classification. DOP demonstrated that Grievant's position did not perform one of the essential functions required for the Claims Deputy classification and that her duties were consistent with the Paralegal classification. Grievant did not prove that the DOP's determination was clearly wrong.

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, Carmela Newhouse has been continuously employed by the Offices of Judges since September 16, 1997.<sup>5</sup> At that time the OOJ was under the Bureau of Employment Programs ("BEP").

2. Grievant was originally hired in the Paralegal classification. She remained in that position until she was promoted to an Employment Programs Claims Deputy

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<sup>4</sup> Respondent OIC did not submit proposed findings and conclusions.

<sup>5</sup> On January 1, 2006, the Workers Compensation Commission ceased to exist as a state agency. More than 300 employees previously assigned to that agency, including Grievant, were transferred to the Office of Insurance Commissioner.

position. Paralegal classification is compensated at pay grade 10 with an annual salary range of \$23,724 to \$43,896. (Respondent DOP Exhibit 2).

3. Grievant applied for and was selected to fill a Hearing Examiner position. She started work as a Hearing Examiner on June 1, 2002. She remained in that position for a number of years. During most of her time as a Hearing Examiner Grievant reviewed worker compensation claims and conducted hearings, which included taking testimony and exhibits. Four or five years ago, the OOJ Chief ALJ determined that due to the decline in workload at the OOJ, all hearings would be conducted by ALJs. Thereafter, Grievant was no longer required to conduct hearings. She continued to perform most of the other duties for her position. Positions in the Hearing Examiner classification are compensated at pay grade 15, with an annual salary range of \$31,164 to \$57,660. *Id.*

4. In 2003 the Workers Compensation Commission (“WCC”) was separated from the Bureau of Employment Programs and the OOJ was placed under the Workers Compensation Commission. The positions held by the BEP Claims Deputies retained that title and classification while employed with by the OOJ under the WCC.

5. When the Worker’s Compensation Program in West Virginia was privatized in 2006, the OOJ was transferred to the OIC. The Insurance Commission is the agency charged with regulating the private workers compensation industry. Many of the positions moved from the WCC to the OIC were given classifications utilized by that agency but most, if not all, of the OOJ positions continued to hold the BEP classification titles.

6. When this change was made Grievant assumed the working title of Claims Deputy but her position remained in the Hearing Examiner classification. In a Job Content Questionnaire (“JCQ”) submitted to DOP for Grievant’s position on February 16, 2011,

Grievant listed the duties of her position and the percentage of her time each duty consumes as follow:

- Performs legal research by reviewing motions from parties to litigation and applying appropriate statutes, regulations and/or case law to the case on point to formulate a ruling on motion. 30%
- Drafts written Orders in response to motions from parties involved in litigation, by discussing case on point, applicable law or statute and a brief explanation of ruling or direction. Draft Order requires dictation or Order to typist or typing Order, followed by proofreading and corrections, then forwarding Order or decision to CALJ<sup>6</sup> for review. 40%
- Document and update agency database with actions taken in a claim to provide a legal record, keep claim status current for others to reference and to track time standard compliance. 10%
- Prepares Decisions by writing findings of fact and conclusions of law and weighing evidence to formulate decision which is then forwarded to ALJ for review and approval. 5%
- Proofreading ALJ Decisions and Orders for typing and/or grammatical errors to ensure quality decisions. 5%
- Document and update personal task list of assignments and work product to ensure time standards are met. 5%
- Assist CALJ and DCALJ<sup>7</sup> with necessary tasks as needed. 5%

(Grievant Exhibit 23).

7. The OIC requested the OOJ to take on the additional responsibilities of hearing National Council on Compensation Insurance (“NCCI”) claims,<sup>8</sup> as well as Failure to Timely Act (“FTA”) petitions.<sup>9</sup> As a result of these new duties the OOJ administration requested a new and more advanced job title for the position responsible for handling these claims.

8. Pursuant to that request, a Position Description Form (“PDF”) was submitted to the DOP from the OIC for a new position which would be assigned to the

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<sup>6</sup> Chief Administrative Law Judge.

<sup>7</sup> Deputy Chief Administrative Law Judge.

<sup>8</sup> These claims involve disputes between insurance carriers and their policy holders.

<sup>9</sup> These petitions are brought by claimants against an insurance regarding the length of time it has taken a claims adjustor to act upon their claim.

OOJ. The PDF was completed on July 7, 2014. The primary duties of that position involved assisting two Deputy Chief ALJs “in litigation duties related through file review, preparation of findings of fact, legal discussions and conclusions of law.” The position would also “assist the Insurance Program Manager in research of all types of pending litigation before the [OOJ] . . .”<sup>10</sup>

9. The DOP Classification and Compensation section reviewed the position and determined that the position should be classified and posted as a Paralegal position. (Respondent DOP Exhibit 3, memorandum dated September 22, 2014.)

10. OOJ posted the position and selected a successful internal applicant. However, when it became apparent that the agency would be unable to give the selected applicant a salary increase, the OIC and OOJ decided to leave the position unfilled and seek a reallocation for Grievant’s position as a result of the addition of duties related to NCCI claims and FTA petitions.<sup>11</sup>

11. OIC submitted a PDF for Grievant’s position to the DOP dated January 12, 2015. As that time Grievant’s position was classified as a Hearing Examiner with a working title of Claims Deputy. Pursuant to the PDF, 50% of the position’s time was allocated to reviewing files and drafting recommended decision related to FTA petitions for review by the Deputy Chief ALJs. This included review of the factual record and legal arguments, as well as research related to controlling statutes, rules, regulations and case law. Additional duties related to processing NCCI claims and managing the document

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<sup>10</sup> Respondent Exhibit 3, Letter from Rebecca A. Roush CALJ to Kathy M. Damron, OIC Administrative Service Manager.

<sup>11</sup> Respondent DOP Exhibit 5, e-mail from Kathy M. Damron, OIC Administrative Service Manager to Sarah Jarrett, DOP Personnel Specialist, dated February 24, 2015.

tracking for these two types of actions.<sup>12</sup> Grievant testified that an additional 30% of her time each week is spent reviewing worker's compensation claims and drafting findings of facts for an ALJ to review and use in his or her final decision. (Respondent DOP Exhibit 1 and level three testimony).

12. The duties to be performed by Grievant regarding the FTA petitions and the NCCI claims are generally the same as those performed in her role of processing Workers Compensation claims, i.e.: reviewing records, conducting legal research, and drafting documents for review by ALJs, as well as maintaining dockets and records. The main difference appears to be that the new duties relate to insurance issues which are new to the OOJ.

13. Because there seemed to be some confusion or disagreement about the position, the DOP conducted a job audit on March 10, 2015. The audit was conducted by Roberta Salyers Compensation Manager for the Classification and Compensation Section, and Sarah Jarrett DOP Program Specialist.

14. When conducting a job audit the DOP staff typically meet with the employee holding the position at their work site so they can observe the employee performing typical tasks, as well as view relevant documents and procedures regularly utilized in the position. The staff then conducts a follow up with the employee's immediate supervisor. In this case, OOJ Chief ALJ Roush and Insurance Program Manager, Patricia Fink, asked the DOP staff to meet with them prior to meeting with Grievant. The DOP staff was told to not let Grievant know that the agency was requesting a reallocation of her position and

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<sup>12</sup> For reasons which were not fully explained, the total time spent on the eight areas of responsibilities equaled 135%.

the meeting with Grievant was set up in a conference room rather than at Grievant's work station. Following the audit the DOP staff met again with the Ms. Roush and Ms. Fink rather than Grievant's immediate supervisors. The DOP staff was informed that the agency was seeking a reallocation of Grievant's position because she was an exemplary employee.<sup>13</sup>

15. After reviewing the PDF and completing the job audit, the DOP determined that the appropriate classification for the position was Paralegal. (Respondent DOP Exhibit 1). By memorandum dated May 6, 2015, then DOP Assistant Director for Classification and Compensation, Bruce Cottrill, informed the OIC of the classification determination.<sup>14</sup> Pay grade 10, where the Paralegal classification is paid, is five pay grades lower than the Hearing Examiner Classification and three pay grades lower than the Employment Programs Claim Deputy Classification which the OIC and the OOJ was seeking for the position.

16. Chief ALJ Roush submitted a request for reconsideration to the DOP Director, Sarah Walker, by memorandum dated May 26, 2015. While she acknowledged that Hearing Examiners were no longer holding hearings and pre-hearing conferences, Chief ALJ Roush asserted that employees in those positions, and others at the OOJ, were performing at least within the Employment Programs Claims Deputy classification. She pointed out that there were eleven positions classified as Claims Deputies at the time,

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<sup>13</sup> By all accounts, Grievant is very capable and conscientious employee who performs all her duties well and able to learn and adapt to new responsibilities as needs arise.

<sup>14</sup> The DOP made the same classification determination for the proposed new position which the OIC and OOJ decided not to fill. See FOF 10, *supra*.

assigned to assist ALJs in the performance of their duties. The employees in these positions ostensibly perform similar duties as Grievant. (Grievant's Exhibit 14).

17. DOP Director Walker denied the request for reconsideration by letter dated June 12, 2015, noting that the "position's primary duties are: reviewing files, drafting recommended decisions and legal research." She concluded that these duties fall within the Paralegal classification. She pointed out that it was the nature of the duties which were class controlling, not an increase in the workload. (Respondent DOP Exhibit 7).

18. Grievant's position was placed in the Paralegal classification. The salary she was receiving fell within the overall range of pay grade 10 and Respondent OIC chose not to reduce her salary notwithstanding the drop in her position from pay grade 15.

19. The OOJ has traditionally grouped and utilized employees who might be considered paralegals in two tiers with working titles of Paralegals and Claims Deputies.

20. Positions which are given the working title of Paralegal are expected to maintain the Administrative Law Judges' ("ALJs") dockets, monitor legislation, review legal documents, perform basic legal research, and make decisions regarding basic motions.<sup>15</sup> Paralegals are required to have a general knowledge of broad principles, workers compensation, law, codes, regulations and procedures.

21. Claims Deputies have been utilized for more advanced legal related research and duties. They are required to be able to apply state and federal statutes and regulations to factual situations. Claims Deputies are expected review evidence, perform legal research and draft proposed findings of fact, conclusions of law and decisions for

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<sup>15</sup> All decisions are reviewed and approved by an ALJ before they are issued to the parties.

the ALJs to review and approve. The Claims Deputies attend hearings with the ALJs to provide technical assistance with recording equipment, swearing in witnesses, and prepare hearing summaries. In addition to the legal research that might be performed by a paralegal in the OOJ, Claims Deputies are expected to have specific recommendations prior to meeting with the ALJ.

22. No orders are issued until they are reviewed and approved by the ALJ. The final rulings on motions and hearing decisions are made by the ALJs.

23. This practice started in the 1990s when the Bureau for Employment Programs sought permission from the DOP to create a progression of classifications within a Paralegal classification series so that there could be a higher pay grade for employees consistently performing more advanced work. The DOP declined to create a classification series for Paralegals, but the classification of Employment Programs Claims Deputies was created in 1991 and revised in February 1999. The OOJ has been utilizing that classification for positions which perform what could be characterized as advanced paralegal work since that time.

24. The classification specifications for the Paralegal list the Nature of Work for that position as follows:

### **PARALEGAL**

#### **Nature of Work**

An employee in this class assists an attorney or administrative superior in a legal setting by conducting research of legal sources such as statutes, regulations, legal opinions and related documents necessary for the preparation of briefs, pleadings and appeals. In a regulatory setting, the incumbent may review and approve applications and reports for compliance with laws and regulations. The work may involve the preparation of case summaries and reports of pertinent facts in hearings attended. Considerable contact is maintained with attorneys and judicial personnel in

the compilation of information. The incumbent may direct an office clerical staff. Performs related work as required.<sup>16</sup>

25. The classification specifications for the Employment Programs Claims

Deputy list the Nature of Work for that position as follows:

#### **EMPLOYMENT PROGRAMS CLAIMS DEPUTY**

##### **Nature of Work**

Under general supervision, performs work at the full performance level adjudicating contested unemployment compensation claims or complex claims for workers' compensation benefits, and reviewing the work of positions adjudicating less complex claims. Investigates contested claims and determines eligibility for benefits, and the amount thereof. Exercises independent judgement in decision-making, but has little latitude to vary procedures within state and federal guidelines, rules, regulations, and laws. Performs related work as required.<sup>17</sup>

26. The main difference between the Paralegal and the Employment Programs Claims Deputies is that the Claims Deputies are responsible for adjudicating cases, whereas Paralegals are not. The DOP interprets "adjudication" as actually hearing cases and/or reviewing evidence and making final determinations on the law and facts. DOP Compensation Manager Salyers determined that Grievant's position did not fit into the Employment Programs Claims Deputy position because her position did not have the authority to make final and binding claims decision. While Grievant drafted final decisions for ALJs, the ALJs made the final determinations and signed the decisions before they became binding upon the parties.<sup>18</sup>

27. In the private sector in the Charleston, West Virginia market, paralegals perform the more complex tasks performed by employees in position with the title of

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<sup>16</sup> Grievant Exhibit 1

<sup>17</sup> Grievant Exhibit 2

<sup>18</sup> Level three testimony of DOP Manager Roberta Salyers.

Claims Deputies for the OIC/OOJ. When the Office of Judges is seeking applicants for their Claims Deputy positions, it is looking for experienced and skilled paralegals.<sup>19</sup>

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant contends<sup>20</sup> that the classification of Paralegal is not the best fit for her position because her duties are more complex than those typically given to Paralegals in the OOJ. Grievant's claims can be divided into four specific points. First, she points to the creation of the Employment Programs Claims Deputy classification under the Bureau for Employment Programs was ostensibly to accommodate positions in that Bureau where employees were routinely performing paralegal duties at advanced level. These positions have been utilized by the OOJ since their inception, and the DOP has authorized posting them in the Employment Program Claims Deputy classification when they have become vacant as recently as 2012. Second, Grievant notes that there are eleven other positions

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<sup>19</sup> Level three testimony of Kristin P. Halkias, OOJ Deputy Chief ALJ. DCALJ Halkias has been in her present position for approximately four years and worked with paralegals in private sector law firms for some years prior to joining the OOJ.

<sup>20</sup> It is apparent that the management of the OOJ is supportive of Grievant's positions. To a great extent their interests in this matter are the same as evidenced by the fact that the issues herein arose from the management's attempt to get extra compensation for taking on new duties.

at the OOJ in that classification with the employees performing duties similar to those assigned to her. If her position is placed in the Paralegal classification, her pay grade will be three levels lower than those colleagues. While this has not resulted in a reduction of her salary she alleges that it is a substantial reduction of the standing and prestige of her position. Third, Grievant argues that DOP misinterprets the term “adjudicating” as it applies to the OOJ. She argues that her analysis of evidence in preparation of proposed decisions constitutes adjudicating even though she does not have authority to make the final decision on a case or motion. Finally, Grievant contends that requiring the OOJ to use the Paralegal classification for positions currently classified as Claims Deputies in a higher pay grade will make it virtually impossible for the OOJ to recruit and retain experienced paralegal applicants necessary to fill those positions when vacancies occur.

DOP notes that the Employment Programs Claims Deputy classification was created for the Bureau of Employment Programs which controls the OOJ. The appropriate way to determine a classification for a present position is to compare that position’s duties and responsibilities with the specific requirements set out in the classification specifications. DOP argues that Grievant’s present duties best fit the specifications set out in the classification of Paralegal not Employment Programs Claims Deputy. Specifically, DOP notes that Grievant no longer hears cases and has no authority to make a final decision on cases or motions. All her documents must be reviewed by an ALJ before they are released. The final decision rests with the ALJ. Therefore, DOP believes that Grievant is not “adjudicating” contested claims which is a mandatory function within the Employment Programs Claims Deputy classification. Finally, DOP recognizes that the OOJ has positions titled Claims Deputy where the employees may very well be

performing similar duties to Grievant. However, the DOP does not take into account the classifications of other employees when making a classification determination for position. Rather, the DOP focuses only on the duties and responsibilities of the specific position and how those duties compare to the specifications of the appropriate classifications.

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, which utilize such positions, 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. The key to the classification analysis is ascertaining which classification constitutes the "best fit" for the required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broadus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990); *Bradley v. Dep't of Transp./Div. of Highways and Div. of Per.*, Docket No. 2008-1772-DOT (Feb. 27, 2009).

The DOP Legislative Rule defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.75. To receive a reallocation a grievant must demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties does not necessarily establish a need for reallocation.

*Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997). "The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id.* Additionally, in order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely match another cited Division of Personnel classification specification than the one under which she is currently assigned. See generally, *Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989). See *Campbell v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-385 (May 26, 2006); *Falquero v. Dep't of Env'tl. Prot. and Div. of Pers.*, Docket No. 2008-1902-DEP (Feb. 3, 2010).

The Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993). The clearly wrong standard of review is deferential and requires the reviewing authority to presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007); *Bradley v. Dep't of Transp./Div. of Highways and Div. of Per.*, Docket No. 2008-1772-DOT (Feb. 27, 2009).

At the time the facts giving rise to this dispute took place, Grievant was in the Hearing Examiner classification. However, she had not conducted hearings for more than four years since the OOJ Chief ALJ decided that only ALJs would be assigned to conduct hearings. Accordingly, there was a substantial change in the duties for Grievant's position which justified a reallocation. The issue is whether the classification that best fits

Grievant's duties and responsibilities is Paralegal or Employment Programs Claims Deputy.

The history related to the inception of the Employment Programs Claims Deputy classification is interesting but not controlling. This classification was created for the Bureau of Employment Programs, and the OOJ has not been within that Bureau for more than a decade. Additionally, the Workers Compensation Commission, ceased to exist with the privatization of workers compensation in 2006. Undoubtedly, the duties of those individuals in the OOJ have changed sufficiently from the mid-1990s to require a comparison of the present duties with the specific language of the classifications as they now exist to make an appropriate allocation decision.

DOP is correct in asserting that the classification titles given to other positions within the OOJ are not relevant to the allocation decision with regard to Grievant's position. The Grievance Board has consistently held that "Classification determinations are not made based upon comparison to other employees, but upon which classification description is the "best fit" for that employee's duties. *Baldwin v. Dep't of Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999); *Garretson v. W. Va. Dep't of Health & Human Res. and Div. of Personnel*, Docket No. 07-HHR-397 (Oct. 22, 2008)." *Hart v. Dep't of Health & Human Ser., and Div. of Per.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009).

Additionally, the ability of the OOJ to recruit and retain employees in their particular positions is not an issue to be considered in a reallocation claim. There are other provisions in the Division of Personnel rules and regulations that can be utilized by an agency to address issues of attracting and retaining personnel. As stated previously, the

key issue in reallocation claims is ascertaining which classification constitutes the "best fit" for the required duties the specific position.. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel, supra.*

In this matter there is no dispute as to what duties Grievant is performing. The main dispute comes down to the meaning of requirements found in the nature of work for the Employment Programs Claims Deputy classification specifications which stated in part:

Under general supervision, performs work at the full performance level **adjudicating** contested unemployment compensation claims or complex claims for workers' compensation benefits, and reviewing the work of positions **adjudicating** less complex claims. (Emphasis added).

Grievant argues that "adjudicating" does not require that a Claims Deputy make final decisions. Rather, Grievant contends that the work of reviewing evidence, researching relevant law, as well as drafting findings of fact and proposed decisions for an ALJ's review and signature, is sufficient participation in the adjudicatory process to meet the requirements of the Employment Programs Claims Deputy classification. Grievant argues that the Claims Deputy classification was created to accommodate positions where the employee was required to have more experience to be able to perform the most complex paralegal tasks. Employees holding the position of Claims Deputy in the OOJ have traditionally not been authorized to make final claims decisions, yet the OOJ has posted and fill those positions in the Employment Programs Claims Deputy with approval of the DOP. Grievant contends this supports her interpretation of "adjudicating" as used in the classification specifications. She argues that she is experienced and performs the most complex tasks assigned to non-lawyers in the OOJ and the best fit for her position is the Claims Deputy classification.

DOP believes that Grievant's duties best fit in the Paralegal classification because she has no authority to make final decisions regarding claims and is therefore not "adjudicating" claims, which is a primary function for the Employment Programs Claims Deputy classification. DOP interprets "adjudicating" as making final claims determinations. It is undisputed that Grievant's position only has authority to recommend the decision but cannot finally decide the claim. DOP argues the past actions for other positions are not relevant to the determination of the allocation of Grievant's present position, not only because of the changes that have taken place in the mission of the OOJ,<sup>21</sup> but also because prior determinations could have been mistaken. DOP also proved that all of Grievant's duties fit within the Paralegal classification. Indeed, Grievant's witness, a Deputy Chief ALJ for the OOJ, testified that paralegals in the private sector perform complex tasks equivalent to Grievant's duties.

In determining which interpretation is correct, it cannot be forgotten that the DOP is charged by statute in policy with creating and applying the classification specifications for State government positions. Accordingly, their interpretation and explanation of the classification specifications must be given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993). A West Virginia Supreme Court of Appeals decision on construing statutes and regulations also provides guidance. At *Syllabus Point 3 of State ex rel. Smith v. W. Va. Crime Victims Comp. Fund*, 232 W. Va. 728, 729 (W. Va. 2013) the Court wrote, "Generally the words of a statute are

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<sup>21</sup> In this regard, it is relevant that the Employment Programs Claims Deputy classification is related specifically the resolution of unemployment and worker compensation claims. Grievant's position does nothing with unemployment claims and at least half of her duties are related to insurance claims which have nothing to do with workers compensation.

to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." (Citing *Syl. Pt. 4, State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959)).

The following definitions from *Black's Law Dictionary* are helpful in determining the ordinary and familiar meaning of the word "adjudicating;" "**Adjudicate**: To rule upon judicially; **Adjudication**: The legal process of resolving a dispute; the process of judicially deciding a case; and, **Adjudicative**: 1. Of or relating to adjudication. 2. Having the ability to judge." *Blacks Law Dictionary*, 8<sup>th</sup> edition, Thomas/West © 2004. The one unifying factor in all these definitions is the ability to decide, rule, or judge a dispute. Implicit in the definitions is that adjudicating involves making the final decision regarding a claim. Grievant simply does not have that authority.

It is easy to understand the frustration of Grievant as well as the OOJ. This dispute begin with an effort to reward an employee for taking on additional duties that fit within her classification. Unfortunately, the reallocation process is not the appropriate mechanism for accomplishing that goal. Ultimately, Grievant did not prove by a preponderance of the evidence that the decision of the DOP regarding which classification was the best fit for Grievant's position was clearly wrong or arbitrary and capricious. Accordingly, the grievance is DENIED.

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. 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, which utilize such positions, 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).

3. The key to the classification analysis is ascertaining which classification constitutes the "best fit" for the required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990); *Bradley v. Dep't of Transp./Div. of Highways and Div. of Per.*, Docket No. 2008-1772-DOT (Feb. 27, 2009).

4. The DOP Legislative Rule defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.75.

5. "Classification determinations are not made based upon comparison to other employees, but upon which classification description is the "best fit" for that employee's duties. *Baldwin v. Dep't of Health and Human Resources*, Docket No. 99-HHR-142 (Oct. 28, 1999); *Garretson v. W. Va. Dep't of Health & Human Res. and Div. of*

*Personnel*, Docket No. 07-HHR-397 (Oct. 22, 2008).” *Hart v. Dep’t of Health & Human Ser., and Div. of Per.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009).

6. The Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993).

7. The clearly wrong standard of review is deferential and requires the reviewing authority to presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007); *Bradley v. Dep’t of Transp./Div. of Highways and Div. of Per.*, Docket No. 2008-1772-DOT (Feb. 27, 2009).

8. Grievant did not prove by a preponderance of the evidence that the decision of the DOP regarding which classification was the best fit for Grievant’s position was clearly wrong or arbitrary and capricious.

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: JULY 26, 2016.**

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