MICHAEL COUTZ and CARL HANNING,

Grievants,

v. **Docket No. 05-WCC-286**

WEST VIRGINIA WORKERS' COMPENSATION

COMMISSION and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants, Michael Coutz and Carl Hanning, are employed as Premium Auditor Supervisors at the West Virginia Workers' Compensation Commission ("Workers' Compensation"). On December 9, 2004, and December 16, 2004, respectively, Grievants file identically worded Statements of Grievance which state:

> I feel I have been discriminated [against] in regards to my job classification in comparison with other personnel within the State Government who perform essentially the same job functions and have comparable job duties, responsibilities and requirements. Specifically to reallocate my position with salary adjustments in accordance with regulations for promotion due to substantial changes in my duties and responsibilities.

The relief sought was, "To be made whole in every way."

These grievances were denied at Levels II and III. On appeal to Level IV, the cases were consolidated, and the parties agreed to submit the cases on the record developed below. This grievance became mature for decision on October 14, 2005, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Both Grievants were previously employed in the Workers' Compensation Division of the

Bureau of Employment Programs ("BEP") as Chief Tax Examiners before Workers' Compensation became a separate entity. This position was in Pay Grade 17.

2. When Workers' Compensation became a separate entity, Grievants were assigned to that agency and maintained their classifications.

3. After the shift to Workers' Compensation, the performance expectations for Grievants and their supervisees have increased. Grievants have been notified about the increase in the volume of work to be produced as these changes have occurred. No grievances were filed as a result of these changes.

4. In keeping with Workers' Compensation's management concept of working supervisors, Grievants are now expected to perform three audits each month, and to go out into the field with their supervisees and observe their work performance. No grievances were filed as a result of these changes.

5. Grievant Hanning now travels to Charleston to work two days a week instead of one day a week. This change was partially driven by his request to be more "in-the- loop."

6. Grievant Coutz is now expected to input data from audits.

7. In 2003, pursuant to the Division of Personnel's Administrative Rule 4.6 (a) (See footnote 2) , Workers' Compensation asked the Division of Personnel to review all current classificationsfor the purpose of establishing a new classification structure for Workers' Compensation and to eliminate the use of BEP titles for Workers' Compensation positions. Test. Mr. Basford, Level III Hearing.

8. The process identified in Finding of Fact 7 was basically divided into two parts. First, new classification titles were developed that were specific to Workers' Compensation, and Grievants were then classified as Premium Auditor Supervisors. Grievants' duties remained the same as those listed in the Chief Tax Examiners' class specification.

9. The second part of the reclassification/reorganization project was the review of all current classifications and the development of new classifications as appropriate. Almost all positions within the agency were reclassified. As the result of this review, Grievants' classification specifications changed very little, but the pay grade of the position was now assigned Pay Grade 18. See class specifications, infra. Because Grievants were above the minimum salary for their reclassified positions, they could not receive a pay increase pursuant to the Division of Personnel's Administrative Rule 5.4(f)(2)(a)(2). (See footnote 3)

10. The performance expectation to complete three audits a month does not increase the complexity of Grievants' duties as this task is one normally assigned to a lower classification. Grievant Coutz's entering of data is also a task normally assigned to a lower classification. These assignments actually dilute the complexity of Grievants' duties. 11. As a portion of their audit reviews, Grievants are expected to refer appropriate questions and information to the underwriting section. This activity is only marginally the performance of underwriting work. The entering of data is not underwriting work.

12. Grievants' classification specification states under Essential Job Functions, "Any specific position in this class may not include all of the duties listed, nor do the examples listed cover all of the duties which may be assigned."

13. On December 15, 2004, Executive Director Gregory Burton informed Grievants that after the completion of the reclassification project, it had been determined they were properly classified as Premium Auditor Supervisors, and their salary would remain the same.

15. The class specifications at issue are set out below, and the Chief Tax Examiner class specification is basically the same as the Premium Auditor Supervisor class specification.

EMPLOYMENT PROGRAMS TAX EXAMINER, CHIEF

Nature of Work

Under limited supervision, performs advanced level work supervising a unit of Employment Programs Tax Examiners involved in audits and the processing of audits of all sizes and types of business entities. Assigns and coordinates audits and projects based on their relative priority. Extensive contact is necessary with tax examiners, higher levels of management, the general public, accountants, attorneys, and various governmental officials. Includes considerable travel. Performs related work as required.

Examples of Work

Ensures proper compliance with applicable unemployment tax laws, regulations and policies by reviewing completed audits and ensures that proper accounting and auditing procedures have been followed by conferring with tax examiners. Keeps staff up to date on changes in procedure and policy by compiling and distributing information, policy statements, regulations, court decisions, etc.

Ascertains compliance with department personnel policy concerning work day guidelines, expense

accounts, time/leave records, etc., by receiving and reviewing tax examiners' activity reports and taking corrective action when necessary.

Prepares training materials for use by new and experienced tax examiners.

Prepares and conducts periodic meetings, both regional and statewide, for purposes of updating tax examiners on law changes, legal decisions, policy changes, procedural changes and training.

Assists tax examiners on difficult audits and/or represents staff audits at post audit conferences, appeals, etc.

Attends meetings and hearings, when requested, to determine the settlement of completed audits.

Interviews candidates for tax examiner positions; evaluates and recommends employees for advancement or merit increases.

Performs other job-related projects and assignments as requested by the Employment Security Assistant Director and/or Tax Administrator.

WORKERS' COMPENSATION PREMIUM AUDITOR SUPERVISOR

Definition of Work:

Under limited supervision, performs advanced level work supervising a unit of Workers' Compensation Premium Auditors involved in audits and the processing of audits of businesses and corporations. Assigns and coordinates audits and projects based on their relative priority. Assists auditors on audits. Extensive contact is necessary with auditors, higher levels of management, the general public, accountants, attorneys, and various governmental officials. Includes considerable travel. Performs related work as required.

Distinguishing Characteristics

This level is distinguished from the lower levels by the supervisory responsibilities. Incumbents supervises three or more auditors.

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

Supervises and reviews work completed by subordinate staff. Ensures proper compliance with applicable laws, regulations and policies by reviewing completed audits and ensures that proper accounting and auditing procedures have been followed by conferring with auditors.

Keeps staff up to date on changes in procedure and policy by compiling and distributing information, policy statements, regulations, court decisions, etc.

Ascertains compliance with policy concerning work day guidelines, expense accounts, time/leave records, etc., by receiving and reviewing auditors' activity reports and taking corrective action when necessary.

Prepares training materials for use by new and experienced auditors.

Prepares and conducts periodic meetings, both regional and statewide, for purposes of updating auditors on law changes, legal decisions, policy changes, procedural changes and training.

Assists auditors on complex audits and/or represents staff audits at post audit conferences, appeals, etc.

Attends meetings and hearings, when requested, to determine the settlement of completed audits.

Interviews candidates for auditor positions; evaluates and recommends employees for advancement or merit increases.

Performs other job-related projects and assignments as requested by the Executive Director, Director or other executive management staff.

Issues and Arguments

The issues in this case are not the typical ones found in a classification grievance. Grievants are not requesting they be placed in a different classification; they agree they are properly classified as Premium Auditor Supervisors. Grievants assert that because they are expected to produce a greater volume of work than before, and because they now have to perform audits themselves, they should be reallocated. Grievants also assert their reclassification should have been a reallocation, and they should have received a five percent pay increase because of the change in pay grade. (See footnote 4) Respondents argue the proper action, reclassification, has been taken. Respondent Workers' Compensation states the duties of the Premium Auditor Supervisor identified in the class specification are basically the same as those of the Chief Tax Examiner. Accordingly, there has been no substantial change in Grievants' duties that would warrant reallocation.

Respondent Division of Personnel, at the request of Workers' Compensation, reviewed all of the agency's current employees' classifications and duties, and Grievants, as well as approximately 800 employees, were reclassified. This type of agency restructuring and reorganization results in reclassifications, not reallocations. The Division of Personnel also notes there has been no substantial change in Grievants' duties, and thus, reallocation is not justified. Although Grievants may have a greater volume of work to do, it is the same type of work as contemplated by their class specifications since their employment by BEP. Grievants' titles were changed to reflect a different agency. The Division of Personnel also observed that performing the work in a lower pay grade does not increase the complexity of the position, but actually dilutes it.

The issue before the undersigned Administrative Law Judge is by what process should they receive their classification change; reclassification or reallocation.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30,1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug.19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

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

Personnel's rules define reclassification as "revision by the State Personnel Board of a class or class series which results in redefinition of the nature of the work performed and a reassignment of

positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved." Division of Personnel's Administrative Rule 3.79. Reallocation is defined as '[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position or to correct a position misclassification. (Emphasis added). Id. at Rule 3.78.

Prior to the agency's reclassification of its employees, Grievants were classified as Chief Tax Examiners. After the reclassification, Grievants were reclassified as Premium Auditor Supervisors, a classification that is basically the same as their prior classification. Grievants were reclassified to their current positions as a result of this reclassification project, and they, like all other employees who were reclassified during this process, are only entitled to a pay increase if their salaries fell below the minimum of the new salary range. (See footnote 5) Grievants salaries did not fall below the new salary range.

Additionally, to allow Grievants to receive a five percent increase in their salaries as a result of their reclassification would be inequitable to all other Workers' Compensation employees whose pay grades and positions were also changed during the reclassification project, but who also did not receive a salary increase because their salary level was above the minimum. In essence, Grievants are asking to be treated differently than 800 Workers' Compensation employees and for Respondents to ignore the rules controlling reclassification. This request must be denied.

As for Grievants' claim there has been a substantial change in their duties that would warrant reallocation, this assertion is also incorrect. An examination of Grievants' duties clearly indicates Grievants are properly classified, and they agree. The duties they perform fall within their class specification. While Grievants' duties have definitely increased in volume, these changes alone do not indicate a need for reallocation. The key in seeking reallocation is to 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). "An increase in the type of duties contemplated in the[current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." Id.

Other specific issues raised by Grievants will be addressed next. One, Grievants must now

perform audits themselves and go out into the field with their supervisees to observe their performance. These decisions are management directives. The performing of audits does not increase the complexity of their position, but actually dilutes it as they are performing lower level tasks. Further, the requirement to supervise out of the office is controlled by the first listed job function of a Premium Auditor Supervisor, "Supervises and reviews work completed by subordinate staff," and as also stated in that section, the examples of work given may not include all of the duties which may be assigned.

Two, Grievant Hanning must now travel two days a week instead of one. The class specification states the position "includes considerable travel." Thus, this task is an expectation of the Premium Auditor Supervisor position.

Three, Grievant Countz is expected to enter data. Although it is unclear why he has this assignment, it is still true that this activity, while important, dilutes the complexity of Grievant Coutz's position as this is a task normally assigned to a lower pay grade.

However, since Grievants have been told there will be an additional increase in the volume of their work in the future, a word of caution should be given. As stated in Thomas v. Kanawha County Board of Education, Docket No. 99-20-291 (January 25, 2000),

> Unfortunately, for Grievant, the frequent expectation for supervisors is that they will have to work greater than a forty hour week. That is one reason why they receive a salary and are not able to earn overtime. Grievant does not receive an hourly wage. Supervisors and professionals are expected to work the amount of time necessary to get the job done. There,of course, could come a time when the expectations set for Grievant in the amount of work he is to perform become arbitrary and capricious, or clearly excessive.

In this case, Grievants are exempt employees and supervisors, and the expectations for them are high. As they learn their duties and receive training, their efficiency and effectiveness will improve, but there is a limit to what an employer has a right to expect.

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

Conclusions of Law

1. In a classification grievance, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-

DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A- 6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Reclassification is defined as reclassification as "revision by the State Personnel Board of a class or class series which results in redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved." Division of Personnel's Administrative Rule 3.79. 3. Reallocation is defined as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position or to correct a position misclassification." Division of Personnel's Administrative Rule 3.78.

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

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

6. The increase in Grievants' duties are the type contemplated in Grievants' class specifications.

7. Grievants have not met their burden of proof and established a violation of any rules or regulations, or that the reclassification of Grievants' positions instead of reallocation 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, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to

serve a copy ofthe appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: November 17, 2005

Footnote: 1

Grievants were represented by Brent Wolfingbarger, Esq., Workers' Compensation was represented by David Fryson, Esq., and the Division of Personnel was represented by Lowell Basford, Assistant Director of Classification and Compensation.

Footnote: 2

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

Footnote: 3

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

Footnote: 4

Although Grievants alleged they had been subjected to discrimination in their Statement of Grievance this issue was not pursued and will not be addressed further.

Footnote: 5

Division of Personnel's Administrative Rule 5.04(f)(2)(a)(2) states: "[w]here the salary of the incumbent coincides with a pay rate in the new range, the salary remains unchanged."