BEFORE THE WEST VIRGINIA EDUCATION AND STATE

EMPLOYEES GRIEVANCE BOARD

NANCY LEPP,

Grievant,

v.

Docket No. 2008-0987-DOR

INSURANCE COMMISSION

AND DIVISION OF PERSONNEL,

Respondents.

DECISION

Prior to January 1, 2006, Grievant Nancy Lepp was employed by the Workers' Compensation Commission and was working in the classification of WC Credit Analyst III ("WC CA3"). (See footnote 1) On that date, the Workers' Compensation Commission ("WCC") was dissolved as a state government agency and many of the employees from that agency, including Grievant, were transferred to the Offices of the Insurance Commissioner ("OIC"). Grievant alleges that she was given supervisory duties she did not previously have when she moved to the new agency. She believes that the new classification of Credit Analyst III (CA 3), that was assigned to her position, fails to compensate her for the new duties she has assumed. On December 19, 2008, Ms. Lepp filed a level one grievance contesting herreclassification as a CA 3. She seeks to be reallocated as a WC Credit Analyst Supervisor ("WC CA Supervisor") effective January 1, 2006, and receive back pay and benefits from that date to the present. Due to the fact that this grievance relates to a classification decision by the Division of Personnel ("DOP"), the DOP is also a party. The OIC, the DOP and Grievant agreed to waive levels one and two. The grievance was submitted directly to level three and on April 7, 2008, a hearing was held in Charleston, West Virginia, before Administrative Law Judge,

Thomas J. Gillooly. Grievant was represented by Rick Fisher, OIC was represented by Gregory A. Elam, and DOP was represented by Karen O' Sullivan Thornton. Proposed finding of fact and conclusions of law were received from all parties at the Public Employees Grievance Board office by May 12, 2008, and the grievance became mature for decision on that date. (See footnote 2)

Synopsis

Grievant claims that she is misclassified as a CA 3 and seeks to be reallocated as a WC CA Supervisor which is two pay grades higher. She maintains that the CA 3 classification does not compensate her for the additional supervisory duties she assumed when she was transferred from the WCC to the OIC. Grievant failed to sustain her burden to prove, by a preponderance of the evidence, that her duties and responsibilities fit the CA 3 classification better than the WC CA Supervisor classification. Controlling precedent requires that “great weight” be given to DOP's determination. Because the evidence failed to establish that DOP's determination was clearly erroneous, this grievance must bedenied. The following findings of fact are based upon a thorough review of the complete record created in this matter.

Findings of Fact

1 1. Grievant was employed as a WC CA 3 for the WCC prior to January 1, 2006.

2 2. As a WC CA 3, Grievant was a team leader for a group of employees **.** As a team leader, Grievant provided assistance and direction to these employees but was not their supervisor.

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

4 4. All positions transferred from the WCC to the OIC were initially transferred with the WC classifications and with the same pay grade and salary. Grievant's position was transferred in the WC CA 3 classification at pay grade 16.

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

6 6. In her position with the OIC, Grievant became the supervisor for five other credit analysts. Grievant's supervisor encouraged Grievant to seek a reallocation since she was now performing as a

supervisor rather than a team leader. 7 7. On February 13, 2006, Grievant submitted a Position Description Form to the DOP for review and consideration. (See footnote 3) Grievant believed her position fit into the WC CA Supervisor classification since she was now acting as a supervisor. That classification is at pay grade 18.

8 8. In response to Grievant's Position Description Form, the DOP removed her position from the WC CA 3 classification and placed it in the CA 3 classification at pay grade 16. This classification carries supervisory duties and is a different classification than WC CA 3. Grievant suffered no loss of pay or drop in pay grade. This action was taken on May, 17, 2006. Grievant was not made aware of the DOP's determination.

9 9. On February 16, 2007, Grievant requested that the OIC resubmit her Position Description Form to the DOP for a classification determination.

10 10. By letter dated April 12, 2007, Grievant was informed by the Deputy Commissioner of OIC that her position would remain reclassified as CA 3 at pay grade 16.

11 11. Grievant requested a reconsideration of the OIC determination from the DOP on April 18, 2007.

12 12. On December 4, 2007, the Acting Director of the DOP provided a letter to Grievant reaffirming the placement of her position in the CA 3 classification stating, “the kind and level of work described in the approved classification specification represents the best fit for your position”. Grievant's reclassification to CA 3 was given the effective date of September 1, 2006. 13 13.

The OIC continues to have several employees with WC classifications and in a few instances, is still posting vacant positions with the WC classifications.

Discussion

There is essentially no dispute related to critical facts in this matter. All parties agree that the WC CA 3 classification no longer fits Grievant's position. There is no dispute that Grievant is now supervising other Credit Analysts instead of serving as a team leader, which was her role at the WCC. No one contests that the CA 3 classification and the WC CA Supervisor classification carry supervisory responsibilities. A comparison of each of the classifications demonstrates that the two classifications are virtually identical. (See footnote 4) Grievance does not contend that placement in the CA 3 classification resulted in a reduction of pay grade or salary. The main difference between the CA 3 classification and the WC CA Supervisor classification is that the WC CA Supervisor

classification is at pay grade 18 and the CA 3 is a pay grade 16.

Grievant contends that all the other positions in her section continue to carry the WC classifications and that the OIC still has many positions throughout the agency that are also classified under WC titles. She was able to demonstrate that OIC continues to post vacancies with WC classifications. Grievant avers that she is carrying a higher level of responsibility than she was at the WCC and her position's classification should be WC CA Supervisor because her duties fit that classification and the pay grade would compensate her for those additional responsibilities.

OIC and DOP respond that the two agencies are working together to place prior WCC positions in existing classifications that do not carry the WC designation. Where there are no existing classifications that meet the WC positions, they are attempting to create classifications that will fairly represent these positions. These activities are part of a reorganization plan that will eliminate all WC classifications in an effort to foster the image of the OIC as a single, unified agency. Another reason for the elimination of the WC designations is they were created solely for the use of the WCC and there are inconsistencies between the WC classifications and the classifications of other state agencies. The reorganization process is time consuming and it is still in progress, which is why the OIC still has WC classified positions. There was credible testimony that some WC classified vacancies continue to be posted because the agencies have yet to find or create alternative classifications for those positions. With regard to the positions inGrievant's section, Respondents have not started reclassification in that section and only addressed Grievant's position because she had voluntarily submitted a Position Description Form, which advanced the process for her. The Respondents contend that a thorough evaluation was conducted of Grievant's Position Description and that the DOP personnel consulted with the appropriate OIC personnel to ensure that the placement of Grievant's position in the CA 3 classification was the best fit.

Because 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). *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 key to the analysis in this case is whether Grievant's current classification constitutes the "best fit" for the duties the 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).

The West Virginia Supreme Court of Appeals has routinely held that, “Interpretations of statues by bodies charged with their administration are given great weight unless clearly erroneous.” Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.,* 166W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt.1, *Dillon v. Bd. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588 *(1983).* In a *per curiam* decision, the Supreme Court applied the foregoing principle to DOP's interpretation of classification specifications. *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. 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).

Grievant does not contend that the CA 3 classification does not contain supervisory duties. She supplied no testimony that her duties and responsibilities did not fairly fall into that classification. The crux of her case is that, because of the addition of supervisory duties to her position, it now fits into the WC CA Supervisor classification. Additionally, the higher level of responsibility should be accompanied by an increase in compensation. That increase would happen within the WC CA Supervisor classification that is pay grade 18. It would not within the CA 3 classification that leaves her at pay grade 16.

It is easy to be sympathetic with Grievant's position. If she had been given the same supervisory duties while she was with the WCC, her position would most likely fit into the WC CA Supervisor classification at the higher pay grade. Unfortunately, she is now working in the OIC and Respondents' efforts toward eliminating the WC classifications are within their discretion. Since the classification descriptions of WC CA Supervisor and CA 3 are virtually identical, if a position fits into one of the classifications it would appear to fit into the other. However, the WC CA Supervisor position is one of the classifications Respondents are trying to systematically eliminate to avoid inconsistent

classificationswithin the agency. Ultimately, there is no evidence to support a finding that the placement of Grievant's position in the CA 3 classification was clearly wrong; consequently the grievance must be denied.

Conclusions of Law

1 1. 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). *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).

2 2. 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).

3 3. The key to the analysis is whether the classification Grievant seeks constitutes the "best fit" for the duties the she performs. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). Thepredominant 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).

4 4. Grievant failed to prove, by a preponderance of the evidence, that Respondents were clearly wrong in finding the CA 3 classification was the best fit for her position.

According the grievance in **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: October 21, 2008

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William B. McGinley

Administrative Law Judge

Footnote: 1

The "WC" designation in the classification title, indicates that it is a WCC classification. Prior to the dissolution of the WCC only positions within the WCC had the "WC" designation.

Footnote: 2

This grievance was reassigned to the undersigned Administrative Law Judge because Thomas J. Gillooly is no longer employed with the Public Employees Grievance Board.

Footnote: 3

The Position Description Form is an official record of the duties and responsibilities assigned to a position and used by the DOP to allocate the position to the proper classification.

Footnote: 4

The first paragraphs of the two classification are as follows:

CREDIT ANALYST 3

Nature of Work: *Under limited supervision from the Receivables Management Director, performs as the Credit Manager Supervisor in overseeing the management of receivables including the administration of delinquent and default employer accounts; assists in the mentoring and training of receivables management staff and ensures that the performance goals of the department are achieved. Individual will serve as a liaison with state agencies and elected officials to resolve delinquent and default accounts. Responsible for more complex cases and serves as a consultant to staff on receivables management issues. Through formal and informal training, acquires an understanding of workers' compensation laws, rules and policies, credit management philosophies, practices, forms and procedures. Performs related work as required.*

WORKERS' COMPENSATION CREDIT ANALYST SUPERVISOR

DEFINITION OF WORK: *Under limited supervision, performs supervisory work in the management of receivables of delinquent and default employer accounts; mentors and trains receivables management staff and ensures that the performance goals of the department are achieved. Individual will serve as a liaison with state agencies and elected officials to resolve delinquent and default accounts. Responsible for more complex cases and serves as a consultant to staff on workers' compensation receivables management issues. Performs related work as required.*