STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Kristal Foster,

Appellant,

v. Case No. 2013-REC-11-0306

Bureau of Workers Compensation, and
Department of Administrative Services, Human Resources Division,

Appellees,

ORDER

This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that the instant Class Plan Review Determination of the Department of Administrative Services that reclassified Appellant's position to Workers' Compensation Underwriter is **AFFIRMED**, pursuant to R.C. 124.03, R.C. 124.14, R.C. 4117.01 (C), and O.A.C. 123: 1-7-15.

Casey - Aye
Lumpe - Aye
Tillery - Aye

Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original/a~~ true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, August 21, 2014.

Clerk

NOTE: *Please see the reverse side of this Order* ***or*** *the attachment to this Order for information regarding your appeal rights.*

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Kristal Foster

and

Edward Gonzales

Appellants

v.

Bureau of Workers' Compensation

and

Department of Administrative Services,

Appellees

Case Nos. 2013-REC-11-0306
2013-REC-11-0308

July 16, 2014

James R. Sprague
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

These cases came to be heard on May 16, 2014. Present at the hearing were Appellants Kristal Foster and Edward Gonzales, who both appeared *pro se*. Appellee Bureau of Workers' Compensation (BWC) was present through its designee, Dee Seidenschmidt, Director of Personnel, and through Jamie Keipper, BWC Director of Financial Underwriting and Appellants' supervisor. Appellee Department of Administrative Services (DAS) was present through its designee, Morgan Webb, Human Capital Management (HCM) Senior Analyst.

These causes come on due to Appellant Foster's and Appellant Gonzales' respective November 7, 2013 and November 8, 2013 timely filing of appeals from Class Plan Review Determinations, wherein their positions, **previously classified as Management Analyst Supervisor (MAS) 1, 64215, would now be reclassified to Workers' Compensation Underwriter (WCU), 66791,** effective October 20, 2013. Notice of those Determinations was issued by e mail on October 11, 2013.

The WCU Class falls within the pertinent collective bargaining unit, into which Appellants' positions have now been placed.

The parties were offered the opportunity to file written closing statements. Accordingly, on June 6, 2014, Appellants Foster and Gonzales filed separate written closing statements. Appellees declined the opportunity to file written closing statements and the instant records were closed on June 6, 2014.

Appellants Foster and Gonzales believe the BWC Underwriting Consultant, 63531 Class would provide a better fit with the duties that they respectively perform. Appellant Gonzales also believes that the Financial Institution Specialist 2, 66147 Class would provide a better fit with the duties he performs.

Unfortunately, it does not appear that Appellants' positions meet the threshold requirements to qualify for consideration concerning the **BWC Underwriting Consultant** Class. This is because the incumbent holding the BWC Underwriting Consultant Class must encumber an exempt position.

Appellants' positions are neither supervisory nor management level, nor are they considered fiduciary or confidential. Thus, pursuant to R.C. 4117.01 (C) (6), (7), (9), and (10), Appellants cannot hold exempt positions.

Further, Appellants work in BWC's Fiscal and Planning Division. Yet, to qualify for the BWC Underwriting Consultant Class, the incumbent must work in BWC's Employer Management Services Section [read: Division].

Unfortunately, neither can Appellants qualify for the **Financial Institution Specialist 2** Class; since that Class is reserved exclusively for employees of the Department of Commerce.

Jurisdiction over the subject matter of the two instant appeals was established pursuant to R.C. 124.03 and R.C. 124.14.

Based on substantial similarity of facts and subject matter, the two instant appeals are hereby **CONSOLIDATED**.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

At hearing, four witnesses testified.

First to testify was **Edward Gonzales, Appellant,** whose position is currently classified as Workers' Compensation Underwriter.

Next to testify was **Kristal Foster, Appellant**, whose position is also currently classified as Workers' Compensation Underwriter.

Next to testify was **Jamie Keipper**, who serves as BWC's Director of Financial Underwriting and who also serves as Appellants' supervisor.

Last to testify was **Morgan Webb**, DAS HCM Senior Analyst, who testified concerning the Class Plan Review Determinations that resulted in the filing of the two instant appeals.

Testimonial and documentary evidence establish that Appellants have served for the entirety of the pertinent review period in BWC's Fiscal and Planning Division (Fiscal and Planning). Specifically, Appellants serve in the Financial Underwriting Department, which falls under Fiscal and Planning. The Financial Underwriting Department is headed by Jamie Keipper, the Director of Financial Underwriting, who, as noted, serves as Appellant's supervisor.

The principal function of Appellants' positions (from 70 to 80 percent of the time) is to perform financial analyses of self-insured employer applications. Appellants' unit processes/reviews about 1200 self-insured employer renewal applications per annum and processes/reviews about four new self-insured employer applications per month.

These renewal and new applications are reviewed by Appellants for the Financial Underwriting Department in order to provide BWC's Employer Services Division with a recommendation regarding the fiscal fitness of the applicant and regarding whether the applicant should continue to be accepted into the Self Insured programs. If the applicant is a new applicant, Appellants' department determines if the employer application should receive approval for the Self-Insured ratings programs. The Financial Underwriting Department also makes a recommendation regarding whether the applicant will or will not need to post

collateral. Recommendations/determinations are sent to the Self-Insured Department, the Retrospective Ratings Programs Department, and the Large Deductible Department, all falling under the Employer Services Division.

Appellants create their own rating of the applicant using Moody's RiskCalc and CreditEdge to come up with a baseline rating. Then, they take that rating and delve into the applicant's financial statements, and other available information, and create their own rating to use as the basis of their recommendation/determination for Employer Services.

For about 10 percent of Appellant's time Appellants perform a monthly reconciliation of BWC's securities inventory, worth approximately $4 Billion Dollars. These securities consist of surety bonds, letters of credit, parental guarantys, cash postings, trusts, CDs, U.S. Treasury stocks and common stocks received from financial institutions and used to update the Financial Underwriting Surety Inventory file. (See Joint Exhibit 1. [Foster] at p. 3 Communications, p.1). Appellants also perform a physical inventory of the securities held in BWC's vault and are two of only four persons allowed such access.

Appellants also periodically review these assets to see if they are stale, can be returned for a lack of continuing need for the securities in a particular case, or need to be bolstered due to diminished value or other factors.

For about 10 percent of their time, Appellants perform miscellaneous duties as assigned, which include reviewing and making recommendations to Financial Underwriting Director Keipper regarding new or updated policies and procedures that principally involve the functions of the Department.

Appellants are concerned that they do not perform premium risk analysis and do not set premiums on workers compensation applications by employers, two functions contemplated expressly or impliedly by the WCU Series Purpose and Class Concept.

This is one of the principal reasons why Appellants believe the BWC Underwriting Consultant would be more applicable to their duties, since, they assert, that Class contemplates a more financially–based risk analysis as versus an insurance premium-based risk analysis. Unfortunately for Appellants, as noted,

above, the BWC Underwriting Consultant is restricted to *exempt* employees who serve in the *Employer Services* Division.

Based on the testimony presented and evidence admitted at hearing and upon Appellants' submitted written closing statements, I make the following Findings:

First, I incorporate, herein, any finding set forth, above, whether express or implied.

Next, I find that Appellants' utilized percentages accurately reflect the duties that they performed during the pertinent review period.

Further, I find that Appellants cannot qualify for either the BWC Underwriting Consultant or the Financial Institution Specialist 2 Classes for the reasons stated, above. This should in no way be seen as reflecting poorly on Appellants. Nor should it be seen as diminishing the high-value and high-quality work that Appellants obviously perform on behalf of the Bureau of Workers' Compensation.

CONCLUSIONS OF LAW

These cases present this Board with the question of whether the Department of Administrative Services' Class Plan Review Determinations (that reclassified Appellants' respective positions from Management Analyst Supervisor 1 to Workers' Compensation Underwriter) should be affirmed? Based on the findings set forth, above, and for the reasons set forth, below, the Board should answer this question in the affirmative and, so, should affirm DAS' Determinations in the two instant appeals.

These cases essentially present this Board with a simple but, unfortunately, somewhat troubling, situation. It is clear that there is only one Classification that was offered by the parties, *that this Board may utilize,* and that provides a reasonable fit with Appellants' duties. That Classification is Workers' Compensation Underwriter.

I have set out, above, the reasons as to why neither the BWC Underwriting Consultant nor the Financial Institution Specialist 2 Classes may be used for Appellants' positions when considering their bargaining unit status and their Division. Thus, the only other Class considered that appears to fit with Appellants' duties is the Workers' Compensation Underwriter Class.

This **Series Purpose** for the Workers' Compensation Underwriter Class indicates, in paragraph 2., that the incumbent Underwriter is to " ... evaluate employer applications for alternative rating plans to determine acceptability of employers for BWC risk programs & calculate & adjust reserves & employer premium rates."

The **Class Concept** indicates, in pertinent part, that the incumbent is " ...to evaluate & classify risk &/or set premium rates on workers' compensation applications for employers."

DAS is bound by the language in the applicable Class Concept, pursuant to O.A.C. 123: 1-7-15. This Board must issue a final Order that is consistent with the applicable Classification Specifications, a somewhat broader mandate. (See R.C. 124.03 (A) (2))

Appellants fulfill the first component of the Series Purpose language since they essentially determine or effectively recommend accepting or rejecting the applications of employers to enter or remain in one of three alternative ratings programs. They do not set premium rates on those applications.

However, as described in the Class Concept, Appellants do evaluate and classify risk and the incumbent may, but is not required to, set premium rates. Since the Class Concept uses the "&/or" connector, the incumbent, as here, need only fulfill one of the two principal functions of the Class to qualify for the Class.

In summary, Appellants fulfill one of the two principal functions listed in the Workers' Compensation Underwriter Series Purpose language and fulfill the requisite one function listed in the Workers' Compensation Underwriter Class Concept language. Thus, their respective positions qualify for the Workers Compensation Underwriter Class. Since this is the only *viable* Class that was offered into the record that this Board may consider, this Board should affirm DAS' instant Class Plan Review Determinations.

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** the two instant Class Plan Review Determinations of the Department of Administrative Services that reclassified Appellants' respective positions to Workers' Compensation Underwriter, pursuant to R.C. 124.03, R.C. 124.14, R.C. 4117.01 (C), and O.A.C. 123: 1-7-15.

James R. Sprague
Administrative Law Judge