PATRICIA A. KUHN, .

Grievant, .

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v. . Docket Number: 94-T-281

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WEST VIRGINIA DEPARTMENT OF TAX .

AND REVENUE and WEST VIRGINIA .

DIVISION OF PERSONNEL, .

Respondent(s). .

DECISION

Patricia Kuhn (hereinafter Grievant) filed this grievance on March 30, 1994, pursuant to the provisions of West Virginia Code §29-6A-1 et seq., challenging her position's classification. After having received adverse decisions at the lower levels from her employer, Grievant appealed to level four of the Grievance Procedure For State Employees on July 13, 1994, requesting that this Decision be based upon the evidence developed at the lower levels. Thereafter, a briefing schedule was established and the case became mature for decision on or about August 1, 1994. The Division of Personnel, as an indispensable party, was also given notice and an opportunity to submit a brief in support of itsposition and no such brief was submitted. The following findings of fact have been properly deduced from the evidentiary record developed by the parties.

Findings of Fact

1. Grievant is employed in the Excise Tax Unit of the Internal Auditing Division as a Tax Audit Clerk.

2. Grievant spends approximately seventy-five percent of her work day examining and auditing "motor fuel" tax refund applications filed by taxpayers to determine their accuracy, timeliness and completeness.

3. Prior to the Division of Personnel's statewide reclassification project, Grievant was classified as a Tax Audit Clerk II. After the reclassification of employees within the Department of Tax and Revenue, Grievant's position was reallocated to that of Tax Audit Clerk.

4. In the fall of 1993, after the reclassification study was completed within the Tax Department, the Department requested of the Division of Personnel that it create the position of Tax Audit Clerk, Senior. The Personnel Board approved this request and the classification specification for said position was later approved by Personnel in conjunction with the Tax Department. This classification became effective on February 1, 1994.

5. As a result, the Tax Department's Director, Assistant Director and Unit Managers made recommendations concerning which positions would be classified under the Senior designation. Grievant's position was not chosen to be reallocated to this new classification.

The relevant sections of the classification specifications at issue herein are reproduced as follows:

TAX AUDIT CLERK

Nature of Work: Under general supervision, at the full-performance level, examines tax returns and other documents for completeness, accuracy and compliance with state tax laws. Work is performed in accordance with statutory rules, regulations, policies, and procedures governing the lawful and timely completion of tax returns. Requires strict confidentiality in regard to taxpayer information. May act as lead worker and train new employees. Performs related work as required.

Distinguishing Characteristics: Employee at this level performs full-performance audits of tax returns which require a working knowledge of state tax laws, filing requirements, deadlines and billing procedures. Performs audits not involving complex issues requiring as high of a degree of theoretical or as in-depth tax knowledge. Audit sources and steps are limited to comparison to the Tax Audit Clerk Senior level.

Examples of Work

Reviews records/computer systems to determine if taxpayer is current in filing and payment of taxes.

Verifies mathematical calculations used in the computation of taxes.

Reviews returns and schedules to ascertain that information required by statute is complete and may determine which taxes that taxpayer is liable for based upon information included on return.

Verifies that applicants qualify for special licenses and permits by reviewing applications for accuracy, completeness, and compliance to the requirements as set forth in the statutes.

Reviews tax payments received for accuracy, records the payment and forwards to the Cashier's office when the account examination is complete.

Drafts correspondence on a variety of tax issues to obtain additional information from or relay information to the taxpayer.

Assists taxpayers in completing tax returns and determining proper reporting classification in accordance with tax laws.

May assist in the drafting of forms and other publications.

Knowledge, Skills and Abilities

Knowledge of tax laws, rules, regulations, policies and procedures relating to applicable tax statutes administered by the division; may require limited knowledge of federal tax laws in some instances.

Knowledge of resources, methods, schedules and forms available to locate return information.

Skill in computing mathematical calculations accurately, including interest, penalties and additions to tax.

Skill in composing correspondence which contains legally accurate information in a grammatically correct format.

Skill in the use of office equipment required to perform duties.

Ability to select the most effective method to process audits and increase collections.

Ability to work effectively with taxpayers, attorneys, CPA's bookkeepers or corporate executives with tact and diplomacy and to disseminate accurate information.

Ability to use computer system.

Ability to establish and maintain effective working relationship with co-workers.

Established: 8/19/93

Revised: 2/1/94

Effective: 2/1/94

TAX AUDIT CLERK, SENIOR

Nature of Work: Under limited supervision, at the advanced level, examines complex tax returns and other documents for completeness, accuracy and compliance with state tax laws and/or any related federal tax laws. Work is performed in accordance with statutory rules, regulations, policies, and procedures governing the lawful and timely completion of tax returns. Requires strict confidentiality in regard to taxpayer information. May act as lead worker and train new employees. Performs related work as required.

Distinguishing Characteristics: Employee at this level performs advanced audits of more complex tax returns which require an in-depth knowledge of state tax laws, regulations, filing requirements, deadlines and billing procedures and a working knowledge of any related federal tax laws, filing requirements and deadlines. Requires a greater latitude of independent judgement and knowledge of theoretical principles in determiningtaxable status based upon complex issues and criteria as prescribed by state or federal laws. Requires the use of multiple sources and steps to perform the audit functions.

Examples of Work

Utilizes state or federal tax laws to determine taxability of income, services or products in accordance with the applicable rates and qualified tax exemptions.

Utilizes federal return and/or federal audit information to complete and compare appropriate state return data; utilizes computer audit databases to research discrepancies in tax returns filed.

May determine taxability and allowable credits based upon federal and/or state tax laws.

Compares information from tax returns with other sources to determine accuracy and validity of reported information such as credits, invoices, inventories, tonnage, etc.

Answers taxpayer inquiries requiring considerable knowledge of many tax laws in order to verify liabilities, resolve complex issues, and effectively communicate with taxpayers, accountants, attorneys, and other parties with

regard to various tax returns and the criteria used in assessing liabilities.

Utilizes additional information provided by taxpayers and other sources to develop or reconstruct tax information and performs complex calculations to determine correct tax due.

Works closely with Programming staff in developing and testing computerized audit and update programs.

Coordinates the reporting of tax data on magnetic media by working with Programming staff, tax practitioners, and taxpayers and maintains associated database files.

Drafts correspondence on complex and sensitive tax issues to obtain additional information from or to relay information to taxpayers.

Compiles, verifies and prepares reports and data for distribution of funds collected to other agencies, counties and municipalities in compliance with state and federal laws.

Establishes tax liabilities based upon audit findings and prepares taxpayer files for legal action on delinquent taxes by computing liability, interest and additions to tax due and by verifying the validity and accuracy of returns against data from other sources.

May assist with or conduct internal or external training sessions.

Assists taxpayers in completing complex tax returns and determining proper reporting classifications in accordance with tax laws.

Assists in the development of tax forms, instructions, and other publications.

Knowledge, Skills and Abilities

Knowledge of tax laws, rules, regulations, policies and procedures relating to applicable tax statutes administered by the division and related federal statutes.

Knowledge of resources, methods, schedules and forms available to locate return information.

Skill in computing complex calculations accurately.

Skill in composing correspondence which contains legally accurate information in a grammatically correct format.

Skill in the use of office equipment required to perform duties.

Ability to select the most effective method to process audits and increase collections.

Ability to analyze the effects of a change in one tax return upon other tax returns.

Ability to work effectively with taxpayers, attorneys, CPA's, bookkeepers or corporate executives with tact and diplomacy and to disseminate accurate information.

Ability to use computer system.

Ability to establish and maintain effective working relationship with co-workers.

Established: 11/16/93

Effective: 2/1/94

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 matched another cited Personnel classification specification than that under which she is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991); for these purposes, the "Nature of the Work"section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievant's current classification constitutes the "best fit" for her required duties. Simmons v. W. Va. Dept. of HHR/Division 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 Services, Docket No.s. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue, if said language is determined to be ambiguous, should be given great weight unless clearly erroneous. See, W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (1993).

The differences in the two classifications at issue are easily determined but not so easily recognized. Tax Audit Clerks are required to work "[u]nder general supervision, at the full-performance level, examin[ing] tax returns and other documents for completeness, accuracy and compliance with state tax laws." It is specifically noted that employees in this position are not required to perform audits involving "complex issues" which require a high degree of in-depth tax knowledge. On the other hand, Tax Audit Clerk, Seniors are required to work "[u]nder limited supervision, at the advanced level, examin[ing] complex tax returns and other documents for completeness, accuracy and compliance with state tax laws and/or any related federal tax laws." Obviously, thedistinction between these two classes is based upon the

complexity of the tax returns and of the laws and regulations which are to be applied thereto.

In the instant case, Grievant has the burden to establish that it is more likely than not that the predominant duties of her position fit better within the classification of Tax Audit Clerk, Senior than that of Tax Audit Clerk. Grievant has not met this burden. The Tax Department has the authority to set the duties for Grievant's position and it appears to the Undersigned that the Tax Department's subjective determination as to the complexity of the nature of work required by Grievant's position should be given weight. The Tax Department must be recognized as being aware of the nature of the audits performed by its various other clerks. Further, the evidence is that the Tax Department worked in conjunction with the Division of Personnel in drafting the language of the Tax Audit Clerk, Senior classification. There is no evidence of record which would support a finding that either the Division of Personnel or the Tax Department acted arbitrarily or did not have a rational basis for classifying Grievant as a Tax Audit Clerk. Therefore, based upon the limited material evidence of record, it is determined that Grievant has not met her burden of persuasion in establishing that she was improperly classified by the Division of Personnel in conjunction with communication from the Tax Department.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusion of law.

Conclusion of Law

Grievant has failed to prove by a preponderance of the evidence that the predominant duties of her position are better described by the classification specification of Tax Audit Clerk, Senior than that of the classification of Tax Audit Clerk.

Accordingly, this grievance is hereby DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and 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. Any appealing party must

advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

November 17, 1994