BETTY D. BROGAN, et al.

Grievants, .

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v. . Docket Number: 95-T&R-153

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WEST VIRGINIA DEPARTMENT OF .

TAX AND REVENUE and .

WEST VIRGINIA DEPARTMENT OF .

ADMINISTRATION / DIVISION OF .

PERSONNEL, .

Respondents. .

D E C I S I O N

Grievants Betty Brogan and Suzanne Dobson, Tax Analyst Is, and Roger Cox and Kerri Petry, Tax Analyst IIs, each with the Department of Tax and Revenue (hereinafter Tax), filed a grievance on July 6, 1994, pursuant to the provisions of the Grievance Procedure for State Employees, West Virginia Code §§29-6A-1, et seq. Grievants challenge the pay grades assigned to the Tax Analyst classification series by the Division of Personnel (hereinafter Personnel), the appropriateness of Tax's prior decision that Tax Analyst IIs are not required to be paid for overtime work, and the level of their respective salaries ascontrasted with that of other Tax Analysts employed by Tax in a separate work unit.

The grievances were denied at levels one and two, and consolidated for hearing at level three. A

level three hearing was held on or about October 17, 1994, but no decision was issued prior to Grievants' request of April 11, 1995, that they be allowed to appeal to level four. Pursuant to W. Va. Code §29-6A-3(a), their request was granted and an evidentiary hearing was held at this Board's Charleston, West Virginia office on May 31, 1995. The case became mature for decision on or about June 26, 1995, after receipt of the parties' post-hearing briefs.

Positions of the Parties

Effective April 30, 1994, the civil service classification of Tax Analyst I was assigned to pay grade 13 with a salary range of $22,644.00 to $36,854.00. The Tax Analyst II classification has been assigned to pay grade 14, with a corresponding annual salary range of between $24,240.00 and $39,432.00. In general, Grievants contend that based upon the work performed, the responsibilities of the positions and the educational and experience requirements for the two classifications, the pay grade assignments for these classifications should be 17 and 19, respectively. (See footnote 1) At the time the grievances were filed, each Grievant worked within Tax'sResearch and Development Division. (See footnote 2) Their second argument is that they have been victims of discrimination because other Tax Analysts within Tax are paid higher salaries even though they perform substantially similar work. Finally, Grievants maintain that they are entitled to back pay for overtime hours they had worked prior to the time Tax had reconsidered its practice of not paying Tax Analyst IIs overtime wages.

Personnel denies that the classifications of Tax Analyst I and II should be assigned higher pay grades. It maintains that the duties of the two positions justify the salary ranges assigned them. Further, it notes that the State Personnel Board has approved hiring rates of ten percent above the minimum for new hires within both classes. Personnel concludes that Grievants have failed to meet their burden of proving that it acted unreasonably, arbitrarily or capriciously, or otherwise in an illegal manner in setting the pay grades for the classifications in question.

Tax responds to Grievants' claim for back pay for overtime worked by asserting that the decision of whether or not employees are entitled to overtime pay is solely up to its general discretion. It avers that even though it changed its practice in this regard, said change did not entitle Grievants to damages for the period when overtime was not available. Finally, Tax admits that the Tax Analysts in the Property Tax Division are paid higher salaries than Grievants, but asserts that this difference

ispermitted consistent with the holdings in Largent v. West Virginia Division of Health, 452 S.E.2d 42 (W.Va. 1994).

Discussion

Sometime in the fall of 1991, Personnel began what it has called its Statewide Reclassification Project. Generally, the purpose of this project was to revamp the then-existing classification and pay plans by eliminating unnecessary classification titles, creating other needed titles, rewriting classification specifications and recreating a pay plan for the classified and classified-exempt service which contains fewer pay grades and eliminates steps within those pay grades. Personnel implemented this project by working in conjunction with each state agency and with the appointed authorities of those agencies. The reclassification of employees within Tax took place sometime during the summer of 1993.

W. Va. Code §29-6-10, states, in pertinent part,

> The Board [Personnel Board] shall have the authority to promulgate, amend or repeal rules, in accordance with chapter twenty-nine-a [§29A-1-1 et seq] of this code to implement the provisions of this article:
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> (2) For a pay plan for all employees in the classified service, after consultation with the appointing authorities and the state fiscal officers, and after a public hearing held by the board. . . . Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The principle for equal pay for equal work in the several agencies of state government shall be followed in the pay plan as established hereto.

Within state government, various classified positions exist in more than one agency, but some classifications exist only within a particular agency. Personnel has interpreted Code §29-6-10 torequire that all employees who hold the same class title must be paid within the pay grade established for that position. This Grievance Board has accepted this theory as consistent with the Legislature's equal pay for equal work mandate referred to above. See, Redden, et al. v. W. Va. State Tax Dept., Docket No. 89-T-339 (Feb. 22, 1991).

Personnel has adopted, pursuant to Code §29-6-10(2), administrative regulations which govern the implementation of its classified pay plan, 143 CSR 1. Section 5.04(a) of this rule states as follows:

> Assignment of classes: The Board shall assign each class of positions to an appropriate pay grade consistent with the duties outlined in the class specification. No salary shall be approved by the Director of Personnel unless it conforms to one of the pay rates in the pay grade assigned to the employee's class of position.

In reference to class specifications, Section 4.04 of said rule states, in pertinent part,

> (a) Class specifications are descriptive only and are not restrictive . . ..
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> (b) In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole. Consideration shall be given to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes affording together a picture of the positions that the class intended to include.
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> (c) A class specification shall be construed as a general description of the kinds of work characteristics of positions properly allocated to that class and not as proscribing what the duties of any position are nor as to limiting the implied power of the appointing authority now or hereafter vested with the right to prescribe or alter the duties of the position.

When Personnel assigns a pay grade to a position, it takes into consideration the general nature of that position's duties, tasksand qualifications, along with its relationship to other positions in the classified plan. After reviewing the language of the class specifications at issue, it then assigns a pay grade to that series of positions which is meant to cover all employees within that class irrespective of the actual duties that one or more of those employees may perform. The focus of this case must be upon the general nature of the two classifications in question, as derived from the applicable class specifications, and not upon the examples of work, skills or abilities of any one incumbent in a position within Tax. See, Vickers v. W. Va. Dept of Tax, Docket Nos. 94-T&R-092/142 (Nov. 14, 1994).

Personnel has been delegated the discretionary authority to create a pay plan and assign classes to positions within that plan. One challenging Personnel's decision-making must establish that it clearly abused its discretionary authority or that its action was clearly illegal. Otherwise, neither a court nor an administrative agency acting in a quasi-judicial role may interfere with the reasonable exercise of discretion, even though intelligent and reasonable minds may differ on the point in

question. State of Washington ex rel. John Reilly v. Civil Service Commission of City of Spokane, 112 P.2d 987 (Wash. 1941). Generally, an agency's action is found to be arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference ofview. See, Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Grievants presented the testimony of various individuals who had worked or currently work for Tax. Much of this testimony pertained to the negotiations and interactions between Tax and Personnel during the reclassification of Tax's employees. As required by statute, the reclassification of Tax's employees was performed by Personnel in conjunction with the authorities in Tax. This process was lengthy and involved because all positions were affected.

Obviously, the supervisors and administrators within Tax had opinions as to the proper classification and salary ranges for their various positions, while officials in Personnel often had different opinions. Many of the conversations, meetings and documents exchanged between the two concerned Tax's attempt to inform Personnel as to the nature of the work of the positions which it had. From there, value judgements were made as to the relative pay grades of the positions. Tax did not always agree with the pay grade assignments proposed by Personnel and, in some cases, was successful in changing the outcome of the reclassification project as related to it. However, even though Tax did not agree that the positions of Tax Analyst I and II should have been assigned pay grades 13 and 14, respectively, this was the ultimate outcome of the process.

Grievants also presented testimony for the purpose of explaining and defining the types of duties and responsibilitiesexpected from those in Tax Analyst positions. Much of the focus in this regard was on the quantity of the work required. They also presented testimony to support their belief that Tax has experienced difficulty in recruiting for the Tax Analyst classes, although the entire evidence of record does not support the conclusion that retention has been a distinct problem. Further, Grievants attempted to demonstrate through opinion testimony and various charts and data compilations that the Tax Analyst positions are underpaid in contrast to the salary ranges established for other classified positions with lower minimum qualifications and less complex duties.

Grievants take great exception to the fact that the Tax Analyst II position is six pay grades below that of the position of Tax Director (pay grade 20), the position they feel is the next one in the "career

ladder" for Tax Analysts. Grievants also asked that the Undersigned take notice of the various civil service classification specifications to compare and contrast them to the Tax Analyst series. Finally, they recognized that the Southeastern States Salary Survey does not contain a position similar to that of a Tax Analyst; therefore, they argue that Personnel should not have used the position of Auditor within that study as a basis for determining their classifications' pay grades.

Lowell D. Basford, Assistant Director, in charge of the Classification and Compensation Section of Personnel, testified concerning the process and rationale behind the decision at issue. In summary, he testified that the pay grades for these twopositions were based upon the classification specifications and not the duties of each incumbent. Further, he testified that the nature of the duties of these two positions are comparable to those of other positions assigned the same pay grades. He opined that the nature of these two classifications do not justify the pay grades of 19 and 20, as the classes maintaining those assignments contemplate much more complex duties and are typically administrative. Mr. Basford also explained how the Southeastern Salary Survey was used to arrive at the salary ranges for these classifications.

Upon a thorough review of the testimony, exhibits, classification plan, pay plan and the various classification specifications, the evidence falls short in establishing that Personnel's decision to assign pay grades 13 and 14 to the Tax Analyst I and II classifications was clearly contrary to law or was a result of arbitrary or capricious decision-making. It is gleaned from the record that many different factors are considered before a pay grade assignment is made and that factors such as minimum qualifications for the classifications and promotion opportunities are not, in and of themselves, determinative of the salary range. What is controlling is the nature of the duties required of the positions, as compared and contrasted to the various other positions within and outside of the respective agency. Also, the nature of the work is not directly related to the quantity of the workload. Clearly, the Tax Analyst I and II positions do not compare equally to the other positions in the classified service atpay grades 17 and 19, such as Architect (17), Community Development Manager (17), Executive Director, Public Employees Retirement System (17), Nursing Director I (17), Child Advocate Attorney (19), Corrections Warden (19), Director, General Services (19). Grievants have failed to meet their burden of proof on this issue.

Grievants contend that they have been discriminated against because Tax pays the three Tax Analyst IIs in its Property Tax Division higher salaries than it pays them, based upon a comparison of

the seven employees' experience and qualifications. In particular, they contend that two employees, Scott Burgess and Betty Brogan (a grievant herein) have been given "experience raises" or "equity raises" which have not been given to them. (See footnote 3) In essence, Grievants contend that had Tax wanted to raise the salaries of some of its Tax Analyst IIs to reward them for their experience, it should have done the same for all Tax Analysts.

"Discrimination" is defined by W.Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or are agreed to in writing by the employee." In past cases, this Grievance Board has normally utilized a "burden of proof" or "evidentiary" test in order to determine if an employee has been the subject of discrimination. Under this test, in order for a grievant to prove that a respondent has set or influenced hissalary in a discriminatory manner, he must first establish a prima facie case of discrimination by showing that:

> (a) he is similarly situated, in a pertinent way, to one or more employee(s);
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> (b) he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and
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> (c) such differences were unrelated to the actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to in writing by the Grievant. [Emphasis added}.

Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). The above test was adapted from the one used by the Supreme Court in cases wherein it has analyzed wrongful discharge and suspect-class, discrimination cases. See, W.Va. Inst. of Tech. v. Human Rights Com'n, 383 S.E.2d 490 (W.Va. 1989); K-Mart Corp. v. Human Rights Com'n., 383 S.E.2d 277 (W.Va. 1989).

In order for Grievants to establish a prima facie case, they first need to show that they are similarly situated to one or more employees for purposes of making a salary comparison. If this evidentiary burden is met, the burden of production then shifts to Tax to introduce a basis for the differences between Grievants' salaries and the salaries of the other Tax Analysts that is either

based upon a legitimate, non-arbitrary reason, or related to the actual job responsibilities of the positions. From there, Grievants may attempt to establish that the offered reasons for the differences are merely pretextual.

The record in this case is not clear; however, there is evidence that Scott Burgess, sometime during the 1994 fiscal year, received a raise in salary which Tax called an "experience raise." Lydia McKee, Assistant Tax Commissioner, testified that Mr. Burgess received this raise because he had assumed additional duties, and that Tax believed he would resign if his salary was not higher. Evidently, Grievant Brogan also received such a raise when she transferred from the Research and Development Division to the Property Tax Division, even though this was a lateral transfer. Grievants contend that all four of the Tax Analysts within the Property Division have received a salary directly based upon their experience, while none of the Tax Analysts in Research have been given such a benefit.

During the level three hearing, Grievants admitted into evidence a chart which was intended to depict the annual salaries of the then-current Tax Analysts at the time the grievances were filed; this chart contains the following information:

Research Division:

Kerri Petry $26,227.20

Betty Brogan $24,604.00

Roger Cox $34,512.00

Susan Dobson $25,920.00

Property Tax Division:

Jeff Amburgey $33,012.48

Charles Barlow $32,004.00

Mark Burgess $28,752.00

As noted, when Grievant Brogan transferred to the Property Tax Division she received an increase in pay which was recognized by Personnel as a merit raise, and by Tax as an "equity" or experience" raise. Also, Mr. Burgess received an "experience increase." Since the Grievance was filed, Kerri Petry has also received an "equity" raise because Tax recognized that she did notreceive a raise after her position was reallocated to the Tax Analyst II classification. (See footnote 4)

Based upon a review of the Grievants' evidence, it is determined that they have established a prima facie case of discrimination in reference to the salaries they are paid, as compared to the salaries of the Tax Analyst IIs in the Property Tax Division. (See footnote 5) Grievants' salaries, as a whole, are lower than those salaries paid to other similarly situated employees who hold the same classification, who perform duties of a similar nature and who are employed by the same employer. Only Grievant Cox's salary is higher than that paid any other Tax Analyst II within the Property Tax Division; however, he has approximately 14 years of experience while the Tax Analyst II in the Property Tax Division with the most years of service only has approximately nine years of experience but is paid just $1500.00 less.

Further, it is apparent that Tax has chosen to compensate its Tax Analyst IIs in the Property Tax Division based somewhat upon a relationship to the experience they hold even after their starting salary had not been so directly related. Also, it is clear from the testimony that Tax has attempted to give pay raises to thoseemployees who have made lateral transfers from the Research Division to the Property Tax Division because it believes that the work is more complex. (See footnote 6)

The next step in the analysis is to determine if Tax has presented a legitimate, nondiscriminatory reason for this recognized difference in treatment. After a thorough review of the evidence, both the testimony and exhibits support the position that the Tax Analyst IIs in these two divisions perform different duties and have different responsibilities. This is not to say that the nature of their duties are different, and therefore, either of the groups is misclassified. However, the two divisions have separate and distinct projects, goals, methods of analysis, workloads and deadlines. Consistent with the definition of discrimination, the evidence rebuts the presumption that Grievants have been discriminated against by being treated differently, with no correlation to their job duties. Finally, Grievants have failed to establish any pretext on behalf of Tax.

Next, Grievants contend that if their first claim is denied based upon a finding that the pay grades for the Tax Analyst I and II positions are appropriate, then they are entitled to back pay for the overtime they worked from the date the grievance was fileduntil April 1, 1995, the date Tax began paying Tax Analyst IIs overtime wages.

The record shows that by the spring of 1993, Tax had determined that Tax Analyst Is were required to be paid overtime pursuant to an interpretation of either the Federal Fair Labor Standards Act or the West Virginia Wage and Hour law. However, it also believed that the Tax Analyst II

positions were either professional or administrative positions exempt from the overtime requirements within these provisions. The issue of overtime was discussed at the level two hearing in this case and Tax maintained that Tax Analyst IIs were not eligible for overtime pay even though other positions recognized as supervisory were being paid overtime. At level three, witnesses for Tax opined that Tax Analyst IIs were not eligible for overtime because they were professional employees, even though Tax Analyst Is were eligible for overtime. (See footnote 7) Interestingly enough, prior to the level four hearing herein, Tax changed its opinion and starting awarding overtime to Tax Analyst IIs, effective April 1995, based upon another review of the matter.

Effective October 27, 1993, Tax updated its Overtime Exemption List - Personnel Policy Memorandum No. 1-91, to indicate that Tax Analyst IIs were exempt from overtime pay. Tax Analyst Is were already eligible for overtime. Grievants aver that it was discriminatory for Tax to maintain that its Tax Analyst Is wereeligible for overtime while Tax Analyst IIs were not. Grievants assert that since Tax Analyst II positions were considered to be supervisory/administrative, then Tax Analyst I positions should have also been so designated. Tax simply maintains that it has the discretionary authority to award overtime pay to the employees within the Tax Analyst series of positions.

The record does not establish what the current classifications of the various Tax Analysts employed by Tax were as of April 1, 1995. Both Grievants Brogan and Dobson have held the classification of Tax Analyst I; however, the evidence does not establish what is their current classification. It is clear that prior to April 1, 1995, Tax's official opinion was that Tax Analyst Is were eligible for overtime while Tax Analyst IIs were not. (See footnote 8)

In regard to Grievants claim of discrimination, based upon their argument, it is determined that they (those who are Tax Analyst IIs) were not and are not similarly situated to the employees classified as Tax Analyst Is. The nature of the work of these two positions is different (which is why there are two classifications within the series); therefore, the incumbents in these positions are not similarly situated with respect to Tax's decision as to which classes of employees are required to receive overtime.

If Grievants were comparing themselves to other employees within the same classification then they would be similarly situated, the focus would then be upon the reason for the decision that these similarly situated employees were not paid overtime. However, because the nature of the decision challenged by Grievants was based upon a classification of their position (administrative, executive,

etc.) for purposes of concluding whether they are entitled to overtime or eligible for overtime under Tax's discretion, they are not similarly situated to Tax Analyst Is. Tax had to base its decision on an analysis of the job functions of the distinct positions. Therefore, Grievants' claim for back pay for wages not paid for overtime work is denied.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. At the time the grievance was filed, Grievants Betty Brogan and Suzanne Dobson were classified as Tax Analyst Is, and Grievants Roger Cox and Kerri Petry were classified as Tax Analyst IIs. Grievants were all assigned to work within Tax's Research and Development Division.

2. The pay grades assigned to the classifications of Tax Analyst I and Tax Analyst II by the Division of Personnel are 13 and 14, respectively.

3. Tax employs Tax Analysts within two divisions, the Property Tax Division and the Research and Development Division.

4. On the average, Tax Analysts assigned to the Property Tax Division are paid higher annual salaries than the Tax Analysts assigned to the Research and Development Division, regardless of the employees' experience or educational level.

5. Tax has determined that Tax Analyst IIs are not required to be paid overtime wages for time worked past a forty hour work-week, pursuant to its interpretation of the applicable federal and state wage and hour laws.

6. At different times, Tax has changed its opinion as to whether Tax Analyst Is are required to be paid overtime wages.

7. The nature of the work of Tax Analyst Is is different from that of Tax Analyst IIs.

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

Conclusions of Law

1. Grievants bear the burden of proving their claims by a preponderance of the evidence. See, W. Va. Code §29-6A-6.

2. The Division of Personnel has the discretionary authority to assign salaries or pay grades to the positions it establishes in its classified plan. Personnel also maintains the authority to promulgate rules and regulations governing the creation of a pay plan for it classification plan. W. Va. Code §29-6-10(2).

3. Pursuant to 143 CSR 1, Section 5.04(a), each classification within Personnel's Classified Plan is to be assigned a pay grade consistent with the duties of the various positions as outlined in the positions' classification specifications.

4. Grievants have failed to establish by a preponderance of the evidence that Personnel's decision to assign the pay grades of 13 and 14 to the classifications of Tax Analyst I and II, respectively, was clearly illegal or the result of an abuse of discretion.

5. Grievants have failed to establish that Tax has engaged in discrimination with regard to the annual salaries it pays its Tax Analysts, both within the Property Tax and Research and Development Divisions.

6. Grievants have failed to establish by a preponderance of the evidence that they are entitled to back pay for Tax's failure to award them overtime wages, for the period of July 6, 1994, to April 1, 1995, based upon their theory that Tax discriminated against them by deciding that Tax Analyst Is were required to be paid overtime wages.

Therefore, this grievance is hereby **DENIED**.

Any party 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 6, 1995

Footnote: 1The salary range established for pay grade 17 is $29,712.00 to $48,336.00, and the range for pay grade 19 is

$34,032.00 to $55,344.00.

Footnote: 2Grievant Brogan transferred to the Property Tax Division sometime after the filing of this grievance at level one.

Footnote: 3Upon Grievant Brogan's transfer to the Property Tax Division sometime in the middle of 1994, she received said raise.

Footnote: 4Grievant Petry's salary at that time was above the minimum salary for pay grade 14.

Footnote: 5While it is true that the Supreme Court in Largent held that the payment of different salaries to different employees within the same classification does not violate the doctrine of equal pay for equal work, the holdings in Largent cannot be interpreted to allow an employer to discriminate against one or more of its employees with regard to the establishment of salaries or the issuance of pay raises.

Footnote: 6Testimony was presented that Tax awards various employees raises upon their acceptance of a lateral transfer from various sub-units to others if it believes that the actual job duties of the new positions are either more complex or greater. No pronouncement as to the appropriateness of this practice is called for in this case as Grievants have not contended that such is impermissible.

Footnote: 7The record establishes that the Tax Analyst Is were typically not offered overtime work or required to work overtime because Tax believed that this issue of entitlement to pay for overtime was too sensitive. Instead, compensatory time was offered.

Footnote: 8Apparently, both Grievants Brogan and Dobson are basing their claim of entitlement to back pay for lost overtime wages either upon the theory that they were Tax Analyst IIs who were not eligible for overtime or that they were Tax Analyst Is who were not paid overtime to which they were entitled.