VICTOR BONNETT, et al.,

Grievants,

v.

DOCKET NO. 99-T&R-118

WEST VIRGINIA DEPARTMENT OF TAX
AND REVENUE and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants are 22 Revenue Agents II with Respondent, Department of Tax and Revenue/Compliance Division ("Tax and Revenue"). (See footnote 1) Revenue Agents II are in pay grade 10. Grievants filed individual grievances in January of 1999, alleging they should be placed into a higher pay grade, based on a comparison with the Credit Analyst II classification, which is in pay grade 14. (See footnote 2) The grievances were denied at level one, and were consolidated before the level two hearing on January 22, 1999. The grievance was denied at level two by decision dated January 28, 1999. A level three hearing was conducted on February 16, 1999, at which time the Division of Personnel ("DOP" or"Personnel") was joined as a party. (See footnote 3) The Grievance Evaluator, Mark Morton, denied the grievance by decision dated March 10, 1999. Grievants timely appealed to level four, and a hearing was held on June 8, 1999. This matter became mature for decision on July 8, 1999, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 4)

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Corrected grievance statement, with attachments.

Ex. 2 -

Comparison of job specification for Revenue Agent II and Credit Analyst II.

Ex. 3 -

September 25, 1991 letter from Michael T. Smith to Frederick Williams, Jr., enclosing revised job specification for Revenue Agent II, effective September 18, 1991.

Ex. 4 -

1998 Employee Performance Appraisal of Victor Bonnett.

Ex. 5 -

Sample documents entitled “Certificate of Sale”, “Notice of Sale”, and “Notice of Seizure”.

Ex. 6 -

Proposed job specification for Compliance Agent.

Ex. 7 -

April 27, 1995 memorandum from Edward H. Staats, to various officials, regarding “Procedures for Seizure and Closure of Businesses”, with attachments.

Ex. 8 -

December 4, 1991 memorandum from John Holcomb to Regional Office Managers regarding “Delegation of Authority Survey.”

Tax and Revenue's Exhibits

Ex. 1 -

July 8, 1997 Internal Memorandum from Edward H. Staats to various officials regarding “Index for Series 9 Rule (Draft)”, or Risk Management Rule, with attachments.

Personnel Exhibits

Ex. 1 -

Position Description Form for David H. Weis, Unit Manager II.

Ex. 2 -

Position Description Form for Revenue Agent.

Testimony

Grievants presented the testimony of David Weis, Victor Bonnett, James H. Ferguson, William B. Bright, II, Douglas Kilmer, and John Holcomb; Tax and Revenue presented the testimony of Edward H. Staats; and Personnel presented the testimony of Lowell D. Basford.

BACKGROUND

Revenue Agent II

In 1993, DOP, pursuant to a legislative mandate, performed a classification study of all classified positions in State Government whereby DOP abolished the previous system of classification and created a new system. In order to create new classifications pursuant to this mandate, DOP sent position description forms to all employees under the classified system. The position description forms established a database by which jobs were classified and pay grades were ultimately assigned.

During this statewide review of all classifications, DOP, in conjunction with Tax and Revenue, created the classification of Revenue Agent II held by Grievants in part by utilizing these position description forms. As a result of the reclassification, the series was expanded from one classification for Revenue Agents to Revenue Agents I and II. In 1993, Revenue Agent IIs were assigned to pay grade 10. DOP assigns classifications to a paygrade by utilizing a method called “market pricing.” By utilizing salary survey data primarily from the Southeast Section Conference Survey or from the private sector where survey data from public entities is unavailable, Personnel, along with the Personnel Board, assigns pay grades based on class specifications, market pricing, and recruitment and retention expectations. This was the method used in assigning Revenue Agent IIs to pay grade 10.

In 1997, the Governor's Cabinet council determinated that Personnel should review and upgrade, if necessary, all 790 titles in the classified system. Every two months, starting in July of 1998, the Personnel Board reviewed different occupational groups. Agencies were contacted and were permitted to have input as to the changes in compensation. In 1999, the Personnel Board approved upgrades for all of the classifications in Tax and Revenue including the position of Revenue Agent II. Pursuant to this overall upgrading of classifications throughout the State, Revenue Agent IIs were upgraded from pay grade 10 to 12 on August 1, 1999. Tax and Revenue agreed to this increase in pay grade for Revenue Agent IIs, as well as other positions raised by this study. The review of the Revenue Agent II pay grade for purposes of the Governor's Cabinet upgrade of salaries was undertaken well in advance of the initiation of this grievance and is unrelated to the filing of this grievance.

Credit Analyst II

In January of 1998, four years after the creation of the Revenue Agent II position, Personnel created the Credit Analyst II position within the Bureau of Employment Programs as part of an overall re-engineering of the Bureau of Employment Programs Workers' Compensation Division. According to Edward Staats, former Chief FinancialOfficer at the Workers' Compensation Division from 1991-1997, the Workers' Compensation Division system was in “deep financial trouble” in the early 90's. Efforts were undertaken to reverse the financial woes of the Workers' Compensation system. These efforts included significant changes to the existing classified positions at Workers' Compensation.

Mr. Staats and others, under the guidance of the Workers' Compensation Performance Counsel, (See footnote 5) re-engineered the Workers' Compensation system to become like a private insurance company. In particular, every major process of the Workers' Compensation system including the Claims Process, the Financial and Accounting Process, the Rate Making Process, the Risk Underwriting Process, and Receivables Management was changed and revised. As part of the overall changes in the Workers' Compensation system, the Performance Counsel developed “Rule 9,” which allowed the Workers' Compensation Fund to act in the manner of a private insurance company.

Rule 9, or the “Risk Management Rule,” allowed “the Division to undertake new methods of evaluating risks of insuring specific companies, designing and developing new systems to evaluate

risks, both in underwriting risks and credit risks, as well as to develop new methods of making rates." Staats, Tr. 232-233; Basford Tr., 223-224. The primary goals of these changes were to: (1) insure that the premiums assigned to particular employers were "reflective of the risks" that Workers' Compensation was insuring throughthe underwriters process; and (2) to insure that the credit risks of all employers were evaluated by the Division. Staats, Tr., 233; Basford, Tr., 184-185; Tax Ex. 1.

As part of the re-engineering of the Workers' Compensation system, classified positions within the Division were significantly changed. This included changing the job classification for those employees who managed receivables. In order to better assess the risks of employers and collect unpaid premiums from employers, the Bureau of Employment Programs, along with Personnel, developed the Credit Analyst series, including the Credit Analyst II position to which the Revenue Agent/Grievants compare themselves in this matter.

The Credit Analyst II position was created by a group of Workers' Compensation employees, including Mr. Staats, in conjunction with Personnel. The Credit Analyst II position emerged from the changes created by Rule 9 and Senate Bill 250, which directed Workers' Compensation to improve its methods of evaluating risks so that default and delinquency could be avoided. The Credit Analyst position became effective in January of 1998.

The Credit Analyst II position was assigned to pay grade 14 in 1997. This pay grade was set pursuant to salary survey data issued in 1995, as well as according to what the Bureau of Employment Programs felt they needed to pay employees in 1997 to recruit and retain those workers. Personnel was unable to find a comparable job for comparison to the Credit Analyst II position in the Southeast States Salary Survey Data, and thus, relied upon data from the private sector. Basford, Tr., 226. Personnel used a salary range below the median pay per Credit Analyst in the private sector. Basford, Tr., 225.

DISCUSSION

Grievants assert that their job description is virtually identical to that of the Credit Analyst IIs, and therefore, they should be placed in the same pay grade. Respondents maintain that Revenue Agent IIs are properly placed in pay grade 10 (now 12) based upon their job duties.

In order to prevail in a grievance of this nature, Grievants must prove the allegations in their complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human

Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). The concept of “equal pay for equal work” is embraced by W. Va. Code § 29-6-10. See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992).

The West Virginia State Personnel Board, a part of Personnel, was created in 1989 to replace the former Civil Service Commission. W. Va. Code § 29-6-6 (1989). The duties and responsibilities of the former Director of the Civil Service Commission were also transferred to the Director of Personnel. W. Va. Code § 29-6-9 (1989). Pursuant to W. Va.Code § 29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or appeal legislative rules governing the preparation, maintenance and review of a position classification plan for all positions within the classified service based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

The Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). The Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Fike v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-155 (Aug. 28, 1998); Trimboli v. W. Va. Dept. of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997); Moore v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-126 (Aug. 26, 1994). See, State ex. rel Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight.

Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

This standard of entitlement to substantial weight applies when a grievant attempts to review Personnel's interpretation of its own regulations and classification specificationsto determine if Personnel's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-052 (July 10, 1995). “There is no question DOP has the authority to establish pay grades within a pay plan.” Stephenson v. W. Va. Bureau of Employment Programs, Docket No. 92-DOP-447 (Aug. 12, 1993).

Further, a grievant may prevail by demonstrating his or her reclassification was made in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehabilitation, Docket No. VR-88-006 (Mar. 28, 1989). Generally, an action is considered arbitrary and capricious is the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE- 081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of Personnel. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

An employee who challenges the pay grade to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1995); Bennett v. Dept. of Health and Human Resources, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dept. of Health and Human Resources, Docket No. 94-HHR-206 (June 15, 1995); Thibault v. Div. of Rehabilitation Services, Docket No. 94-RS-061 (May 31, 1995); Frome v. Dept. of Health and Human Resources, Docket No. 94-HHR-140 (Nov. 29, 1994). See O'Connell v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-251 (Oct. 13, 1995).

Unless a grievant presents sufficient evidence to demonstrate Personnel's interpretation of pay grade is clearly wrong, or the result of an abuse of discretion, an administrative law judge must give deference to Personnel and find that the pay grade assignment was correct. Farber, supra; O'Connell, supra.

This Board has treated arguments such as Grievants' to be one for a higher pay scale based on "comparative worth" (a.k.a. "comparable worth") and not one of equal pay for equal work. Grievants are not comparing themselves to employees within their own classification, but to employees who perform substantially similar work through exerting the same effort and by utilizing the same skill level within a substantially similar working environment. See Moore, supra; Fike, supra.

The majority of federal courts are unwilling to substitute their judgment for that of the various employers in the comparative worth Title VII cases dealing with the issues of numerous positions' value to their employers. In Moore, supra, the Administrative Law Judge stated, "this Grievance Board is likewise reluctant to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, and substitute its judgment for that of the administrative agency in charge of classification and compensation." However, this Board also noted in Moore that the line of federal cases considering the issue of "comparative worth" under federal anti-discrimination laws is distinguishable from cases such as we have. This is because the definition of discrimination used for state public employment does not require proving intent. See Moore, supra. Moreover, Fike shows that there is still a residual equal pay for equal work analysis in comparable worth cases. Regardless of how this case is properly labeled, Grievants are arguing that the decision to place the Revenue Agent II classification in a lower pay scale than the Credit Analyst II classification is arbitrary, capricious, and an abuse of discretion because of the similarity of their job functions. See Moore, supra.

In determining whether two positions are so similar that providing a pay grade for one position that is different than the other is a violation of the anti-discrimination "equal pay for equal work" provisions of the West Virginia Code, the focus is on the actual work performed in each position. See Akers v. W. Va. Dept. of Tax and Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995)(noting that when considering the "equal pay for equal work" provision of the Code, the West Virginia Supreme Court has always "considered the actual duties performed.")(citation omitted).

In a case such as this, it is necessary to compare the job specifications of the Revenue Agent II and the Credit Analyst II. The classification specifications for these jobs are restated below:

REVENUE AGENT II

Nature of Work

Under general supervision, performs work at the full-performance level in the collection of delinquent taxes and in the enforcement of any other aspects of the State's tax laws. Responsible for the collection of any delinquency which may occur with respect to any taxes administered by the State Tax Division. Exercises good judgement in dealing with many sensitive issues and sometime unpleasant or uncooperative potential taxpayers. Considerable and frequent travel throughout an assigned region is required. Must be proficient in the execution of tax returns forms and have knowledge of the economic reasoning behind the taxation. Performs related work as required.

Distinguishing Characteristics

The Revenue Agent II is distinguished from the Revenue Agent I by performing field collections. At this level, the incumbent travels throughout a region contacting taxpayers in person to collect delinquent taxes and serve legal notices.

Examples of Work

Contacts taxpayers by phone, correspondence or in person to inform them of tax delinquencies, establish tax liability and of incomplete or missing tax returns and other documents.

Serves legal notices such as notice of assessment, notice of hearing, distress warrants, administrative decisions, and subpoenas; issues and delivers warrants to magistrate court for action.

Visits businesses suspected of operating without a business license and issues a license when required, discusses tax obligations, and instructs operators on the types and rates of taxes to be paid.

Determines appropriate procedure and technique required in collecting delinquent accounts.

Answers inquiries regarding delinquent taxes or bad checks and investigates taxpayer complaints.

Conducts investigations of all incidents of suspected non-compliance with State tax laws and regulations.

Assists taxpayers in compiling and completing delinquent tax returns; computes any interest, penalty, or addition for late payment of taxes or late filing of returns.

Provides taxpayer service by assisting with completion of all pertinent return forms and disseminating tax information which includes interpretation of tax laws and regulations and filing requirements.

Attends special events such as carnivals, auctions, fairs, and concerts to secure returns and collect taxes.

Assists in the training of new revenue agents by teaching them the art of collecting delinquent taxes according to

Department rules and regulations.

Schedules field appointments and prepares weekly work production reports.

Provides sworn testimony in judicial and administrative proceedings involving non-compliance with State tax laws and regulations.

Knowledge, Skills and Abilities

Knowledge of State tax laws including all taxes administered by the State Tax Division.

Knowledge of the art of collecting monies.

Knowledge of the procedures for processing warrants, liens, assessments, court notices, and bad checks.

Knowledge of the nature and use of all remedies available to enforce compliance with State tax laws and regulations.

Skill in performing mathematical calculations.

Skill in computing interest, penalty, and addition on taxes when needed.

Ability to communicate orally and in written form with taxpayers, other employees, and the general public.

Ability to interpret tax laws, policies, rules and regulations pertaining to tax collections.

Ability to establish and maintain effective working relationships with taxpayers, other employees, government officials, and the general public.

Ability to review data, interpret same, and prepare weekly production reports.

Minimum Qualifications

TRAINING Graduation from an accredited four-year college or university which must have included six semester hours in accounting.

SUBSTITUTION Experience in accounting, bookkeeping, credit collections, preparation of tax returns, or related work outside the Department may be substituted at the rate of two years of experience for one year of college; or tenure with the Department of Tax & Revenue in a related field may be substituted on a year-for-year basis for the required training. If the experience being substituted is in the area of

bookkeeping, accounting or credit collections, the six hour accounting requirement may be waived.

SPECIAL REQUIREMENT Availability of a car and possession of a valid West Virginia driver's license is required.

CREDIT ANALYST II

Nature of Work: Under limited supervision from the Credit Management Supervisor, oversees the management of receivables including the administration of delinquent and default employer accounts. Responsible for complex cases and accounts representing large sums of money. 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.

Distinguishing Characteristics: The Credit Analyst II distinguished from the Credit Analyst I by the complex analysis and acumen necessary to manage accounts representinglarge sums of money owed the Division. Positions allocated to this class will manage, with minimal supervision, a significant number of employer accounts determined to have medium to high credit risk. This position will be responsible for administering the standards, methods, laws, and forms utilized by the Receivables Management Department.

Examples of Work

Meets or exceeds the performance measures established for the department.

Analyzes financial information from the employer such as tax documentation and financial statements, in order to determine the collection strategy applicable to an individual account.

Decides credit management tactics based on sound judgment and compliance with applicable rules and procedures.

Communicates directly with representatives from Customer Accounting, Field Audit, Underwriting and Legal Services to ensure that all account activities related to the employer are completed timely and that employer information is communicated in the proper manner.

Plans and directs meetings with employers to resolve delinquent and default accounts.

Negotiates repayment options with employers.

Demonstrates the ability to successfully collect delinquent and default accounts.

Provides testimony in civil and criminal court proceedings.

Participates in training classes.

Supports senior staff and management in completing the work of the unit.

Assists with special projects.

Assists in training personnel at the Credit Analyst I level.

Assists in the leadership and motivation of department staff to achieve Receivables Management goals and objectives.

Knowledge, Skills and Abilities

Knowledge of workers' compensation laws, rules and regulations, policies and procedures.

Ability to interpret and properly apply written procedures, instructions, policies, laws, rules and regulations.

Ability to evaluate employer financial information and render appropriate decisions based on the results of the financial analysis.

Ability to exercise sound judgment in appraising situations and rendering decisions.

Ability to establish and maintain effective working relationships with staff, employers, elected officials and the public in general.

Ability to communicate effectively both orally and in writing.

Ability to maintain a professional disposition when dealing with difficult situations.

Ability to speak in public.

Ability to operate a personal computer and use spreadsheet and word processing software in daily work.

Minimum Qualifications

Training: Bachelor's degree from an accredited four-year college or university. Preference may be given to applicants with a degree in accounting, finance or a related field.

Substitution: Additional qualifying experience as described below may be substituted on a year-for-year basis for the required college education.

Experience: Four years of full-time or equivalent part-time paid experience in collections, financial analysis and/or accounting.

Grievants contend that the two jobs at issue, Revenue Agent II and Credit Analyst II are virtually identical, noting that the purpose of both jobs is identical: collecting receivables owed by businesses to the State. The only difference is that Credit Analysts collect premiums owed to the Workers' Compensation Fund and Revenue Agents collect taxes owed to the State.

Grievants offered extensive testimony demonstrating that they perform the full gamut of activities in managing the 250 to 700 accounts for which they are responsible. Many of these accounts are placed on an informal payment plan created and enforced by the Revenue Agents with little or no supervision. These plans are derived by the Agents after a careful analysis and review of the taxpayer's financial statements, balance sheets and similar documents. If necessary, Revenue Agents attach, seize and sell the taxpayer's real and personal property in order to pay off obligations that are due. Often the Revenue Agents' work is done at the taxpayer's place of business. It is uncontroverted that this activitiy can be dangerous. Revenue Agents also work at special projects such as fairs or events at a civic center. To effectuate their responsibilities, Revenue Agents keep in contact with judges, lawyers, investigators, law-enforcement officers, and other government officials. Revenue Agents must have computer skills. In short, every activity that ismentioned in the Credit Analyst II job specification is performed by Revenue Agent II emloyees.

There was no direct testimony regarding the actual work performed by Credit Analysts. Mr. Lowell Basford, Assistant Director, Compensation and Classification Section, opined that the Credit Analyst position was more complex than the Revenue Agent position, yet he admitted that he has no personal knowledge of work performed by Credit Analysts. Mr. Basford and Mr. Staats implied that the Credit Analyst position was created in order to help Workers'Compensation do insurance underwriting, yet there was no evidence that employees in that position actually perform that work. Nor does the job specification for Credit Analysts anywhere imply that such work is part of their duties. As Mr. Staats testified, the job of the Credit Analyst is to collect receivables.

Comparing the work actually performed by the Revenue Agents with the job specifications of the

Credit Analyst shows that the two jobs are virtually identical. Both positions oversee the management of large delinquent employer accounts, analyze financial data, determine the correct tactics to manage the accounts, communicate with other individuals of the agency, meet with employers to resolve delinquent accounts, discuss repayment options with employers, demonstrate ability to successfully collect default accounts, provide testimony in civil and criminal court proceedings, support senior staff, assist with special projects and train other employees.

Another important issue in resolving this grievance is the level of supervision under which these tasks are performed. Grievants offered detailed testimony showing that they perform their work under very limited supervision. Mr. Bonnett testified that he rarelyconfers with a supervisory authority in performing his duties. Grievant Ferguson also testified that he has very limited supervision. Mr. Ferguson runs the Lewisburg satellite office, handling all of the office's accounts and is only visited by a supervisor once a month. It is important to note that many of the satellite offices are run by Revenue Agent IIs and any Revenue Agent II could work in any satellite office. This delegation of authority seems necessary considering the fact that the Compliance Division handles over 75,000 accounts in any given year with each Revenue Agent II handling anywhere from 250 to 700 accounts.

Testimony regarding the level of supervision of Revenue Agent II employees came not only from Grievants themselves, but also from former supervisor David Weis. Mr. Weis stated that his practice was to refrain from interfering with the ongoing work of the Revenue Agents who worked under him. Finally, Assistant Director of Compliance John Holcomb testified that he works in the supervisory capacity over the Revenue Agent II employees, but is personally involved with less than 100 of the accounts handled by the Division. Indeed, most of the supervision appears to be initiated by the Revenue Agent who might come to a higher authority with questions or for approval from Tax and Revenue to make an offer of settlement and compromise.

There was no testimony regarding the actual level of supervision of Credit Analyst II employees. However, the job specification states that Credit Analyst II employees work under “limited” supervision. Since it appears that Revenue Agent IIs also work under limited supervision, the level of supervision of the two positions appears to be the same.

Finally, there was substantial testimony regarding a meeting that took place between Tax and Revenue and the Workers' Compensation Division, during which there was ageneral discussion regarding collection activities by Tax and Revenue. Workers' Compensation wanted to improve its

collection of delinquent accounts. Mr. Bonnett testified he attended this meeting, and at the end of the meeting, Workers' Compensation made known its desire to establish a position that corresponded with the Revenue Agent position.

Assistant Director of Compliance Holcomb also testified about this meeting. He testified that senior management of Workers' Compensation wanted to review how Tax and Revenue seized and sold property. The personnel that performed these tasks were also discussed as these procedures were explained. Mr. Holcomb also had numerous telephone conversations with Workers' Compensation concerning collection activities during this time period.

Also testifying were two former employees of Tax and Revenue, William Bright and Douglas Kilmer. Both of these individuals testified regarding a facsimile sent by the Department to the Division of Workers' Compensation. G. Ex. 6. This facsimile consisted of a two page job specification for the Revenue Agent position. Mr. Bright testified that he sent this document in response to questions raised by the Workers' Compensation Division regarding personnel. Mr. Kilmer testified that he recognized his handwritten notes on the document, and may have adapted this document from similar documents and communicated with individuals over at Workers' Compensation regarding the jobs performed by the Revenue Agents. Mr. Kilmer also testified that he had several meetings with Workers' Compensation regarding the operations of the Compliance Division over a twenty-year period. He testified that he particularly remembers a “big” meeting held “probably” in 1995. G. Ex. 7. One of the things that particularly stands out in his mindabout this meeting is that it was the first time Workers' Compensation wanted to discuss personnel matters. At that time, Workers' Compensation did not appear to have the personnel position which would have performed the collection activities performed by the Revenue Agents.

Finally, the deposition of Lydia McKee was entered into evidence. Ms. McKee testified about her concerns regarding keeping and recruiting Revenue Agents while she was the Assistant Tax Commissioner. McKee Dep., at pp. 7, 11. This was a serious problem, she testified, and was caused by the low pay being received by Revenue Agents. McKee Dep., at 11, 13. Ms. McKee transmitted her concerns to Mr. Basford by letter and also had meetings with DOP regarding the proper classification and pay rates for Revenue Agents (and other positions) shortly before she left the Department in August of 1998. McKee Dep., at 10-12, 15-16.

Respondents called two witnesses. DOP called Lowell D. Basford, supervisor of the Classification

and Compensation Section of DOP. This Section has the responsibility of developing and maintaining the job classification and compensation plan for classified and classified-exempt services. This includes approximately 22,000 positions in about 40 agencies. Mr. Basford is considered an expert in the area of Classification and Compensation. In his testimony, Mr. Basford presented numerous distinguishing characteristics between the Credit Analyst II position and the Revenue Agent II job specification: they work in two different agencies; the Credit Analyst II works under limited supervision, the Revenue Agent II is subject to general supervision; the Credit Analyst II involves a higher level of complexity in the analysis of financial statements and other datain comparison to the Revenue Agent II; and the Credit Analyst IIs' work environment involves familiarity and consultation with underwriters and other units because Workers' Compensation functions like an insurance agency. DOP Response to Tax's Questions (submitted before hearing in lieu of lower level transcript). Mr. Basford further noted that the minimum qualifications for Credit Analyst II require a 4-year bachelor's degree and 4 years of full-time or equivalent part-time paid experience in collections, financial analysis and/or accounting. In contrast, the minimum qualifications for Revenue Agent II do not require a 4-year bachelor's degree.

According to Mr. Basford, the job description for a Credit Analyst includes the word “analyst” because this job requires complex analysis of financial documents by Credit Analyst IIs. In contrast, Revenue Agent IIs include the word “agent” because their jobs are akin to law enforcement. Specifically, Mr. Basford indicated that “the Credit Analyst, because of the very involved process that they must go through in analyzing the financial data that they need to do their work, that this is significantly different from what the Revenue Agents do based on the specifications and based on the description forms that we had.” LIV Basford Test.

Generally, Mr. Basford found that the duties of the Credit Analyst IIs are more difficult and more complex than the duties of the Revenue Agent II. When the specifications for the respective agencies were drafted, DOP took into account “the whole picture” for both agencies. This meant that DOP developed a particular relationship between the jobs in the particular agencies. For example, jobs and pay grades were established based on the “flowof the work from the field to the central office and how the positions relate to each other, how they interact and all that sort of thing.” LIV Basford Test.

According to Mr. Basford, there were no significant recruitment or retention problems with the Revenue Agent IIs. There were 38 applicants readily available to take Revenue Agent II positions

and an additional 79 applicants who are very close to having full qualifications for the position. Thus, a total of 117 potential employees existed for Revenue Agents at the time of the level four hearing. LIV Basford Test.

FINDINGS OF FACT

1. Grievants are employees of Tax and Revenue and hold the classification position of Revenue Agent II. At the beginning of the grievance, Grievants were compensated at pay grade 10, but as of August 1, 1999, they are being compensated at pay grade 12.

2. The classification position of Credit Analyst II was established in October 1997 for the Bureau of Employment Programs.

3. The primary purpose of the Revenue Agent II and the Credit Analyst II classification is the same: to collect receivables owed to the State.

4. Credit Analyst IIs perform primarily analysis, while the duties of a Revenue Agent II are akin to law enforcement.

5. Credit Analyst IIs work under limited supervision while Revenue Agent IIs are subject to general supervision.

6. Credit Analyst IIs have higher minimum qualifications including a preference for applicants with a degree in finance, accounting or related fields. 7. The pay grade of the Revenue Agent II was based on the Survey, their job duties, and a comparison with other state employees. This pay grade was set in 1993. The pay grade has been adjusted to pay grade 12 in August of 1999 pursuant to a review of all classified positions by DOP and the employing agency.

8. DOP conferred extensively with Tax and Revenue, the appointing authority, and received the input, assistance, and approval of its job classification plan and pay grade plan from the Tax Department.

CONCLUSIONS OF LAW

1. Grievants have the burden of proof in this case to establish, by a preponderance of the evidence, that the assignment of Revenue Agent II to pay grade 10 (now 12) was clearly wrong, arbitrary, capricious, contrary to regulation, or otherwise illegal and improper. W. Va. Code § 29-6A-6; Bennett v. Dept. of Health and Human Resources, Docket No. 93-HHR-518 (June 23, 1995);

Johnston v. Dept. of Health and Human Resources, Docket No. 94-HHR-2006 (June 5, 1995). Grievants have failed to meet their burden.

2. W. Va. Code § 29-6-10 authorizes the State Personnel Board to promulgate rules for the implementation and administration of the classified State employees' job classification and pay plans for which plans the Personnel Board is responsible. Frome v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-140 (Nov. 29, 1994)

3. W. Va. Code § 29-6-10 vests the responsibility for preparing, maintaining, and revising classified State employees' job classification plans and pay plans in the State Personnel Board. 4. DOP assigned pay grades to class titles so that equity is achieved within a “family” of class titles, as well as within the agency as a whole.

5. 143 C.S.R. 1 § 4.01 requires DOP to confer with the “appointing authority” when adopting and implementing a job classification plan for classified State employees, and requires DOP to base its job classification plan upon “an investigation and analysis of the duties and responsibilities for each position.”

6. The Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2).

7. The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Moore v. Dept. of Health and Human Resources, Docket No. 94-HHR-126 (Aug. 26, 1994). The Personnel Board has properly exercised its discretion in this matter.

8. “[T]he rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation.” Farber v. Dept. of Health and Human Resources, Docket No. 95-HHR-052 (July 10, 1995). See State ex rel Callaghan v. W. Va. Civil Service Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980).

9. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. Pt. 3, W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. StateHealth Planning, 174 W. Va. 558, 328 S.E.2d 164

(1985); Dillon v. Bd. of Educ. of County of Mingo, 171 W. Va. 631, 301 S.E.2d 588 (1983).

10. An employee who challenges the pay grade to which his or her position was assigned bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. Blankenship, supra; Bennett, supra; Johnston, supra; Thibault v. Div. of Rehabilitation Services, Docket No. 94-RS-0061 (May 31, 1995); Frome, supra; See O'Connell v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-251 (Oct. 13, 1995).

11. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996).

12. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of DOP. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

13. Unless a grievant presents sufficient evidence to demonstrate DOP's determination of pay grade is clearly wrong, or the result of an abuse of discretion, an administrative law judge must give deference to DOP and find that the pay grade assignment was correct. Farber, supra; O'Connell, supra. 14. In order for Grievants to prevail they must show that Tax and Revenue and DOP acted in an arbitrary and capricious manner in assigning the Revenue Agent IIs to pay grade 10 (now 12). To meet this burden, Grievants must show Tax and Revenue and DOP had no rational basis for placing Grievants in their current pay grade, or that Respondents acted in bad faith by placing the Revenue Agent IIs classification in pay grade 10 (now 12) despite overwhelming evidence indicating the classification should be otherwise placed.

15.

Grievants have failed to carry their burden in this matter.

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 (1998). 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 of the 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: August 30, 1999

Footnote: 1

Grievants are Victor G. Bonnett, Darrell Jennings, Pamela Blethen, Arvel Sargent, Don Bias, William Porter, Kristin Liller, David Kilmer, Walter Bowers, James Ferguson, Cynthia Miller, Marcia Anderson, Shawn Mikeal, Kimela Elmore, Susie Saunders, Mickey Martin, Philip Jones, Cathy Taylor, Donna Garrison, Kim Silvester, Janet Swindler, and Brenda Kuhn.

Footnote: 2

At the hearing on this matter, the Division of Personnel disclosed that it had upgraded the Revenue Agent II position to a pay grade 12.

Footnote: 3

The tape recorder malfunctioned at level three, and there is no level three transcript.

Footnote: 4

Grievants were represented by John F. Dascoli, Esq., The Segal Law Firm, Tax and Revenue was represented by Jeffrey G. Blaydes, Esq., Assistant Attorney General, and the Division of Personnel was represented by Stephanie C. Schulz, Esq., Assistant Attorney General.

Footnote: 5

The Performance Counsel was developed to oversee the revamping of Workers' Compensation. It is comprised of labor, business, and state government representatives.