LAVADA L. WILLIAMSON,

Grievant,

v. **Docket No. 98-T&R-275D2** (See footnote 1)

WEST VIRGINIA DEPARTMENT OF

TAX AND REVENUE,

and

WEST VIRGINIA DEPARTMENT OF

ADMINISTRATION, DIVISION OF PERSONNEL,

Respondents.

DECISION ON DEFAULT

On July 27,1998, Respondent West Virginia Department of Tax & Revenue (T&R) submitted the following matter to this Grievance Board at Level IV:

> Pursuant to the provisions of W. Va. Code § 29-6A-3(a)(1) (1998), the West Virginia Department of Tax and Revenue ("Employer") requests a hearing before a level four hearing examiner regarding the greivance (sic) of Lavada L. Williams ("Grievant") in order to establish: (1) that Grievant should not prevail by default since the failure of the level two grievance evaluator to respond within the required time was unavoidable due to the leave schedules of both the grievance evaluator and Grievant; and (2) that, even if Grievant is presumed to have prevailed on the merits of the grievance, her reclassification to Accountant/Auditor V is clearly wrong and contrary to law. Following a Level IV hearing on September 16, 1998, the undersigned issued an Order holding that Respondent T&R was in default at Level II of the grievance procedure for state employees as defined by W. Va. Code § 29-6A-3(a)(2). That Order is incorporated in this decision and attached as Appendix A. Because the challenged personnel action at issue, Grievant's reclassification as an Accountant/Auditor II, was actually taken by the West Virginia Division of Personnel (DOP), that agency was joined as an essential party, as provided by Rule 4.13 of the Procedural Rules of the West Virginia Education and State Employees Grievance Board, 156 C.S.R. 1 § 4.14 (1996).

On November 12, 1998, a supplemental Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia. (See footnote 2) In accordance with W. Va. Code § 29-6A-

3(a)(2), Respondents were provided an opportunity to demonstrate that the remedy sought by Grievant, reclassification as an Accountant/Auditor V, was either clearly wrong or contrary to law. The parties were permitted to supplement the record with additional documentation following the hearing, and this matter became mature for decision on November 20, 1998, following receipt of additional evidence and argument from Grievant and DOP.

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence presented at Level IV.

FINDINGS OF FACT

1. On July 1, 1998, Grievant initiated a grievance contesting her classification as an Accountant/Auditor II, contending she should have been classified instead as an Accountant/Auditor V, retroactive to December 1, 1997.

2. Respondent Tax & Revenue issued a response at Level II on July 20, 1998, which this Grievance Board determined was untimely, placing T&R in default in accordance with W. Va. Code § 29-6A-3(a)(2). See Appendix A.

3. The classification specification for Accountant/Auditor V, promulgated by DOP, and effective December 1, 1997, states the following:

ACCOUNTANT/AUDITOR V

Nature of Work

Under limited supervision, performs expert accounting/auditing duties in one or more of the following areas: general accounting, internal auditing, external auditing, budget/administration, and financial analysis. The incumbent may be responsible for preparing complex reports such as appropriation requests and work programs, conducting special investigative audits, supervising staff in the maintenance of accounting and financial records such as budgeting and payroll, developing agency policies and procedures, and analyzing complex financial statistics and other accounting data. Extensive travel may be required. Performs related work as required.

Distinguishing Characteristics

Positions in this class are reserved for employees recognized as an expert in the accounting/auditing field as evidenced by certification from one or more accounting/auditing societies listed below, appointment to national certification committees, and peer review committees.

Examples of Work

Develops policies and procedures; designs and updates the accounting/auditing systems.

Analyzes financial statistics and other accounting data.

Participates in budgeting decision with agency executives and program directors. Conducts more sensitive audits; examines data that requires complete confidentiality.

Prepares or reviews a variety of professional accounting and other reports such as they relate to policies, procedures, investments, financial positions and operational results.

Writes audit and/or comprehensive review programs, tests accounting records and related reconciliations, develops sampling and other techniques of evaluation, prepares reports of auditors' findings, recommendations, and conclusions; explains findings and recommendations to grantee organizations and agency officials.

Reviews prior audit reports and financial statements of agency/entity.

Analyzes complex administrative and technical problems and formulates suggested improvements or solutions; evaluates and approves selection of information to be included in reports of examination.

Prepares complex reports such as appropriation requests and work programs; analyzes variances.

Conducts and supervises research into the accounting needs of the agency/entity.

Confers with state officials and federal representatives on major problems which affect or are affected by the accounting system.

Evaluates efficiency and effectiveness of various programs; analyzes financial records for completeness and accuracy to determine compliance with state and federal laws as well as with national accounting and auditing standards.

Consults with accounting agency on accounting procedures and problem resolution.

Maintains knowledge of current trends and developments in the field.

May supervise and review work completed by Accounting Technicians and other office support.

May lead and train lower-level accountants/auditors to prepare financial documents such as journals, vouchers, warrants, expenses, revenues, reconciliations, disbursements, summaries, financial schedules, and transactions and in implementation of departmental procedures.

May lead employees in the maintenance of proprietary ledgers, budgetary control ledgers, reports of allotment balances, preparing financial reports, trial balances, profit and loss statements, inventories, accounts receivable controls and appropriations.

May testify in court hearings.

Knowledge, Skill and Abilities

Knowledge of generally accepted professional accounting and auditing principles and practices.

Knowledge of the principals, practices, methods and techniques of governmental accounting and auditing.

Knowledge of database principles and/or computerized accounting applications.

Skill in the use of a calculator.

Skill in the use of a personal computer especially in the area of accounting spreadsheet applications.

Ability to prepare accurate accounting entries and adjustments and perform mathematical computations accurately and quickly.

Ability to develop and prepare audit schedules and working papers.

Ability to analyze and interpret accounting records

Ability to communicate effectively, both verbally and in writing.

Ability to use sound technical judgment in determining the accuracy and completeness of financial information obtained.

Ability to establish and maintain effective working relationships with others.

Minimum Training and Experience Requirements

> **TRAINING**: Bachelor's degree from an accredited college or university with at least 24 semester hours in accounting, and certification from a nationally recognized accounting or auditing certification society.
>
> **EXPERIENCE**: Six years of full-time or equivalent part-time paid professional accounting or auditing experience.
>
> **SUBSTITUTIONS**: (1) Master's degree in accounting may substitute for two years of the required experience.
>
> (2) Certification or registration as a public accountant in West Virginia may be substituted for the training and two years of the required experience.

J Ex 4 (emphasis added).

4. In support of her reclassification request, Grievant submitted correspondence from the Government Finance Officers Association of West Virginia, which stated the following:

> This letter is written to acknowledge that Mrs. Lavada Williamson has attended the following courses conducted by the GFOAWV from a period of 1990 through 1998:
>
> **Courses**
>
> Introductory Governmental Accounting May 31 and September 6, 1990
>
> Intermediate Governmental Accounting September 26, 1991
>
> Cash Management May 7-8, 1992
>
> **GFOAWV Meetings**
>
> B & O Rules & Regulations October 2, 1992
>
> Municipal Fees
>
> Special Excess Levy Elections September 1996
>
> Financial Reporting
>
> Audit Standards
>
> Budget, Updated Chart of Accounts April 23-24, 1998
>
> Budget Revisions

Audit Standards/Assignment

Legislative Changes

> This is to certify that she has participated in the above listed events and also been very helpful in filling speaking engagements during the semiannual conference meetings of the GFOAWV.

> Lisa, (See footnote 3) as President of the GFOAWV, I would like to thank you very much for letting Lavada participate in all the activities of our organization over the past years, as she is a well-qualified individual and has been of much help and assistance to all finance persons of municipalities.

R Ex 1.

5. The Government Finance Officers Association of West Virginia is a state organization affiliated with the Government Financial Officers Association of the United States and Canada.

6. Working in a position that involves finance and budgeting at any level of government is the only eligibility requirement for membership in the Government Finance Officers Association of West Virginia. 7. Grievant holds a bachelor's degree from an accredited college with at least 24 semester hours in accounting.

8. Grievant has more than six years of full-time professional accounting and auditing experience.

9. Grievant is not presently certified or registered as a public accountant in West Virginia.

10. Since this grievance was filed, T&R, with DOP's approval, reallocated Grievant's position to the Accountant/Auditor IV classification.

DISCUSSION

Effective July 1, 1998, the West Virginia Legislature amended the grievance procedure for state employees to add a default provision. (See footnote 4) This default provision is contained in W. Va. Code § 29-6A-3(a)(2), which provides, in pertinent part:

> The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination

> regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

Respondents contend that awarding the requested remedy of reclassifying Grievant as an Accountant/Auditor V by default would be clearly wrong because Grievant does notmeet the minimum training requirements for that classification. In a default matter, Respondents have the burden of establishing their defense by a preponderance of the evidence. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Obviously, reclassification to the correct job title and pay grade is a remedy which logically "flows from" this grievance. See Gruen v. W. Va. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994). However, the issue presented in this grievance is whether it would be clearly wrong to place an employee into a classification or position for which she does not meet all minimum training requirements.

In previous decisions that did not involve the default provision, this Grievance Board has declined to instate employees to positions they were seeking through the grievance procedure when it was determined that they did not hold the minimum qualifications required for the position. For example, in Weaver v. Mason County Board of Education, Docket No. 94-26-128 (Oct. 25, 1994), it was held that the employer properly denied a General Maintenance/Electronic Technician position to an applicant who had twice failed to pass the competency test required for that position under W. Va. Code § 18A-4-8e. In Quintrell v. Lincoln County Board of Education, Docket No. 95-22-051 (Aug. 31, 1995), an employee who had been wrongly denied a full day of inservice training to prepare for the competency test was allowed an additional opportunity to prepare for and take the test for school aide, but would only be instated to an aide's position if she passed the required test. Similarly, in Hill v. Marshall County Board of Education, Docket No. 97-25-102 (Dec. 31, 1997), the employer was not required to reclassify an employee to Plumber II, where the employee did not have the requisite experience as a Plumber I to hold the higherclassification. Further, in Cyphers v. Marion County Board of Education, Docket No. 94-24- 134 (Oct. 31, 1994), the employer was precluded from hiring an applicant who had not obtained the license required for the position before the posting closed.

Implicit in this Grievance Board's prior decisions is the concept that an employer should not be

expected to conduct the public's business through employees who are not minimally qualified to perform the essential duties of their jobs. For example, an unsuccessful applicant for a school bus operator's position who prevailed by default should not be assigned duties transporting school children if they do not have the license or certification required to operate a school bus. Therefore, in accordance with W. Va. Code § 29-6A-3(a)(2), it is clearly wrong to award a position to an employee by default where he or she does not meet the minimum qualifications specifically required to perform the duties of the job. Accordingly, an agency may establish that the remedy of placing a grievant into a position or classification as the result of a default that transpires under the state employee grievance procedure is clearly wrong by demonstrating, by a preponderance of the evidence, that the grievant does not hold the training, license, or certification minimally required for the position or classification at issue. (See footnote 5) Whether a prevailing grievant holds the minimum qualifications for a given job must be determined on a case-by-case, fact-specific basis.

Respondents concede Grievant generally performs the work described in the classification specification for Accountant/Auditor V, but submit she does not hold thespecific certification required to demonstrate the level of expertise expected from employees in this classification. The Accountant/Auditor V classification requires “certification from a nationally recognized accounting or auditing certification society.” Lowell Basford, DOP's Assistant Director for Classification and Compensation, explained that he supervised the job classification study for Accountant/Auditor positions, and participated, with the assistance of a subject matter expert committee, in drafting the classification specification for Accountant/Auditor V at issue in this grievance. According to Mr. Basford, the certification requirement in the minimum training section implements the language in the “distinguishing characteristics” for Accountant/Auditor V which calls for “employees recognized as an expert . . . as evidenced by certification from one or more accounting/auditing societies.” J Ex 4.

The classification specification does not clearly describe how an organization becomes accepted as a “nationally recognized accounting or auditing certification society.” Presuming, for the sake of argument, that the Government Finance Officers Association of West Virginia, through its affiliation with the Government Financial Officers Association, meets that requirement, the credential which Grievant provided from that organization does not constitute the required “certification” because it does not, on its face, certify or attest to Grievant's recognized expertise in the accounting or auditing fields. See Watts v. W. Va. Dept. of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877

(1995). The document merely attests to Grievant's membership in the organization and participation in the organization's activities. Certainly, this correspondence would not constitute a nationally recognized certification, even though that organization may consider Grievant an expert in the field of governmental accounting and auditing. Accordingly, although Respondent defaulted at Level II of the grievance procedure, awarding Grievant the remedy of reclassification to Accountant/Auditor V would be clearly wrong in accordance with W. Va. Code § 29-6A-3(a)(2), because she does not hold the certification minimally required to attain that classification.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

CONCLUSIONS OF LAW

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2).

2. When the employer asserts that the remedy received is contrary to law or clearly wrong, the employer must establish such a defense by a preponderance of the evidence. See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

3. Where a grievant seeks instatement to a particular position or classification as a remedy based upon the employer's default at Levels I through III of the grievance procedure for state employees, and the employer establishes by a preponderance of the evidence that the grievant does not hold the minimum training requirement to perform the essential duties of the position, awarding such a position to an unqualified individual would be “clearly wrong” within the meaning of W. Va. Code § 29-6A-3(a)(2). 4. Whether a prevailing grievant holds the minimum qualifications for the position or classification at issue must be determined on a case-by-case, fact-specific basis.

5. Respondents established that awarding the remedy of reclassification to Accountant/Auditor V to Grievant would be clearly wrong because she does not meet the minimum training requirement mandated by the Division of Personnel's classification specification for assignment to that classification of employment.

Accordingly, Respondent's request for a determination under W. Va. Code § 29-6A- 3(a)(2), that the remedy sought, reclassification to Accountant/Auditor V, is clearly wrong, is **GRANTED**. Because it has been presumed, in accordance with W. Va. Code § 29-6A- 3(a)(2), that Grievant prevailed on the merits of her grievance, but she is not entitled to the remedy sought as a matter of law, this grievance is hereby **DENIED**.

Any party, or the West Virginia Division of Personnel, 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. Any appealing party must advise this office of theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 6, 1999

Footnote: 1

A "2" has been added to the docket number to distinguish this decision from the "Order Granting Default" previously issued in this matter.

Footnote: 2

Grievant appeared pro se. Respondent T&R was represented by Assistant Attorney General Steve Stockton. Respondent DOP was represented by Lowell Basford, Assistant Director for Compensation and Classification.

Footnote: 3

The letter was addressed to Lisa Thornburg, Grievant's immediate supervisor in T&R.

Footnote: 4

This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins- Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).

Footnote: 5

If the original grievance challenged the training, experience or licensure requirements under a theory that such

requirements were not job-related, a different analysis would be required. See generally Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).