PAMELA BLETHEN, et al.,

Grievants,

v. Docket No. 03-T&R-416R2

DEPARTMENT OF REVENUE/

STATE TAX DEPARTMENT

and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

In May 2003, twenty-six current and three former employees of the Department of Revenue/State Tax Department ("Tax"), assigned as Revenue Agent 2s ("RA2") filed individual grievances asserting that they perform the same essential tasks as Credit Analyst 2s ("CA2"), and are entitled to placement in the same pay grade under the principle of equal pay for equal work. Grievants seek elevation to paygrade 14, retaining their current pay step, back pay with interest from October 16, 1997, attorney fees and costs, as relief. (See footnote 1) After a request to amend the grievance was denied, a second grievance was filed in which Grievants argue that a four pay grade difference between the RA2 classification and the Tax Unit Supervisor 1 ("TUS1") classification, is arbitrary and capricious. (See footnote 2) The relief requested is the same as the first grievance, elevation to paygrade 14, back pay and interest. After beingdenied at the lower-levels, the grievances were appealed to level four and consolidated.

On September 15, 2004, Administrative Law Judge M. Paul Marteney ruled on motions filed by Respondents, dismissing three Grievants who were not employed by Tax at the time the grievance was filed, and denying the claims of the remaining Grievants, finding they were untimely filed and/or barred from consideration on the basis of *res judicata*. (See footnote 3) On appeal to the Kanawha County Circuit Court,

Judge Louis H. Bloom affirmed the decision in part, but remanded it with direction to review the issue of whether the claims were timely filed under the continuing practice exception. (See footnote 4)

On September 6, 2005, ALJ Marteney issued a second decision, finding that Grievants had not established their claims were based on continuing grievablepractices. (See footnote 5) On appeal, the Kanawha County Circuit Court reversed the level four decision and remanded it to the Grievance Board for further consideration of the merits.

Counsel for all three parties, John Dascoli of The Segal Law Firm (Grievants), and Assistant Attorneys General A. M. Pollack (Tax) and Karen O'Sullivan Thornton (Division of Personnel ("DOP")), agreed to submit the matter for decision based on the lower-level record. Proposed findings of fact and conclusions of law were submitted by the parties on April 21, 2006, and the grievance was subsequently reassigned to the undersigned for decision.

Issues and Arguments

Two issues remain in this case. The first is whether Grievants perform the same duties as those former Workers Compensation Commission employees who were classified as Credit Analysts 2, and were compensated at pay grade 14. If so, Grievants would be entitled to placement in the higher pay grade. Grievants argue that they perform the same work as those in the CA2 classification, and are entitled to equal pay for equal work. Respondents assert that Grievants' duties and responsibilities are not those required of a CA2, and they are properly compensated at paygrade 12.

The second issue is whether a four pay grade difference between the RA2 and the TUS1 classifications is arbitrary and capricious, and therefore unlawful. Grievants argue that DOP initially advised them that a two pay grade difference was appropriate. DOPasserts that the change in the TUS1 pay grade was the result of a court order, and that there is no official rule or regulation governing the number of pay grades between any one classification and the immediate supervisory level.

After a detailed review of the entire record, the undersigned finds the following findings of fact to be supported by a preponderance of the credible evidence.

Findings of Fact

1. Grievants have been employed by the State Tax Department as Revenue Agent 2s at all times pertinent to this grievance.

2. The positions of Revenue Agent I and 2 were created as part of a new classification system implemented by DOP in 1993. Revenue Agent 2 was initially assigned to pay grade 10, but was upgraded to pay grade 12, effective August 1999.

3 The classification specification for the position of RA2 follows:

REVENUE AGENT 2

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 2 is distinguished from the Revenue Agent 1 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.

4. In October 1997, DOP created the Credit Analyst 2 position, at pay grade 14, within the Bureau of Employment Programs as part of an overall re-engineering of the Workers' Compensation Division to function like a private insurance company. The Division was 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. The primary goals were to: (1) insure that the premiums assigned to particular employers were “reflective of the risks” that Workers' Compensation was insuring through the underwriters process; and (2) to insure that the credit risks of all employers were evaluated by the Division.

5. The classification specification for the position of CA2 follows:

CREDIT ANALYST 2

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 2 is distinguished from the Credit Analyst 1 by the complex analysis and acumen necessary to manage accounts representing large 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 1 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 Qualification

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.

6. By Order dated January 2, 2003, Judge Paul Zakaib of the Circuit Court of Kanawha County determined that TUS1s assigned to the Tax Department's Compliance Division were performing essentially the same functions as Credit Analyst 3s, and were entitled to placement in the same pay grade. *Stanley, et al. v. Dep't of Tax and Revenue,* Civil Action No. 01-AA-93 (Jan. 2, 2003). As a result, the TUS1s were elevated to pay grade 16.

7. No other classification pay grades were adjusted by DOP as a result of the *Stanley* decision.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving

their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W.Va. Code* § 29-6A-6. *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

In support of their claim to a higher pay grade, Grievants cite both *West Virginia Code* § 29-6-10, and Division of Personnel Administrative Rule, Section 3.15. *W. Va. Code* § 29-6-10 authorizes the DOP to establish and maintain a position classification plan for all positions in the classified service, guided by the principle of equal pay for equal work. *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989). This principle is reflected in DOP Administrative Rule, Section 3.15, which defines a class or class of positions as:

one or more positions sufficiently similar in duties, training, experience and responsibilities, as determined by specifications, that the same titles, the same qualifications, and the same schedule of compensation and benefits may be equitably applied to each position in the class.

Additionally, Section 5.4(a) of the Administrative Rule requires that each class of positions be assigned to an appropriate pay grade consistent with the duties outlined in the class specification.

Because 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, the claim to be assigned a higher pay scale is sometimes reviewed using theprinciple of “comparative worth” (a.k.a. “comparable worth”) and not one of equal pay for equal work. *See Moore v. Dep't of Health & Human Res.,* Docket No. 94-HHR-126 (Aug. 26, 1994). However, when determining whether two positions are so similar that providing a pay grade for one position that is different than the other, 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).

Further, DOP's interpretation and explanation of the classification specifications at issue should

be given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993). This standard of entitlement to substantial weight applies when a grievant attempts to review Personnel's interpretation of its own regulations and classification specifications to determine if Personnel's decision was arbitrary and capricious or an abuse of discretion. *See Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Farber v. W. Va. Dep't of Health and Human Res.*, Docket No. 95-HHR-052 (July 10, 1995). Thus, proving by a preponderance of the evidence that a position is assigned to an incorrect paygrade is a difficult undertaking.

Blethen claim

Grievants contend that the purpose of both the RA 2 and CA2 positions is the collecting of receivables owed by businesses to the State, and achieving that goal requires the same skills and duties, entitling them to the same pay grade. This exact issue was previously addressed in the matter of *Bonnett, et al. v. W. Va. Department of Tax &Revenue and Division of Personnel,* Docket No. 99-T&R-118 (Aug. 30, 1999). In *Bonnett,* the ALJ found many similarities in the positions. Both oversee the management of 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 court proceedings, support senior staff, assist with special projects and train other employees. Notwithstanding these similarities, Lowell D. Basford, Assistant Director of DOP for Classification and Compensation, testified that substantial differences between the positions also exist. Specifically, he found the CA2 duties involve a high level of complexity in the analysis of financial statements and other data, whereas the RA2 position is comparable to law enforcement. The grievance was denied.

Additional testimony offered by Grievants and CA2s in the present grievance confirms that the very general purpose of both classifications is to collect receivables owed to the State. Both positions require subject matter expertise; however, the duties of the RA2 are substantially structured with standard instructions or procedures, allowing the employee to make basic decisions using established options. By comparison the CA2 must apply various analytical skills within an integrated process which includes the functions such as underwriting, rate-setting and safety and loss control. Of greater significance is the fact that a CA2 is a lead worker, responsible for the daily activities of

other employees. An RA2 has no such responsibility. Finally, Mr. Basford testified that the salary of CA2 was determined in part by to facilitate the recruiting and retaining of qualified employees. Even if the duties and responsibilities of the RA2 classification was found tobe identical to the CA2, a pay differential to address circumstances including class-wide recruitment and/or retention is specifically permitted by Section 3 of the DOP Administrative Rule. (See footnote 6) Tax has not requested a pay differential for RA2s based on recruitment and/or retention problems. Therefore, Grievants have failed to prove they are entitled to placement in pay grade 14.

Ferguson claim

___This claim arises from the ruling by the Kanawha County Circuit Court in the matter of *Stanley, et al. v. Dep't of Tax and Revenue,* Civil Action No. 01-AA-93 (Jan. 2, 2003). Finding that s TUS1 performed essentially the same duties as a CA3, Tax and DOP were ordered to reallocate the TUS1 classification to pay grade 16, the same pay grade of CA3s. Grievants argue that the resulting four pay grade difference between themselves and their supervisors is arbitrary and capricious. DOP asserts that it simply implemented the Court's directive, and that there is no rule or regulation defining the number of pay grades between classifications.

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 scopeof 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).

The thrust of Grievants' argument in this case seems to be that the original determination by DOP that there would be a two pay grade difference between RA2 and TUS1 justifies the continuance of that salary structure. The change in the TUS1 pay grade was mandated by a court order which did not address the status of any other classifications. Mr. Basford testified that there is no rule or policy which dictates the number of pay grades between classifications, and provided numerous examples of varying pay grades between employees and their supervisors. Given the evidence presented,

Grievants have failed to establish that DOP acted in an arbitrary and capricious manner when it did not adjust the RA2 pay grade in relation to the TUS1 reallocation.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. An employee who challenges the pay grade or classification 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. Dep't of Health v. Blankenship, 189 W.Va. 342, 431 S.E.2d 681 (1995); *Bennett v. Dep't of Health and Human Res.*, Docket No. 93-HHR-518 (June 23, 1995); *Johnston v. Dep't of Health and Human Res.*, Docket No. 94-HHR-206 (June 15, 1995); *Thibault v. Div. of Rehab. Serv.,* Docket No. 94-RS-061 (May 31, 1995); *Frome v. Dep't of Health and Human Res.*, Docket No. 94-HHR-140 (Nov. 29, 1994).

3. 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).

4. The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. *Moore v. Dep't of Health and Human Res.*, Docket No. 94-HHR-126 (Aug. 26, 1994).

5. 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. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health 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).

6. Grievants have failed to prove by a preponderance of the evidence that the position of RA2 should be assigned to pay grade 14.

7. 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 andHuman 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).

8. 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).

9. Grievants failed to prove that DOP acted in an arbitrary and capricious manner when it failed to reallocate the position of RA2 to pay grade 14.

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.

DATE: **AUGUST 30, 2006**

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Attorney fees and costs may not be awarded by the Grievance Board.

Footnote: 2

This grievance is referred to in the record as the Ferguson claim, and includes most of the individuals who were

dismissed from the Blethen claim. They are Marcia Anderson, Don Bias, Pamela Blethen, Victor Bonnett, Thomas Bryant, David Crowder, Kimela Elmore, James Ferguson, Donna Garrison, Mark Gaughenbaugh, Darrell Jennings, Philip Jones, David Kilmer, Shawn Mikeal, Tammy Nutter, William Porter, Darlene Rupe, Seretha Saunders, Pearl Short, Kimberly Silvester, Janet Swinler, Cathy Taylor, Daniel Waters, Jamie Higdon, Paula Junkins, and Kristen Liller.

Footnote: 3

Blethen, et al. v. Dep't of Revenue/State Tax Dep't and Div. of Personnel, Docket No. 03-T&R 416, also referred to as the Blethen claim.

The preclusion doctrine of res judicata may be applied to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Vance v. Jefferson County Bd. of Educ., Docket No. 03-19-018 (May 27, 2003).

Footnote: 4

Judge Bloom's decision was upheld by the West Virginia Supreme Court of Appeals as to the issues of res judicata and lack of standing in Blethen, et al. v West Virginia Department of Revenue/State Tax Department and West Virginia Division of Personnel, Slip Opinion No. 32962 (June 29, 2006).

The remaining Grievants in the Blethen claim are Thomas Bryant, David Crowder, Mark Gaugenbaugh, Jamie Higdon, Paula Junkins, Tammy Nutter, Darlene Rupe, Pearl Short, and Daniel Waters.

Footnote: 5

Blethen, et al. v. Dep't of Revenue/State Tax Dep't and Div. of Personnel, Docket No. 03-T&R 416R (Sept. 6, 2005).

Footnote: 6

The possibility that the CA2 classification was incorrectly assigned to pay grade 14 exists but the issue was not raised, and will not be addressed.