WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JANICE BOWLING, et al.,

Grievants,

v.

Docket No. 05-TD-404

DEPARTMENT OF REVENUE/STATE TAX DEPARTMENT and DIVISION OF PERSONNEL,

Respondents.

DECISION

This grievance was filed by Janice Bowling, Jean Warner, Darlene McCarty, Patricia Sterner, Stacey Cook and Jeanie Klim against their employer, Respondent, Department of Revenue/State Tax Department ("Tax"). The Division of Personnel ("DOP") was joined as a party at Level III. Grievants believe their classification, Tax Service Representative, pay grade 12, should be in pay grade 16, a pay grade closer to the Tax Resolution Officer classification.

Grievants bypassed Level I and Level II conferences. The grievance was denied following hearing at Level III. Appeal to Level IV was made on October 31, 2005. Level IV hearings were conducted on January 4, 2007, and May 22, 2007, in the Grievance Board's Charleston Office. Grievants were represented by Janice Bowling at the Level III hearing, and by Mark Blevins, Esq., at the Level IV hearings. DOP was represented by Karen Thornton, Assistant Attorney General, and Tax was represented by A.M. "Fenway" Pollack, Assistant Attorney General. This matter became mature for

decision on June 25, 2007, after the receipt of the parties' proposed findings of fact and conclusions of law. Foradministrative reasons, the matter was reassigned to the undersigned on November 26, 2007.

Synopsis

Grievants' assert their pay grade should be increased from pay grade 12 to pay grade 16. Grievants do not claim that they are misclassified, they claim that their classification should be placed in a higher pay grade due to their duties being comparable to the Tax Resolution Officer classification. (See footnote 1)

Respondents maintain that the duties performed by the Grievants fell squarely within the Taxpayer Service Representative classification specification, and that classification is properly allocated to pay grade 12.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are employed by Tax as Taxpayer Service Representatives and are in pay grade 12. All Grievants are paid within their pay grade. Grievants do not assert they are misclassified, but they seek a higher pay grade.

2. A Position Description Form ("PDF") was authored by Grievants on January 12, 2005, and was submitted to DOP for consideration. DOP made a determination that the positions were properly classified as Taxpayer Service Representatives.

3. In the PDF, Grievants compare their duties to those performed in the TaxResolution Officer classification which is in pay grade 18. (See footnote 2)

4. The intent of the Tax Resolution Officer classification was to assist Tax in implementing alternative dispute resolution mechanisms to encourage taxpayers to resolve tax disputes through settlements rather than litigation. The 2004 Legislature approved legislative rules which authorized Tax to develop alternative methods to resolve tax disputes. Hence, the Tax Resolution Officer classification was developed to properly classify the new position and to assign the classification to an equitable pay grade to facilitate recruitment.

5. The purpose of the Classification and Compensation Plan is to attract and retain qualified

applicants in the classified and the classified exempt service. The purpose of the classification specification is to classify positions, to assign pay grades, to recruit and select applicants and to develop selection instruments. Classification specification validation is the process whereby class specifications are sent back to the applicable agency, and they are reviewed by subject matter experts within the agency. These subject matter experts examine the proposed specification as a draft document and verify with DOP that the duties, responsibilities and descriptors are proper for the positions assigned to that classification. See Level IV Testimony of Lowell D. Basford.

6. The pertinent sections of the classification specifications at issue are as follows:

TAXPAYER SERVICE REPRESENTATIVE

Nature of Work

Under general supervision, performs full-performance work providing services to taxpayers such as assisting in the preparation of tax return forms; answering inquiries concerning taxes; explaining tax laws, administrative rules, court rulings, and department policies to potential taxpayers. Responds to complex and technical inquiries and must be knowledgeable about all taxes administered by the agency. May be assigned to a regional tax office to provide the same taxpayer services. In the beginning, guidance and supervision are received from more experienced personnel and work is reviewed, then as knowledge of laws and regulations and taxes administered are acquired independent judgement is exercised. May train other personnel. Performs related work as required.

Examples of Work

Answers general complex correspondence which requires a broad tax knowledge and may require legal research.

Responds to all types of taxpayer inquiries; utilizes a computer terminal to enter, review or update information.

Interprets and explains agency policies, administrative policies, legislative changes, court rulings, and other matters pertaining to the taxpayer.

Assists taxpayers in completing tax returns for any of the taxes administered by the agency.

Occasionally appears before civic groups to explain tax procedures and other items of interest in the field of taxation.

Compiles statistics and makes reports pertaining to the job activities.

Answers telephone and walk-in inquiries pertaining to taxes, bad checks, liens, warrants, and other tax documents.

Participates in training sessions to learn new and/or changes in tax laws and policies.

Directs clerical personnel in the typing and preparation of correspondence.

TAX RESOLUTION OFFICER

Nature of Work

Under limited supervision, at the full-performance level, facilitates discussion between taxpayers or taxpayer representatives and the agency toward resolving disputed tax liabilities by agreement of all parties; resolves disputes regarding notices and assessments issued from the State Tax Department. Explores settlement alternatives that are designed to lessen the need for further litigation of disputed state tax liabilities. Provides recommendations to Tax Department administration concerning acceptance or rejection of settlements. Develops and implements procedures governing operations of the department's tax dispute conciliation program. Receives, reviews and investigates inquiries and complaints arising in matters pending before the State Tax Department. Coordinates problem resolution activities between the taxpayer and divisions in the department.Provides to taxpayers technical information pertaining to tax laws, rules and regulations. Assists taxpayers in meeting their tax obligations. Provides services to taxpayers such as answering tax inquiries, explaining tax laws, rules, court rulings, and departmental policies. Responds to complex and technical inquiries and must be knowledgeable about all taxes administered by the agency. Handles sensitive inquiries from taxpayers and their representatives and other government officials. Incumbent possesses considerable latitude to accomplish tasks with planning, organizing and directing alternative resolutions of tax disputes and exercises independent judgment when dealing with taxpayers who may be upset and confused about tax law. Prepares annual report of Resolution Office activities for the Tax Commissioner. Limited travel within the State will be required. Performs related work as required.

Examples of Work

Develops and implements plans for the accomplishment of conciliation of tax disputes.

Receives, reviews and responds to inquiries and complaints from taxpayers and/or their representatives on matters to which taxpayers have been unable to obtain satisfactory response.

Presents taxpayers with options available, or possible course of action, and explains consequences of action or failures to comply.

Interprets and explains agency policies, administrative policies, legislative changes, court rulings and other matters pertaining to the taxpayer.

Writes and/or edits complex letters, policies and procedures that may require research.

Responsible for bringing to the attention of the appropriate person(s) systemic and clerical errors and improper or unfair treatment.

Coordinates and reviews work of subordinates.

Keeps informed of changes in tax laws and policies that may affect the taxpayers.

Compiles statistics and generates reports pertaining to the activities of the office.

Completes tax returns for any of the taxes administered by the agency; computes tax, interest, penalty or additions to tax.

Provides instruction to taxpayers in completion of on-line tax forms.

Appears in public forums to explain tax policy and procedures.

Assists in assessing tax training needs of the division and conducts internal tax training seminars.

Utilizes a computer to access Tax Department and State databases.

7. “Nature of Work” and “Examples of Work” sections detail the differences in the two class specifications, especially in the areas of complexity, job duties, and providing taxpayers with options available, and explaining consequences of action or failures tocomply.

8. While Grievants assert they perform the duties in the Tax Resolution Officer classification specification, they cannot forgive a tax, cannot establish payment plans, do not interact with taxpayers after an adult is conducted, do not handle assessments after an audit has been conducted, do not negotiate settlements, do not have the authority to waive tax liabilities, and do not have the authority to resolve disputes as a result of audits performed by the Auditing Division of the Tax Department.

Discussion

As this grievance does not involve a disciplinary matter, Grievants bear 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). (See footnote 3) I. Background and standard of proof

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.

Additionally, the State 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). (See footnote 4) The State 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 State 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. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

Additionally, "DOP is primarily concerned with administering a classification andcompensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function." *Travis v. Dep't of Health and Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998). 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*, 328 S.E.2d 164 (W. Va. 1985). As stated by the West Virginia Supreme Court of Appeals, an employee who alleges impropriety regarding a reclassification action or 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. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Bennett v. Dep't of Health and Human Res.*, Docket No. 93-HHR-518 (June 23, 1995); *Johnston v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-206 (June 15, 1995); *Thibault v. W. Va. Div. of Rehab. Serv.*, Docket No. 94-RS-061 (May 31, 1995); *Frame v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-140 (Nov. 29, 1994).

This standard of entitlement to substantial weight applies when an employee grieves DOP's interpretation of its own regulations, classification specifications, and pay grades. *Farber v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, 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/Div. of Personnel*, Docket No. 92-DOP-447 (Aug. 12, 1993). The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, andcompensation schemes, or to substitute its judgment in place of DOP. *Moore, supra*. Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. If a grievant can demonstrate his or her classification or pay grade was made in an arbitrary and capricious manner or was an abuse of discretion, then he or she has met the required burden of proof. *See Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, No. 29066 (W. Va. 2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

"Generally, an action is considered arbitrary and capricious if 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)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as

arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*,547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

II. Equal pay for equal work

Grievants' assertion is that the actions of Tax and DOP violated W. Va. Code § 29- 6-10 (1) & (2). As previously stated, this Code Section gives the State Personnel Board the authority to implement both a classification and pay plan for all employees in the classified service.

The holding of the West Virginia Supreme Court of Appeals in *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994), is instructive in examining the issues raised by Grievants. *Largent* noted W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2, 3 & 4. The requirement is all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-435 (Feb. 28, 1995)*; Tennant v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-H-177 (May 29, 1992). *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989). Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, lengthof service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Id*. at 246. (Emphasis added).

It is clear there has been no violation of the equal pay for equal work principle of W. Va. Code § 29-6-10 with this set of facts. While Grievants assert they perform the duties in the Tax Resolution Officer classification specification, they do not. Grievants cannot forgive a tax, cannot establish payment plans, do not interact with taxpayers after an audit is conducted, do not handle assessments after an audit has been conducted, do not negotiate settlements, do not have the authority to waive tax liabilities, and do not have the authority to resolve disputes as a result of audits performed by the Auditing Division of the Tax Department. These are all job duties and responsibilities Grievants do

not have the authority to perform. Accordingly, Grievants have not proven a violation of the equal pay for equal work principle, as they are properly classified and paid within their pay grade.

III. Pay Grade

A grievant may prevail by demonstrating his or her pay grade was selected in an arbitrary and capricious manner. *See Kyle*, *supra*. Also, an employee who alleges impropriety and 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. *Trimboli*, *supra*. *See Blankenship*, *supra*. Unless a grievant presents sufficient evidence to demonstrate DOP's determination of pay grade is clearly wrong, inappropriate, or the result of an abuse of discretion, an administrative law judge must give deference to DOP and uphold the pay grade assignment. *Farber*, *supra*. Grievants did not meet this burden of proof. Mr. Basford indicated that the duties performed by the Grievants, based on the PDF and the testimony provided at the hearings, fell squarely in the Taxpayer Service Representative classification specification. Furthermore, Mr. Basford opined that classification was properly allocated to pay grade 12. No evidence was presented by Grievants as to why or how the establishment of their classification and the assignment of the pay grade 12 was improper. Each pay grade must relate to all the classification specifications within the same family and to all others within the pay plan. Grievants did not demonstrate a change in the complexity of their duties so as to warrant a change in their pay grade, and did not establish DOP's determination of their pay grade was clearly wrong, inappropriate, or the result of an abuse of discretion. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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). 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. *Frame v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, 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 State 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./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994).

5. “[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. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 95-HHR-052 (July 10, 1995). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

6. 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*, 431 S.E.2d 681 (W. Va. 1993); *Princeton Community Hosp. v. State Health Planning*, 328 S.E.2d 164 (W. Va. 1985); *Dillon v. Bd. of Ed. of County of Mingo*, 301 S.E.2d 588 (1983). 7. An employee, who alleges the actions of the DOP and Tax were in violation of statute, policy, rule, or regulation, bears the burden of proving this claim by a preponderance of the evidence. This is a difficult undertaking. *Blankenship, supra*; Thibault v. Div. Rehab. Serv./Div. of Personnel, Docket No. 94-RS-061 (May 31, 1995); *Frame, supra*; *See O'Connell v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 95-HHR-251 (Oct. 13, 1995).

8. "Generally, an action is considered arbitrary and capricious if 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)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads*, *supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

9. 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 judgemay not simply substitute her judgment for that of DOP. *See generally*, *Harrison v. Ginsberg*, 286 S.E.2d 276, 283 (W. Va. 1982).

10. W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent v. West Virginia Div. of Health and Div. of Personnel*, Syl. Pts. 2, 3 and 4, 192 W. Va 239, 452 S.E.2d 42 (1994). The requirement is all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-H-177 (May 29, 1992). *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

11. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or <u>other special identifiable criteria that are reasonable and that advance the interest of the employer</u>." *Largent* at 246. (Emphasis added).

12. No violation of the equal pay for equal work principles of W. Va. Code § 29-6- 10 occurs when "[a] preponderance of the credible evidence of record indicates that DOP properly acted within its discretion in [the] interpreting and applying of its Administrative Rule pertaining to pay differentials." Especially when "a reasonably defined group ofemployees" is used, as this follows § 5.04 authorized

special treatment in appropriate circumstances. *Travis v. Dep't of Health and Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998).

13. An Administrative Law Judge is "unable to substitute [his] judgment for that of the State Personnel Board and DOP where the decision at issue has a rational basis." *Id*. 14. When employees are paid in accordance with the pay scale for their classification, there is no violation of the equal pay for equal work doctrine when a pay increase is granted to employees who are in another classification. *Pishner v. Dep't of Health and Human Res.*, Docket No. 97-HHR-478 (May 21, 1998) *aff'd* Kanawha County Circuit Court, Civil Action Number 98-AA-93 (Dec. 10, 2001). *See Aultz v. W. Va. Dep't of Transp.*, Docket No. 90-DOH-522 (Feb. 28, 1991).

15. Grievants failed to present any evidence addressing why or how the establishment of their classification, Taxpayer Service Representative, and the assignment of the pay grade 12 was improper.

16. Grievants did not meet their burden of proof and failed to demonstrate a violation of the equal pay for equal work principle.

17. Grievants did not establish that the placement of their classification in Pay Grade 12 was arbitrary and capricious, an abuse of discretion, or without a rational basis.

18. Grievants have failed to prove a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work in relation to theircompensation. Grievants are properly classified, and they are properly compensated within the pay scale for their position.

19. Grievants have failed to prove Tax or DOP acted arbitrarily or capriciously, abused their discretion, or their actions did not have a rational basis. Respondents did not exceed their statutory authority in their development and implementation of the Tax classification specifications and pay grade plans at issue in this case. *Nelson v. Dep't of Health and Human Res./Office of Inspector General and Div. of Personnel*, Docket No. 05-HHR-315 (May 16, 2006).

20. The Taxpayer Service Representative is the classification that best fits the job duties and responsibilities of Grievants and that the classification is properly allocated to pay grade 12.

Accordingly, this grievance is **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. *See* W. Va. Code § 29-6A-

7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). Neither the Public 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: December 12, 2007

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

The Level III hearing was conducted as a misclassification grievance. At Level IV, Grievants clarified that the grievance was actually an issue of equal pay for equal work. Grievants did not seek to be reallocated, only to receive an increase in the pay grade assigned to their classification.

Footnote: 2

The position known as Tax Resolution Officer has not been filled by Tax. Nonetheless, such classification was developed by Personnel in 2004.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 4

Section 5.1 of DOP's Rules notes the purpose and intent of the classification plan is to "[t]o attract qualified employees and retain them in the classified service" and the State Personnel Board "shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses."