THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS C. GUERTIN,
Grievant,

v. **Docket No. 2009-1687-DOR**

WEST VIRGINIA TAX DEPARTMENT
AND DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant Thomas C. Guertin is employed by the Tax Department as a Tax and Revenue Auditor 2. On four separate occasions Grievant applied for a promotion to the position of Tax and Revenue Auditor 3. On the last two occasions, Grievant was informed by the Tax Department ("TaxD") and the Division of Personnel ("DOP") that he did not meet the minimum qualifications for the Tax and Revenue Auditor 3 classification. On June 22, 2009, Mr. Guertin filed a grievance contesting the TaxD decision regarding his application for promotion. As his Statement of Grievance, Mr. Guertin wrote the following:

> Rejecting of application for Tax & Revenue auditor 3 position based on work experience requirements. Requirements state tax related auditing or accounting. The accounting does not indicate tax related on the job posting.

Grievant requested the following relief:

> Consideration for promotion to Tax & Revenue Auditor 3. Copies of all waivers for new hires and promotions to Tax & Revenue Auditor 2 and 3.

The DOP was included as a Respondent to the grievance.

A level one hearing was conducted on July 27, 2009, and a decision denying the grievance at that level was entered on August 11, 2009. DOP did not participate in the

level one hearing. A level two mediation was held with all the parties on November 2, 2009, and an Order regarding the mediation was entered the next day.

Grievant appealed to level three and a hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on February 5, 2010. Grievant appeared at the hearing *pro se.* Respondent TaxD was represented by Wayne Williams, Assistant Attorney General and Respondent DOP was represented by Karen O'Sullivan Thornton, Senior Assistant Attorney General. At the close of the evidence, the parties made oral closing arguments and waived their rights to submit written Proposed Findings of Fact and Conclusions of Law. Consequently, the grievance became mature for decision at the close of the level three hearing on February 5, 2010.

Synopsis

Grievant's main argument is that the Respondents misinterpreted the experience requirements in the classification specifications for the Tax and Revenue Auditor 3 position. Respondents interpret the specification to require auditing experience be in the tax field. Grievant avers that auditing experience outside the area of tax should be considered.

Grievant was unable to demonstrate that the DOP's interpretation was clearly wrong or arbitrary and capricious. The grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Guertin is employed by the TaxD as a Tax and Revenue Auditor 2 ("T&R A 2"). Grievant was initially employed by the TaxD as a Tax and Revenue Auditor 1 ("T&R A 1") on December 1, 2005. He was promoted to a T&R A 2 on March 1, 2007.

2. Grievant applied for promotion to Tax and Revenue Auditor 3 ("T&R A 3") positions on three separate occasions. The T&R A 3 positions Grievant applied for were posted during the following time periods:

- November 2008;
- January 2009;
- March 23, 2009; and,
- June, 2009.

3 Different applicants were selected for the first two positions posted. Grievant did not receive any information about his qualification for the T&R A 3 classification following these postings.

4. The description for the T&R A 3 position that was posted on March 23, 2009, contained the following language as an experience requirement:

> EXPERIENCE: Three years of full-time or equivalent part-time paid experience as a Tax and Revenue Auditor II or five years of full-time or equivalent part-time paid experience in tax related auditing or accounting work.

Grievant Exhibit 1. This same language is listed as the minimum experience requirement of the Classification Specifications adopted by the DOP for the T&R A 3 classification. Respondent DOP Exhibit 2.

5. Grievant had numerous years of accounting and auditing experience while he was in the United States Marine Corps but none of that experience was tax related.

6. Grievant was the only applicant for the T&R A 3 position posted on March 23, 2009.

7. The TaxD requested a determination from the DOP as to whether Grievant met the minimum qualifications for the T&R A 3 classification. By memorandum dated May 27, 2009, Lynn M. Schilling, DOP Senior Personnel Specialist, informed TaxD[1] that Grievant lacked nineteen months of required experience to meet the minimum qualifications for that position. Ms. Schilling acknowledged that Grievant had general auditing experience in the military but noted the following:

> . . . while [Guertin's] experience in the military is related to auditing, the minimum requirements listed in job specification clearly indicate that the five years work experience must be *tax related* accounting or auditing. We had to use the five years requirement because [Guertin] has not held the position title of a Tax and Revenue Auditor 2 for three years . . .

Grievant Exhibit 2. This is the interpretation that the DOP has consistently applied to the experience requirement found in the T&R A 3 classification specifications.[2]

8. Grievant's supervisor, Andrew Glancy notified Grievant of the DOP eligibility decision by e-mail dated May 29, 2009. Mr. Glancy specifically wrote:

> Per DOP you do not qualify because your experience, while extensive, is not tax related. You were promoted to a tax and revenue II On March 1, 2007, therefore you will be eligible for promotion to tax and revenue auditor III on March 1, 2010.

Grievant Exhibit 3.

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[1] Ms. Schilling's memorandum was sent to Linda Coleman in the Tax Department Operations Division.

[2] Ms. Schilling noted in her memorandum that she asked her supervisor to review Grievant's work experience to verify whether Schilling's interpretation was consistent with DOP's typical interpretation of the T&R A 3 classification specification language. Schilling's supervisor agreed that it was.

9. Grievant applied for the position posted in June 2009, and filed this grievance on June 22, 2009.

10. By letter dated August 10, 2009, Tax and Revenue Manager Kevin L. Lanham, notified Grievant that he would not be considered for the T&R A 3 position Grievant had applied for because DOP had determined that he did not meet the minimum experience qualifications for the position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

Grievant had basically four concerns: 1) he was not told that he was not qualified for the T&R A 3 the first two times he applied. He was only informed that he did not meet the requirements when he was the only applicant for the position. 2) Since Grievant did not receive the same information on all occasions he applied for the position, Grievant was concerned that DOP's interpretation of the experience requirements might not be applied consistently. 3) Grievant felt that the modifying term "tax related" should only be applied to accounting experience and not auditing experience. 4) Grievant spent some time in the

military performing voluntary tax auditing and he was unsure if that experience should be considered since it was unpaid.

The last concern will be considered first. Grievant participated in a volunteer program wherein marines were helped with their tax returns. While working in this program, Grievant spent some time performing tasks which might be interpreted as auditing the tax forms completed by subordinates. Grievant believes that this work should be considered as “tax related” auditing to help him meet the minimum requirements for the T&R A 3 classification.[3]

Grievant did not make this experience known to his employer or the DOP at any previous time he applied for the T&R A 3 positions. Consequently, the experience could not be considered at the time the decisions Grievant contests were made. It has been consistently held that the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). Since this information was not available at the DOP when eligibility determination was made, it cannot be used for the first time in the grievance procedure to overturn the decision. Additionally, even if this experience was considered, it was insufficient to meet the minimum qualifications. The DOP determined that Grievant’s qualifying experience was short by nineteen months. Grievant testified that he performed the volunteer tax-related auditing for a total of

[3] Ms. Schilling did not concede that the volunteer tax work performed by Grievant constituted tax related auditing. However, she testified that if it were brought to the DOP’s attention in connection with a future classification determination the experience would be considered along with Grievant’s other experience.

approximately six months. Obviously, had this experience been counted it would not have effected DOP's determination.

With regard to Grievant's first concern, DOP does not generally make an eligibility determination unless requested to do so by the employing agency. In this situation, a different qualified applicant was selected for the first two T&R A 3 positions for which Grievant applied. Therefore, the issue of Grievant's eligibility did not arise. When Grievant was the only applicant for the third position it became necessary to determine whether he was eligible to hold the position since he was going to be selected. That is why no eligibility determination was made until the third time Grievant applied. While it is understandable that this might seem odd to the Grievant, the explanation is reasonable and consistent with the selection process.

The remaining two concerns are closely related and will be considered together. W. VA. CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as the TaxD, which utilize such positions, must adhere to that plan in making their employees' assignments. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994). The classification specifications for the T&R A 3 classification were adopted by the DOP pursuant to this statutory authority and contain the following experience requirement as one of its minimum qualifications:

> **EXPERIENCE:** Three years of full-time or equivalent part-time paid experience as a Tax and Revenue Auditor 2 or five years of full-time or equivalent part-time paid experience in tax related auditing or accounting work.

Grievant did not have three years of experience in the T&R A 2 classification so he did not clear the initial experience hurdle.[4] The alternative is to have five or more years of "tax-related" auditing or accounting work. Grievant spent more than twenty-five years in the United States Marine Corps and during that time amassed many years of experience in accounting and auditing. With the exception of the previously discussed volunteer tax preparation work, none of that experience was tax-related. Grievant notes that, in the sentence setting out the experience requirements, the term "tax related" immediately precedes the word "accounting" but not the word "auditing." He opines that, in a literal sense, the term "tax related" does not modify the word "auditing" and his non tax-related auditing experience should be used to meet the minimum experience requirements for the classification.

Senior Personnel Specialist, Lynn Schilling testified that the DOP has consistently interpreted the phrase "experience in tax related auditing or accounting work" to require any work in either accounting or auditing to be tax related to meet the minimum experience qualification. Ms. Schilling has been working in the DOP section that reviews qualifications in classifications since the DOP was established and testified that this interpretation has been consistently applied by the DOP. Additionally, she confirmed the interpretation with her supervisor. It is reasonable that the experience should be tax-related since an employee in the T&R A 3 classification would be handling complex tax related transactions.

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[4]As of March 1, 2010 Grievant had three years of experience as a T&R A 2 and at that point met the minimum experience qualification for the T&R A 3 classification.

The West Virginia Supreme Court of Appeals has consistently held that interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous. *CB&T Operations Co., Inc. v. Tax Comm'r,* 211 W.Va. 198, 202, 564 S.E.2d 408, 412 (2002) (quoting *Syl. Pt. 4, Security Nat'l Bank & Trust Co. v. First W.Va. Bancorp., Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981)). The same Court has applied this rule to classification determinations made by the DOP in Syl. Pt. 2 of *W. Va. Dep't of Health & Human Res. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993)*per curiam*. 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.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). DOP's interpretation of the minimum experience qualifications for the T&R A 3 classification have a reasonable basis and has been consistently applied. Grievant did not prove the DOP's determination was clearly wrong or arbitrary and capricious. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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. The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv*., Docket No. 93-RS-489 (July 29, 1994).

3. DOP's interpretation and application of the classification specifications at issue are given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) *per curiam*; *See also CB&T Operations Co., Inc. v. Tax Comm'r,* 211 W.Va. 198, 202, 564 S.E.2d 408, 412 (2002) (quoting *Syl. Pt. 4, Security Nat'l Bank & Trust Co. v. First W.Va. Bancorp., Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981))

4. 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.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

5. Grievant did not prove by a preponderance of the evidence that the DOP's qualification determination regarding the T&R A 3 classification was clearly wrong or arbitrary and capricious.

Accordingly, the Grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: July 27, 2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE