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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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MARY AKERS

v.

Docket No. 89-T-173

WEST VIRGINIA TAX DEPARTMENT¹

DECISION

Mary Akers, until her retirement, was employed by Respondent West Virginia Tax Department. On June 12, 1989, she initiated the following grievance at Level IV:²

¹ As of February 1, 1989, the West Virginia Tax Department became part of the new West Virginia Department of Tax and Revenue. The former name will be utilized in this Decision.

² Ms. Akers is one of six individuals granted leave to file their classification-related claims directly at Level IV by the Supreme Court of Appeals of West Virginia. AFSCME v. CSC, 380 S.E.2d 43 (W.Va. 1989).

This case must be considered somewhat a companion to two others heard concurrently herewith by the undersigned, namely, Boggs v. W.Va. Tax Dept., Docket No. 89-T-174 (Sept. 22, 1989), and Payne v. W.Va. Tax Dept., Docket No. 89-T-175 (decision pending). Boggs in particular is quite similar in many respects to the instant matter, and with the parties' consent, administrative notice has been taken of facts developed in one yet applicable to both.

I am requesting back pay from 12/16/78 to 12/1/85 with interest for working out of classification. I was classified as a Clerk III, Audit Clerk I, and Audit Clerk II and performed the duties of Audit Clerk III, and I wish to be made whole in every way.

Hearing³ was conducted August 3, 1989. The parties agreed to submit their proposed findings of fact and conclusions of law no later than August 31; that date having passed, this case is deemed mature for disposition.⁴

At the hearing, Grievant affirmed that her only contention in this case is that she should have been classified as an Audit Clerk III for the entire period December 16, 1978, through December 1, 1985.⁵ Grievant's Exhibit 1 includes an official West Virginia Civil Service System⁶ (CSS)

³ Grievant was represented by American Federation of State, County and Municipal Employees' Pamela L. Ray and Lisa Harlow, and Respondent was represented by Deputy Attorney General John E. Shank.

⁴ Neither Grievant nor Respondent presented fact-law proposals by August 31 or timely requested an extension in which to do so. However, Grievant filed such material, a case statement and closing argument on September 13. Normally, this late submission would not be considered at all; in this instance, the undersigned has reviewed it and determined it not to affect the outcome.

⁵ Grievant did not contend, for instance, that she should have been classed as an Audit Clerk II during the time she was an Audit Clerk I. Any claim in this or similar regards is deemed abandoned.

⁶ As of February 1989, the West Virginia Civil Service System was reorganized and became the West Virginia Division of Personnel.

classification description for this title, which provides, in pertinent part:

Nature of Work: This is responsible work in examining books and records of government units or private businesses subject to state regulations. Employees of this class are responsible for auditing subsidiary books and records maintained by individuals and private industry in enforcing special tax and regulatory laws. Work is subject to analysis and review while in progress and upon completion by a supervising auditor, and employees are given general instruction as to methods, procedures, and objectives.

The Audit Clerk I's work is described in Gr. Ex. 1 as,

Under close supervision, an employee in this class receives and audits accounts and/or reports for completeness and accuracy. Assignments are reviewed by an administrative superior upon completion for conformity with departmental rules and policies.

And finally,⁷ the Audit Clerk II,

Under general supervision, . . . performs advanced level sub-professional auditing work in checking reports for completeness and accuracy. Evaluates the compliance of data with prescribed laws, rules, or regulations. Employee may also supervise lower level audit clerks and other clerical personnel.

These CSS "Nature of Work" descriptions, and the testimony at Level IV, reveal a basic difference between Audit Clerk III and the two lower Audit Clerk designations.

⁷ No information was provided concerning Grievant's earlier "Clerk III" position.

While the latter are, in essence, tax return review positions⁸, the former involves review of other, more detailed records generally maintained on the premises of the subject "government unit or private business." The evidence was essentially undisputed that persons employed by Respondent under the classification of Field Agent performed these duties, and that no one else employed by Respondent, at least in the Business Tax Division in which Grievant served, matched the Audit Clerk III "Nature of Work" specifications.⁹

Grievant presented detailed information on the tasks to which she had been assigned over the years from 1978 until 1985 and beyond.¹⁰ She also offered information on the mid-1980's Tax Department classification study which resulted in the establishment of the Tax Audit Clerk series, to which she was promoted effective December 1, 1985. One document related to that study was a January 28, 1985,

⁸ Other reports, perhaps generally in-house, might also have been reviewed by Audit Clerks I and II. Grievant, at least during a portion of the period in question, performed other related duties including correspondence control.

⁹ A Ms. Laverna Cadle, who was in Respondent's employ, won a CSS classification grievance in 1984 and was promoted to Audit Clerk III. However, the particulars of that situation were not appreciably explained herein; for further discussion, see n. 12, infra.

¹⁰ Grievant could not recall some particulars of her work history with Respondent. While this is unfortunate, it is certainly understandable since an extended period of time was under scrutiny.

memorandum from June Sydenstricker, Respondent's Personnel Officer, Gr. Ex. 14. The memo advised, in part,

[T]he Audit Clerk III specification. . . does not accurately describe the work you perform.

. . . I recommend your position be reclassified to that of a Tax Audit Clerk II. In the absence of this action taking place within the next fifteen days, I recommend your position be allocated to Audit Clerk III to realign the position to that classification indicating the greater complexity of this series.

Ms. Sydenstricker appeared at Level IV and testified that her intent in making the alternative recommendation was merely to allow for increased pay for Grievant if the Tax Audit Clerk II classification was not effected. She agreed with Grievant that others formerly employed in the Business Tax Division performed essentially the same work as she although classed as Audit Clerk III. She explained that the Tax Department formerly utilized the higher classifications to promote deserving senior staff members without regard to whether or not CSS descriptions were met, and that this was the situation in this instance.¹¹ Grievant did not refute this contention in any way.¹²

¹¹ Clearly, such a practice is questionable.

¹² Grievant's Exhibit 14 also makes reference to a CSS pronouncement that class specifications should not be the primary guide to classification determinations. Any such approach is specifically rejected by this Decision.

Apparently, the reference is to CSS decisions in Cooksey v. DNR, Docket No. 923 (July 18, 1984), and Cadle v.
(Footnote Continued)

It does not appear that Grievant correctly should have been classified as an Audit Clerk III at any time between 1978 and 1985. Careful review of the testimony and the extensive documentation presented at Level IV simply does not lead to the conclusion that her duties were in line with CSS' description for that professional categorization. Instead, it appears that, at least toward the end of the period in question, Grievant's duties most closely matched those described in the specifications for Audit Clerk II.¹³

(Footnote Continued)

State Tax Dept., Docket No. 190 (Oct. 15, 1984), copies of which were provided by Grievant on September 15. While Cadle orders an Audit Clerk II in Respondent's employ reclassified to Audit Clerk III, it does not explain the ratio decidendi in enough detail to allow its application herein. Cooksey, on the other hand, states,

The appellant based her right to the Audit Clerk III class primarily on the fact that other positions in Natural Resources of similar complexity were classified as Audit Clerk III. This Commission rejects such arguments as justification for an improper classification. To allow a position to be misclassified simply because other positions are misclassified would legitimize such actions and serve to undermine the basis of the classification plan and the principle of personnel and pay administration on which it is founded. This Commission further recognizes that many positions in this and other classes are misclassified.

¹³ Cooksey, in a rather confusing analysis of the differenced among the Audit Clerk I, II and III titles, concludes at p. 5,

Audit Clerk I is entry level, routine clerical auditing work performed under close supervision. Audit Clerk II is advanced clerical auditing work which may also involve supervision of other Audit Clerks. Audit Clerk III involves primarily the

(Footnote Continued)

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant was employed by Respondent as a Clerk III, Audit Clerk I and Audit Clerk II during the period December 16, 1978, through December 1, 1985.

2. From December 16, 1978, through December 1, 1985, Grievant was not performing the duties of an Audit Clerk III, as they were and are revealed by the Civil Service System (CSS) classification description for that position.

CONCLUSIONS OF LAW

1. In order to prevail, a grievant must prove, by a preponderance of the evidence, the allegations of her complaint. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

(Footnote Continued)

auditing of books and records of other government units.

Even under this rationale, Grievant clearly was more closely aligned with the Audit Clerk II title for at least most of the disputed period than the others.


At p. 8, Cooksey uses Tax Department Audit Clerk III's as a "benchmark." It describes these positions as involving "the auditing of business and personal income tax forms to assure compliance with the state tax laws." However, it does not specifically address Audit Clerk I and II functions within Tax, and the evidence presented in the context of the instant case leads to the conclusion that the primary one was also "the auditing of business. . .income tax forms to assure compliance with the state tax laws."

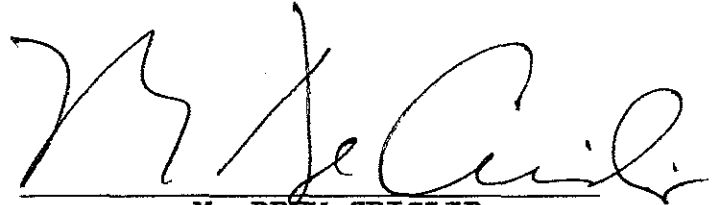
2. In a classification-related complaint, a grievant must show that she was performing the duties of one professional categorization, as revealed by the official CSS specifications thereof, while being assigned to another. In essence, this may be accomplished by demonstrating that a position more closely matches one CSS classification description than another. Hayes v. DNR & CSS, Docket No. NR-88-038 (Mar. 28, 1989). Grievant has not met her burden in this regard.¹⁴

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. [Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that

¹⁴ CSS in Cadle found the appellant "a full performance Audit Clerk which equates to our Civil Service classification of Audit Clerk III." The reference to "full performance," a term that is not specifically defined in CSS Regulations or other authority of which the undersigned is aware, is cryptic; it is noted that an employee seemingly could be a full performer at any classification level.

the record can be prepared and transmitted to the appropriate court. 



M. DREW CRISLIP
HEARING EXAMINER

Dated: September 22, 1989