PHYLLIS VICKERS, ET AL, and .

DONNA J. HASTIE, ET AL, .

Grievants, .

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v. . Docket Numbers: 94-T&R-092/142

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WEST VIRGINIA DEPARTMENT OF TAX .

AND REVENUE and WEST VIRGINIA .

DIVISION OF PERSONNEL, .

Respondent(s). .

DECISION

This complaint was originally filed as separate grievances by two groups of employees (hereinafter Grievants) of the West Virginia Department of Tax and Revenue (hereinafter T&R) against that agency and the West Virginia Division of Personnel (hereinafter Personnel) pursuant to the provisions of West Virginia Code §§29-6A-1 et seq. (See footnote 1) After having proceeded through the lower levels of the grievance procedure, the two claims were appealed tolevel four and consolidated for hearing and decision by the undersigned as it was determined that the legal issue presented by both claims was identical. (See footnote 2) The case became mature on or about July 20, 1994 after receipt of the parties' post-hearing briefs. The following recitation of facts is necessary for an understanding of the parties' respective legal arguments.

Sometime in the fall of 1991, Personnel began what it has called its Statewide Reclassification Project. Generally, the purpose of this project was to revamp the then-existing classification plan and pay plan by eliminating unnecessary classification titles, creating other needed titles, rewriting classification specifications and recreating a pay plan for the classified and classified-exempt service which contained fewer pay grades and eliminated steps within those pay grades. Personnel implemented this project by going to each state agency and working in conjunction with the appointed authorities of those agencies. The reclassification of employees within T&R took place sometime during the summer of 1993.

As a result of Personnel's efforts, the previous Tax Audit Clerk series was eliminated and only one level of Tax Audit Clerk remained in T&R. This was the base position which was assigned to pay grade eight. Thereafter, T&R presented a recommendation to Personnel that it establish the classification of Tax Audit Clerk,Senior at pay grade nine. This recommendation was accepted effective February 1, 1994. In the meantime, Grievants (classified as Tax Audit Clerks), had filed complaints in September 1993 challenging their reallocation and the pay grade assigned to their position. Because of the efforts of T&R, the only part of Grievants' complaint which has survived concerns Personnel's assignment of pay grade nine to the Tax Audit Clerk, Senior classification.

Grievants contend that the duties and responsibilities of the position of Tax Audit Clerk, Senior are as complex and technical as those for the position of Taxpayer Service Representative, pay grade ten. Therefore, they aver that the pay grade assigned to their position should have been at least pay grade ten. Grievants maintain that they perform many of the same duties performed by those individuals classified as Taxpayer Service Representatives and are also required to have the same knowledge of tax laws, regulations and procedures. At the hearing in this matter, Grievants basically attempted to support their case by submitting into evidence samples of work product and by offering testimony comparing and contrasting the work described in the two classification specifications at issue.

Both Respondents deny that it is an abuse of discretion to have the two classifications assigned different pay grades. Personnel defends its decision by referring to its statutory authority to establish pay plans under W. Va. Code §29-6-10(2) and arguing that it has complied with all statutory mandates. Itasserts that the distinctions between the nature and duties of the positions warrant a one-pay grade difference. In particular, it explained that the Taxpayer Service Representative

classification was assigned to pay grade ten because incumbents in that position are required to travel as a part of their job, because they are constantly required to hold themselves out as agency representatives to members of the public and because their work is not as process driven, systematic or predictable as that of the Tax Audit Clerk, Seniors.

W. Va. Code §29-6-10, states, in pertinent part,

> The Board [Personnel Board] shall have the authority to promulgate, amend or repeal rules, in accordance with chapter twenty-nine-a [§29A-1-1 et seq] of this code to implement the provisions of this article:
>
> (2) For a pay plan for all employees in the classified service, after consultation with the appointing authorities and the state fiscal officers, and after a public hearing held by the board. . . . Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The principle for equal pay for equal work in the several agencies of state government shall be followed in the pay plan as established hereto.

Within state government, various classified positions exist in more than one agency. Personnel has interpreted Code §29-6-10 to require that all employees who hold the same class title must be paid within the pay grade established for that position. This Grievance Board has accepted this theory as consistent with the Legislature's equal pay for equal work mandate referred to above. See, Redden, et al. v. W. Va. State Tax Dept., Docket No. 89-T-339 (Feb. 22, 1991).

Personnel has adopted, pursuant to Code §29-6-10(2), administrative regulations which govern the implementation of its classified pay plan, 143 CSR 1. Section 5.04(a) of these rules states as follows:

> Assignment of classes: The Board shall assign each class of positions to an appropriate pay grade consistent with the duties outlined in the class specification. No salary shall be approved by the Director of Personnel unless it conforms to one of the pay rates in the pay grade assigned to the employee's class of position.

In reference to class specifications, Section 4.04 of said rules states, in pertinent part,

> (a) Class specifications are descriptive only and are not restrictive . . ..
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> (b) In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole. Consideration shall be given to the

> general duties, specific tasks, responsibilities required, qualifications and relationships to other classes affording together a picture of the positions that the class intended to include.
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> (c) A class specification shall be construed as a general description of the kinds of work characteristics of positions properly allocated to that class and not as proscribing what the duties of any position are nor as to limiting the implied power of the appointing authority now or hereafter vested with the right to prescribe or alter the duties of the position.

When Personnel assigns a pay grade to a position, it takes into consideration the general nature of that position's duties, tasks and qualifications, along with its relationship to other positions in the classified plan. After reviewing the language of the class specifications at issue, it then assigns a pay grade to that series of positions which is meant to cover all employees within that class irrespective of the actual duties that one or more of those employees may perform. The focus of this case must be based uponthe general nature of the two positions in question as derived from the applicable class specifications and not upon the examples of work, skills or abilities of any one person.

The nature of work sections of the two classification specifications at issue herein 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 departmental 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 judgment is exercised. May train other personnel. Performs related work as required.

Tax Audit Clerk, Senior

Nature of Work

> Under limited supervision, at the advanced level, examines complex tax returns and other documents for completeness, accuracy and compliance with state tax laws and/or any related federal tax laws. Work is performed in accordance with statutory rules, regulations, policies and procedures governing the lawful and timely completion of tax returns. Requires strict confidentiality in regard to taxpayer information. May act as a lead worker and train new employees. Performs related work as required.

Grievants' argument is really based upon the theory of comparative worth and not equal pay for equal work. They contend that by virtue of the duties they perform their position is worth as much to T&R as is the position of Taxpayer Service Representativebecause their duties are as complex and because they are required to be as knowledgable about state tax laws and regulations. Such an argument is not generally accepted in most jurisdictions and has not been embraced by this Grievance Board. See, discussion generally, Moore v. W. Va. Dept. of HHR, Docket No. 94-HHR-126 (Aug. 26, 1994).

It is obvious from even a cursory review of the nature of work sections of the two class specifications at issue that the two positions are inherently different. Taxpayer Service Representatives are required to deal directly with the public in an informational setting while Tax Audit Clerk, Seniors are responsible for reviewing individual and business tax returns to help assure compliance with the state's tax laws and regulations. Although it is accepted that both positions may encompass overlapping duties, this is not the basis upon which the assignment of either positions' pay grade is based pursuant to the applicable regulations. Further, the skills and abilities actually possessed by Grievants is not directly relevant to the assignment of pay grade to their position because Personnel assigns pay grades based upon the requirements of the position and not the specific attributes of any particular incumbent.

Personnel established that the assignment of a pay grade to a classified position is based upon more than just the perceived complexity of the duties contemplated by the position. Such a decision is also based upon conditions of employment such as travel, public contact, relationship to other agencies, the amountof technical support for the position and comparisons of similar positions in other agencies. Personnel has established a rational basis for the one-pay grade distinction at issue herein and Grievants have not established that it abused the discretion delegated to it by Code §29-

6-10. In fact, the evidence establishes that T&R recommended to Personnel that Grievants' position be assigned to pay grade nine. This is the only clear indication of the relative worth of the two positions in question to T&R.

In conclusion, it is not intended by the Legislature that this Grievance Board act as an expert in matters of the relative worth of classified positions to various employers, job market analysis or compensation schemes. Personnel has established Section 5.04(a) of its administrative regulations to guide it in establishing pay grades for the positions in its classified plan and Grievants have not established that Personnel acted, in any way, in contravention to this rule. Further, Personnel has articulated a legitimate difference in the nature of the classified positions at issue herein. Therefore, based upon the relevant evidence of record, Grievants complaint must be denied.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievants are classified as Tax Audit Clerk, Seniors at pay grade nine.
2. The classified position of Taxpayer Service Representative has been assigned to pay grade ten by Personnel.
3. The Department of Tax and Revenue recommended to Personnel that the position of Tax Audit Clerk, Senior be assigned to pay grade nine.
4. The overall nature of the positions of Tax Audit Clerk, Senior and Taxpayer Service Representative is different.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievants bear the burden of proving their claims by a preponderance of the evidence. Howell v. W. Va. Dept. of HHR., Docket No. 89-DHS-72 (Nov. 29, 1990).
2. Grievants have failed to prove that the Division of Personnel violated W. Va. Code §29-6-10(2) by abusing its discretion in establishing the pay grades for the classified positions of Tax Audit Clerk, Senior and Taxpayer Service Representative.

Therefore, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

November 14, 1994

Footnote: 1The grievants are listed as follows: Rebecca Lowe, Lola Flint, Elizabeth Kennedy, Ernest Duncan, Vicki Stewart, Karl Hawley, Vera Talbert, Naomi LaMaster, Sophie Taylor, Esther Ellis, Phyllis Vickers, Beulah Metheny, Marvin Slavin, Richard Crouser, Pam Hamilton, Donna Hastie, Nancy McGraw, Kelly Proctor, Meredith Rush, Diana Webb and Pamela Wilson.

Footnote: 2There was no testimony taken at the level three hearing in the "Vickers" grievance because the parties became stalemated as a result of a ruling on an issue regarding the admissibility of a majority of Grievants' exhibits.