JERRY PAYNE, et al.,

Grievants,

v.

DOCKET NO. 94-T-064

WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE/DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants (See footnote 1), employed by the Department of Tax and Revenue ("Tax"), filed this grievance on or about September 24, 1993, alleging they are misclassified as Tax Unit Supervisor I's. Following adverse decisions at the lower levels, Grievants appealed to level four on February 28, 1994. Following several continuances for good cause, this case was held in abeyance pending settlement negotiations. This matter was reassigned to the undersigned Administrative Law Judge on May 22, 1996, and a level four hearing was held on October 7, 1996, at which time this case became mature for decision.

The classification specifications at issue are reproduced herein as follows:

TAX UNIT SUPERVISOR I

Nature of Work

Under limited supervision, at the full-performance level, plans, assigns, and coordinates the work of para-professionals in a unit of the agency. Interprets and applies state and federal laws and regulations and departmental policies and procedures. Exercises independent judgement in recommending and initiating actions necessary to carry out responsibilities delegated by immediate

supervisor. Performs related work as required.

Distinguishing Characteristics

The Tax Unit Supervisor I is distinguished from the Tax Unit Supervisor II by typically supervising staff that involves the administration of taxes. The type of subordinates supervised would be tax audit clerks, revenue agents, drafters, tax mapping technicians, investigators, taxpayer service representatives, or support staff with a high level of monetary accountability. This class is not intended for supervisors for a clerical support staff or to be used as lead workers.

Examples of Work

Plans, assigns, supervises and reviews the technical, semi-professional and clerical work of subordinate staffs.

Oversees and coordinates programs and taxes administered within the area of responsibility.

Evaluates work for quality, accuracy, and compliance with established tax laws, rules, and regulations.

Instructs, trains, and advises staff in work procedures.

Confers with administrative and professional staff on unit requirements, projects and workloads.

Interprets and implements state and federal tax laws and regulations and administrative policies, opinions, and procedures for staff, corporate officers, state and federal officials, and the general public.

Develops new procedures to accomplish job assignments.

Composes, dictates, or prepares letters and memoranda in connection with supervised staff and unit operation.

Compiles and prepares federal and state reports of the unit's activities and taxes administered.

Reviews employee performance, interviews prospective employees and makes recommendations for hiring, disciplinary actions, and merit increases.

May modify and integrate personal computer files related to tax accounts; train subordinates in use of tax computer files; make recommendations on computer needs.

TAX UNIT SUPERVISOR II

Nature of Work

Under limited supervision, at the full-performance level, plans, assigns, and coordinates the work of professional, semi-professional, technical, and clerical staff in a unit of the agency. Exercises independent judgement in recommending and initiating actions necessary to carry out responsibilities. May involve travel. Performs related work as required.

Distinguishing Characteristics

The Tax Unit Supervisor II is distinguished from the Tax Unit Supervisor I by the nature of work supervised. The Tax Unit Supervisor II supervises a professional staff such as Tax and Revenue Auditors, Tax Analysts and/or Tax Appraisers. May supervise para-professionals and/or clerical support staff in addition to the professional staff. The Tax Unit Supervisor II is distinguished from the Tax and Revenue Manager by the predominant duties of supervising a staff and coordinating the work in the area assigned. Also at this level, the incumbent supervises a unit or may supervise several small units whereas the Tax and Revenue Manager performs administrative duties and manages large multiple units.

Examples of Work

Plans, assigns, supervises and reviews the work of a professional staff.

Oversees and coordinates programs and taxes administered within the area of responsibility.

Evaluates work for quality, accuracy, and compliance with established tax laws, rules, and regulations.

Instructs, trains, and advises staff in work procedures.

Confers with administrative and professional staff on unit requirements, projects and workloads.

Interprets and implements state and federal tax laws and regulations and administrative policies, opinions, and procedures for staff, corporate officers, state and federal officials, and the general public.

Develops new procedures to accomplish job assignments.

Composes, dictates, or prepares letters and memoranda in connection with supervised staff and unit operation.

Compiles and prepares federal and state reports of the unit's activities and taxes administered.

Reviews employee performance, interviews prospective employees and makes recommendations for hiring, disciplinary actions, and merit increases.

Prepares, conducts and attends meetings representing the agency.

Provides testimony at administrative or judicial hearings.
May modify and integrate personal computer files related to tax accounts; train subordinates in use of tax computer files; make recommendations on computer needs.

Discussion

In order for Grievants to prevail upon a claim of misclassification, they must prove by a preponderance of the evidence that their duties for the relevant period more closely match another cited Personnel classification specification than that under which they are currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991); for these purposes, the "Nature of Work" section of a classification specification is its most critical section. Atchison v. W. Va. Dept. of Health, Docket No. 90-H-444 (Apr. 22, 1991); See generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievants' current classification constitutes the "best fit" for their required duties. Simmons v. W. Va. Dept. of HHR/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Services, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. W. Va. Admin. Rule §4.04(a); Coates v. W. Va. Dept. of Health and Human Res., Docket No. 94-HHR-041 (Aug. 29, 1994). Even though a job description does not include all the actual tasksperformed by a grievant, that does not make the job classification invalid. W. Va. Admin. .Rule at §4.04(d). Finally, Personnel's interpretation and explanation of the classification specifications at issue, if said language is determined not to be ambiguous, should be given great weight unless clearly erroneous. See, W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993).

The West Virginia Division of Personnel ("Personnel") interprets W. Va. Admin. Rule §4.04 which

deals with "class specifications," as follows:

(a)
Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.

(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 as affording together a picture of the positions that the class intended to include.

(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 prescribing what the duties of any position are nor as limiting the expressed or implied power of the appointing authority now orhereafter vested with the right to prescribe or alter the duties of any position.

(d)
The fact that all the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.

Employees can perform duties outside their job description as the class specifications are to characterize the type of work to be performed, not to identify every task of the position. Class specifications are descriptive, not exhaustive, and are to give a "flavor" of the difficulties, complexities, and duties of the position. Class specifications are to follow the organization of an agency's work, not to precede it. Personnel's goal in writing the class specification is to give a general description of the duties, not to handcuff the agency in the way it conducts business.

In this case, both positions are managerial positions. The first task is to draw a meaningful distinction between the classification specifications at issue by reviewing the documents from the top

down. The Tax Unit Supervisor I's main focus is on managing the work of para-professionals involved in the administration of taxes, specifically within the Compliance Division of Tax, which is responsible for the collection of taxes. The Tax UnitSupervisor I position is an entry-level management position, and the types of employees it supervises reflect that. The Tax Unit Supervisor II's are responsible for the management of professional employees in the Audit Division of the Department, which include auditors, analysts and examiners, most of which hold accounting or other advanced education degrees.

It is undisputed that the nature of the work involved in the two classification specifications, i.e., managerial, is basically the same. The distinction between the two classifications is the level of employees being managed, and essentially, where the positions fall within Tax's organizational hierarchy. Grievants attempted to establish that Revenue Agents, the employees they manage, are "professionals", and that there is no distinction between the subject positions. Personnel defines "professional" as someone who has undergone a "prolonged course of study" for a particular type of work. The National Labor Relations Board also defines "professional" as such, using as examples such persons as legal, engineering, scientific, and medical personnel. Davis v. Dept. of Health and Human Serv., Docket No. 93-HHR-392 (Apr. 29, 1994); citing NLRB v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267, 94 S.Ct 1757, 40 L.Ed.2d 134 (1974).

While there is no doubt that the employees under the supervision of Grievants act in a professional manner and are competent in the performance of their jobs, the use of the term "professional" by the Division of Personnel, as it is used by the NLRB, clearly contemplates individuals who have achieved a particular level of skill in a particular field through advanced study, such as accountants, lawyers, physicians, nurses, social workers, architects, engineers, etc. Grievants supervise employees engaged in a more technical sort of work, i.e., collection and administration of taxes, who usually deal directly with thepublic. The employees supervised by Tax Unit Supervisors II's are engaged in more complex, endeavors, such as auditing, analysis and examining tax records. These individuals generally do not deal directly with the public, and often seek legal counsel to assist them in preparing their reports. Therefore, Grievants do not supervise "professional" employees as that term is used by Personnel and as is found in the Tax Unit Supervisor II job description. Davis, supra.

With regard to Tax's organizational hierarchy, it has been determined by Tax and Personnel that

the Tax Unit Supervisor I classification represents an entry-level management position. Employees in that classification who wish to advance within Tax may apply to join the Auditing Division, and move up to Tax Unit Supervisor II's, or remain within the Compliance Division and be promoted to Assistant Directors. There is a concern within Tax regarding the applicable pay grades, because, as it exists now, individuals such as Revenue Agents, who wish to advance to the position of Tax Unit Supervisor I, are often required to take a reduction in pay, resulting in a disincentive for employees to advance through the organization. Nevertheless, that apparent pay inequity does not render Grievants or other Tax Unit Supervisor I's misclassified.

Based upon the record developed in this case and the foregoing discussion, it is appropriate to make the following findings of fact.

Findings of Fact

1. Grievants are Tax Unit Supervisor I's within the Department of Tax and Revenue, Compliance Division.

2. Grievants are responsible for the seven regional offices of the Department of Tax and Revenue. 3. Grievants manage and supervise individuals responsible for the collection and administration of taxes, including Revenue Agents.

4. Revenue agents are not considered "professional" employees, as that term is used by the Division of Personnel and the National Labor Relations Board.

5. The Tax Unit Supervisor I classification is an entry-level management position within Tax, as reflected by the types of employees being supervised.

6. Tax Unit Supervisor II's manage and supervise accountants, auditors, examiners and analysts, who are considered "professional" employees.

7. The Tax Unit Supervisor II classification is a higher-echelon management position as compared to the Tax Unit Supervisor I.

Conclusions of Law

1. Grievants have failed to prove by a preponderance of the evidence that they are improperly classified as Tax Unit Supervisor I's based upon a review of their normally assigned duties and responsibilities, as well as the types of employees they supervise.

2. Personnel's interpretation of the two classification specifications at issue is not clearly wrong as applied to the facts developed by Grievants. Blankenship, supra.

Accordingly, this grievance is **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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MARY JO SWARTZ

Administrative Law Judge

Dated: January 8, 1997

Footnote: 1

Jerry Payne, David Weis, George Cremeans, Sharon Lewis, Alexandra Melonas, Joe Mancina, Cynthia Stanley and David Kinder.