MICHAEL COUTZ,

Grievant,

v. Docket No. 98-BEP-260

BUREAU OF EMPLOYMENT PROGRAMS/

FISCAL AND ADMINISTRATIVE MANAGEMENT

DIVISION and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was initiated March 20, 1998, by the Grievant, Michael Coutz, against the Respondents Bureau of Employment Programs ("BEP") and Division of Personnel ("Personnel"). The grievance statement reads:

> Discrimination (See footnote 1) in regards to my job classification i[n] comparison with other personnel within State Government who perform essentially the same job functions and have comparable job duties, responsibilities and requirements.

As relief Grievant sought classification as an Accountant/Auditor Supervisor, and back pay from December 1, 1997. (See footnote 2) Grievant is currently classified as an Accountant/Auditor IV, and manages a unit of two professional employees and three non-professional employees. The parties agree that if Grievant supervised one additional professional employee, he would be classified as an Accountant/Auditor Supervisor, in a higher pay grade. They disagree as to whether he supervises a particular professional employee (Mike Adams), and whether it is appropriate that the classification specification for Accountant/Auditor Supervisor requires supervision of at least three professional employees.

The following Findings of Fact are made based upon the evidence presented at Levels III and IV.

FINDINGS OF FACT

1. Grievant is employed by the Bureau of Employment Programs as an Accountant/Auditor IV. His

position was reallocated to this classification December 1, 1997. He is in charge of the Financial Administrative Management Financial Accounting unit.

2. Grievant supervises two professional accounting/auditing employees: Tim Harvey, an Accountant III, and Angela Leshon, an Accountant I. He also supervises Donald Comuzie, an Accounting/Auditing Technician, Edwina Kennedy, a Secretary I, and Kim Kidd, a Secretary I. 3. At the time Grievant completed his position description form, November 24, 1997, three vacancies were listed as reporting to Grievant: an Accountant I, an Accountant II, and an Accounting Assistant I. Grievant's unit was able to complete its workload without these three positions being filled, with the assistance of Mike Adams. As of the time of the Level IV hearing, these vacancies had been removed from Grievant's unit.

4. Grievant hired and supervised Mike Adams, an Accountant/Auditor III, for five years. Mr. Adams was moved to a different cost center on the organizational chart, but performs the same work for Grievant as he did when Grievant supervised him, under Grievant's direction. He spends about 50% of his time performing work for Grievant's unit. Grievant assigns and reviews this work and approves Mr. Adams' journal entries.

5. Mr. Adams' supervisor is listed officially as Mark Miller. Mr. Miller approves Mr. Adams' sick and annual leave, prepares his performance evaluation, and would be responsible for making merit increase recommendations for Mr. Adams.

6. The Accountant/Auditor Supervisor classification specification states under "Distinguishing Characteristics," "[t]his classification is reserved for positions supervising three or more professional accounting/auditing employees." Personnel is reluctant to assign such numbers because they are binding and positions fluctuate with reorganizations. It did so in this case because a subject matter expert committee of accounting managers and professionals from various state agencies, which worked with the Division of Personnel for over a year assisting Personnel in resolving various issues and making decisions about criteria, asked that this classification specification listexactly how many employees would have to be supervised in order to be placed in this classification.

7. Personnel's standard for the supervisory level for all classification specifications is three or more employees.

8. Personnel defines supervision as planning, assigning, and approving work, completing performance evaluations, signing leave slips, and being responsible for making merit increase

recommendations.

9. Grievant's duties and responsibilities are better described by the "Nature of Work" section of the Accountant/Auditor Supervisor classification specification than that of the Accountant/Auditor IV classification specification. Grievant is responsible for the work of his unit, supervises staff in the preparation of financial reports and maintenance of accounting and financial records, and attends all supervisor meetings, participating in these meetings as any other supervisor does.

DISCUSSION

W. Va. Code §29-6-10 authorizes Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as BEP, which utilize such positions must adhere to that plan in making assignments to their employees. Toney v. W. Va. Dep't of Health & Human Resources, Docket No. 93-HHR- 460 (June 17, 1994), at 12.

In order for Grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, DocketNo. NR-88-038 (Mar. 28, 1989). Personnel job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These 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 the Work" section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989).

The key to the analysis is to ascertain whether the grievant's current classification constitutes the "best fit" for his required duties. Simmons v. W. Va. Dep't of Health and Human Resources, 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 Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Importantly, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. See, W. Va. Dep't of Health v. Blankenship,

189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

The holding of the Supreme Court of Appeals of West Virginia in Blankenship presents a state employee contesting his classification with a substantial obstacle to overcome in attempting to establish that he is misclassified. In this case, Respondents do not dispute that Grievant's duties fit within those described in the Accountant/Auditor Supervisor classification specification. The "Nature of Work" section of this classification specification provides:

> Under administrative direction, performs highly responsible supervisory work in one or more of the following areas: general accounting, internal auditing, external auditing, budget/administration, and financial analysis. The incumbent is responsible for supervising the preparation of financial reports and correcting discrepancies in information, assisting in the development of agency policies and procedures, assigning members of staff to audit teams, participating in budgeting decisions with agency executives and program directors, supervising staff in the maintenance of accounting and financial records, and interpreting and applying agency policies and procedures. May testify in legal proceedings. Performs related work as required.

The "Nature of Work" section of the Accountant/Auditor IV classification specification provides:

> Under general supervision, performs advanced accounting/auditing duties in one or more of the following areas: general accounting, internal auditing, external auditing, budget/administration, and financial analysis. The incumbent may be responsible for preparing highly complex expense, revenue, and reconciliation reports, planning, assigning, and reviewing agency audits, and handling more sensitive accounting/auditing matters. Responsibilities may also include supervising employees in the preparation of financial reports and the maintenance of proprietary ledgers, budgetary control ledgers, profit and loss statements, and other comparable reports. Extensive travel may be required. Performs related work as required.

The testimony supports that Grievant's level of responsibilities are better characterized by the "Nature of Work" section of the Accountant/Auditor Supervisor classification specification.

However, the Accountant/Auditor Supervisor classification specification specifically requires the position to supervise three or more professional accounting/auditingemployees. Grievant does not formally supervise this number of professional employees. (See footnote 3) Personnel believes its hands are tied; while Grievant believes the applicable restrictions should not be applied in his case, because he is so close to fitting within the Accountant/Auditor Supervisor classification, and the restriction on supervision is arbitrary and capricious.

Grievant argued first, that the vacancies listed on his position description form as subordinate positions should be counted, which would give him three or more direct professional subordinates. Lowell D. Basford, Personnel's Assistant Director, stated vacancies are not considered by Personnel, because there is no supervisory work in connection with vacancies, such as approving leave and

completing performance appraisals. He testified that if someone currently classified as an Accountant/Auditor Supervisor lost one or more employees so that he was supervising less than three employees, BEP should notify Personnel so that position could be reallocated for as long as the vacancies remained.

While this issue is now moot, as there are no longer any vacancies under Grievant, it should be addressed as to the issue of backpay.

Grievant testified that his unit is understaffed. He stated when Adna Thomas, the Director of Grievant's department, told him he was going to move Mr. Adams to a different cost center and he would take on additional duties, he had no problem with this decision, so long as he was able to replace Mr. Adams, but this has not occurred. Grievant testifiedhis unit could not complete its work without Mr. Adams' assistance, indicating Mr. Adams' position should be filled by a full-time employee assigned to Grievant's unit.

While Grievant makes a good argument, he has not proven that it is arbitrary and capricious to not consider vacancies in his case. Mr. Basford's explanation that a vacancy requires no supervisory effort is a rational explanation for not counting vacancies, particularly when those vacancies no longer exist, as is the case here, and will never be filled.

Grievant also argued that it was arbitrary and capricious to choose three supervisees as a dividing line between his classification and the Accountant/Auditor Supervisor classification.

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgement for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, an action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Mr. Basford could not explain why three or more employees was chosen as the standard for a supervisory position. He emphasized that this same standard has been applied to all employees, and was the standard chosen in this case by the accounting professionals who worked on the class series. However, it appears that the chosen standard could just as easily have been any other

number, as is demonstrated by the following Level IV testimony:

Mr. Wolfinbarger: Why three? Why, why was the number three selected as the cutoff, the demarcation?

Mr. Basford: Because that is the standard that we have, ah, as you'll see in DOP number two . . .

Mr. Wolfinbarger: I, I understand that. Why? Why is that the standard?

Mr. Basford: Well, that has been the, the long-term, ah, standard we have, and, ah, that, that has to do with the span of control, and, um, ah, ah, many people would argue that it's too low; that it has to be, it ought to be seven, eight, ah. The federal government is now going to a span of control of one to fifteen. So, ah, but still, you know, we, we use that standard for all the other classifications as well - all of them.

Mr. Wolfinbarger: Why not four?

Mr. Basford: We just, we chose three. Why not seven?

Mr. Wolfinbarger: Why not two?

Mr. Basford: Why not eight?

Mr. Wolfinbarger: So, what you're saying is it's, it's arbitrary?

Mr. Basford: No, I'm not saying it's arbitrary. I'm, well, you could say that two would be arbitrary, four would be arbitrary.

. . . .

Mr. Wolfinbarger: Why not four?

> Mr. Basford: Because three was the standard we had before, and that's the standard we used for all the rest of them, so, if we've been arbitrary with this, we've been arbitrary with all of them, sure.

Mr. Basford's explanation is not convincing. It is apparent that personnel and accounting experts have determined that there are different levels of supervision which require varying degrees of supervisory effort, but where the line should be drawn is amatter about which opinions vary. Although Personnel has been consistent in following this standard, it could just as easily have chosen some other number, and this explains Personnel's reluctance to support placement of such a number in a classification specifi cation.

The undersigned has concluded from the testimony that Grievant's unit is efficient, and clearly, Grievant has been penalized for this efficiency, while those who may not be as efficient have been rewarded by being placed in a higher pay grade.

This system also lends itself to manipulation by an agency. While there was no proof offered of this in Grievant's case, one who is favored by an agency may easily be rewarded by assuring that he is assigned at least three subordinates, while someone who has fallen out of favor may be penalized by assigning a subordinate to another supervisor on the organizational chart, as was done here with Mr. Adams. It is clear that, for cost accounting purposes, that is, for the purpose of allocating Mr. Adams' time and salary to a particular unit or cost center, Mr. Adams could just as easily have remained in Grievant's unit as his time is allocated 50% to Grievant's unit and 50% to another unit. This, combined with the fact that Grievant's unit is understaffed and Grievant believes Mr. Adams is overextended, certainly raises the question of whether some manipulation has occurred in this case. If Mr. Adams were officially assigned to Grievant to supervise, as he was in the recent past, Grievant would fall into the classification he seeks in a higher pay grade.

This Grievance Board has disregarded the standard three or more supervisee rule where it appeared Personnel had likewise disregarded this rule in reclassifying a position similar to the grievant's, indicating that it appeared in that particular case that the level ofresponsibility was more important than the number of subordinates. Evans v. W. Va. Dep't of Health and Human Resources, Docket No. 93-HHR-511 (June 30, 1994). It is appropri ate that this standard also be disregarded under the facts of this grievance, as it is not properly applicable to Grievant's situation.

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. "The West Virginia Division of Personnel (Personnel) is authorized by W. Va. Code §29-6-10 to establish and maintain a position classification plan for all positions in the classified service. State agencies utilizing such positions must adhere to that plan in making assignments to their employees." Toney v. W. Va. Dep't of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994), at 12.

2. In order to prevail in a misclassification claim, a grievant must prove by a preponderance of the evidence that his duties for the relevant period more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).

3. Personnel job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These 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 "Natureof the Work" section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989).

4. Grievant established by a preponderance of the evidence that it was arbitrary and capricious to penalize him for efficiently operating his unit with less than a full staff of professional employees, and to assign Mike Adams to a different cost center and supervisor when he is working half his time for Grievant. Grievant has proven he should be classified as an Accountant/Auditor Supervisor.

Accordingly, this grievance is **GRANTED**. Respondents are **ORDERED** to place Grievant in the Accountant/Auditor Supervisor classification, effective December 1, 1997, and to pay him backpay, if any is due, as though his position had been placed in that classification as of that date.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: December 16, 1998

Footnote: 1 Grievant did not pursue his grievance as a discrimination claim, but rather challenged the requirement that one officially supervise three professional employees.

Footnote: 2 Grievant's supervisor responded at Level I on March 23, 1998, that he had no authority to render a decision on the grievance. Grievant appealed to Level II, and received the same response on March 24, 1998. Grievant appealed to Level III, wherea hearing was held on May 15, 1998. The grievance was denied on July 13, 1998, and Grievant appealed to Level IV on July 21, 1998. A hearing was held at Level IV on October 30, 1998. Grievant was represented by Brent Wolfinbarger, Esquire, and Roger Thomas; Respondent Bureau of Employment Programs was represented by Thomas K. Rardin, its Personnel Administrator; and Respondent Division of Personnel was represented by Lowell D. Basford, its Assistant Director. This matter became mature for decision on November 17, 1998, upon receipt of post-hearing written argument from the Division of Personnel. The remaining parties declined to submit written argument.

Footnote: 3 The type of employees supervised can be a distinguishing characteristic, at least in part. For example, supervision of professional employees can result in a different classification from a position supervising non-professional employees. Payne v. W. Va. Dep't of Tax and Revenue, Docket No. 94-T-064 (Jan. 8, 1997).