CYNTHIA STANLEY, et al.,

Grievants,

v.

Docket No. 99-T&R-490

DEPARTMENT OF TAX AND REVENUE
and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was filed by Grievants, Cynthia Stanley, Lexie Redden, Jerry Payne, David Kinder, George Cremeans, Mary Sue Catlett, and William Annon, against their employer, Respondent, Department of Tax and Revenue ("Tax"). The Division of Personnel ("Personnel") was joined as a party at Level III. Grievants believe their classification, Tax Unit Supervisor I, pay grade 14 (See footnote 1), should be in pay grade 16, as is the Credit Analyst III classification. As relief Grievants asked that the Tax Unit Supervisor I classification be placed in pay grade 16, effective October 16, 1997, with back pay and interest, and to be made whole. (See footnote 2)

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

FINDINGS OF FACT

1. Grievants are employed by Tax as Tax Unit Supervisor I's at Regional Offices of the Compliance Division throughout the state. The Tax Unit Supervisor I classification is in pay grade 14. There are approximately 20 employees in this classification. Not all employees classified as Tax Unit Supervisor I's are employed at Regional Offices.

2. Personnel consulted with Tax when setting the pay grade for the Tax Unit Supervisor I, and Tax concurred with the assigned pay grade.

3. Credit Analyst III is a classification developed by Personnel for the Workers' Compensation

Division of the Bureau of Employment Programs. It is in pay grade 16. There are two employees in this classification, and both are located in the Workers' Compensation Office in Charleston. They are in the Receivables Management Unit.

4. Grievants supervise para-professional employees who are classified as Revenue Agents and Secretaries. They are also responsible for running the Regional Offices.

5. The two Credit Analyst III's supervise both para-professional and professional employees in the classifications Credit Analyst I, Credit Analyst II, Accountant/Auditor I, and Employment Programs Specialist Senior, which is a pay grade 14.

6. John Holcomb, Assistant Director of the Compliance Division, is Grievants' supervisor. Mr. Holcomb reports to James E. Dixon, Director of the Compliance Division.

7. Lisa Teel is the Director of the Receivables Management Unit for BEP. She is classified as an Employment Programs Manager II, pay grade 20. The two Credit Analyst III's report to her. In Ms. Teel's absence, the two Credit Analyst III's jointly act as Director, and they attend meetings for Ms. Teel when she is unable to attend. 8. Credit Analyst III's are responsible for managing the Receivables Management Unit. They jointly set performance standards for their subordinates. Together with Ms. Teel they develop policy and make decisions about how the Unit will operate.

9. Credit Analyst III's occupy the same position in the Receivables Management Unit hierarchy that Mr. Holcomb occupies in the Compliance Division hierarchy.

10. Credit Analyst III's have management responsibilities which are at a higher level than the employee supervisory duties of Grievants.

DISCUSSION

The West Virginia State Personnel Board was created in 1989 to replace the former Civil Service Commission. W. Va. Code § 29-6-6 (1989). The duties and responsibilities of the former Director of the Civil Service System were also transferred to the Director of Personnel. W. Va. Code § 29-6-9 (1989). Pursuant to W. Va. Code § 29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or appeal legislative rules governing the

> preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

The Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Moore v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-126 (Aug. 26, 1994). See, Callaghan v. W. Va. Civil Service Comm'n, 166W. Va. 117, 273 S.E.2d 72 (1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hospital v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

This standard of entitlement to substantial weight applies when a grievant attempts to review Personnel's interpretation of its own regulations and classification specifications to determine if Personnel's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-052 (July 10, 1995). “There is no question [Personnel] has the authority to establish pay grades within a pay plan.” Stephenson v. W. Va. Bureau of Employment Programs/Div. of Personnel, Docket No. 92-DOP-447 (Aug. 12, 1993).

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of Personnel. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

An employee who alleges impropriety regarding a reclassification project and challenges the pay grade to which his or her position was assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1995); Bennett v. Dep't of Health and Human Resources, Docket

No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Resources, Docket No. 94-HHR-206 (June 15,1995); Thibault v. Div. of Rehabilitation Services, Docket No. 94-RS-061 (May 31, 1995); Frame v. Dep't of Health and Human Resources, Docket No. 94-HHR-140 (Nov. 29, 1994). See O'Connell v. W. Va. Dep't of Health and Human Resources, Docket No. 95- HHR-251 (Oct. 13, 1995). Unless a grievant presents sufficient evidence to demonstrate Personnel's determination of pay grade is clearly wrong, inappropriate, or the result of an abuse of discretion, an administrative law judge must give deference to Personnel and find that the pay grade assignment was correct. Farber, supra; O'Connell, supra.

Grievants are not comparing themselves to other employees within their classification who perform substantially similar work through exerting the same effort and by utilizing the same skill level within a substantially similar working environment. Therefore, Grievants' argument is not actually one of equal pay for equal work, but an argument for a higher pay grade based on comparative worth. See Moore, supra. However, there is still a residual equal pay for equal work analysis in comparable worth cases. Hensley v. Bureau of Employment Programs, Docket No. 00-BEP-033 (Sept. 11, 2000), citing Fike v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR- 155 (Aug. 28, 1998).

Most federal courts have been reluctant, if not expressly unwilling, to strike down an employer's pay system on the basis of a pure comparable worth theory, absent a companion showing of intentional discrimination. This Grievance Board has likewise been reluctant to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, and substitute its judgment for that of the administrative agency in charge of classification and compensation. Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997); Moore, supra. “However, this Board also noted in Moore that the line of federal cases considering the issue of 'comparative worth' under federal anti-discrimination laws is distinguishable from casessuch as we have. This is because the definition of discrimination used for state public employment does not require proving intent. See Moore, supra.” Hensley, supra.

> In determining whether positions are so similar that providing a pay grade for one position that is different than another is a violation of the anti- discrimination “equal pay for equal work” provisions of the West Virginia Code, the focus is on the actual work performed in each position. See Akers v. W. Va. Dep't of Tax and Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995)(noting that when considering the “equal pay for equal work” provision of the Code, the West Virginia Supreme Court has always “considered the actual duties performed.”)(citation omitted).

Hensley, supra.

While several witnesses testified as to the duties performed by individuals in the classifications at issue, "[t]he focus of this case must be upon the general nature of the two classifications in question, as derived from the applicable class specifications, and not upon the examples of work, skills or abilities of any one incumbent in a position within Tax. See, Vickers v. W. Va. Dept of Tax, Docket Nos. 94-T&R-092/142 (Nov. 14, 1994)." Brogran v. Dep't of Tax and Revenue, Docket No. 95-T&R-153 (Nov. 6, 1995). The classification specifications for the two classifications at issue are reproduced below.

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.

Knowledge, Skills and Abilities

Knowledge of the policies, procedures and techniques of the area of assignment.

Knowledge of tax laws, rules, and regulations.

Knowledge of practices and procedures of office management.

Ability to plan, assign, and coordinate work of clerical and technical staff.

Ability to train, advise, instruct, and interpret rules and regulations to staff.

Ability to use computer system.

Ability to communicate well, both orally and in writing.

Minimum Qualifications

Training:

Graduation from an accredited four-year college or university. Special requirements as described below may apply.

Substitution:

Experience as described below may substitute for the required training on a year-for-year basis.

Experience:

Five years of full-time or equivalent part-time paid experience in the area of assignment as determined appropriate by the appointing authority, two years of which must have been in a lead worker, supervisory, or administrative capacity.

Substitution:

Successful completion of graduate study in an area closely related to the area of assignment may substitute for up to two years of the non-supervisory experience.

SPECIAL REQUIREMENT: Six semester hours of accounting is required for the supervision of taxpayer service representatives, tax audit clerks, and revenue agents.Within one year of appointment or promotion to position incumbent must successfully complete State Tax Division managerial program and complete, if applicable, the accounting requirements.

Established: 8/19/93

Effective: 9/16/93

CREDIT ANALYST III

Nature of Work

Under limited supervision from the Receivables Management Director, performs as the Credit Manager Supervisor in overseeing the management of receivables including the administration of delinquent and default employer accounts; assists in the mentoring and training of receivables management staff and ensures that the performance goals of the department are achieved. Individual will serve as a liaison with state agencies and elected officials to resolve delinquent and default accounts. Responsible for more complex cases and serves as a consultant to staff on receivables management issues. Through formal and informal training, acquires an understanding of workers' compensation laws, rules and policies, credit management philosophies, practices, forms and procedures. Performs related work as required.

Distinguishing Characteristics

The Credit Analyst III is distinguished from the Credit Analyst II by the skills necessary to manage personnel within the Receivables Management Department as well as the ability to analyze and resolve the most complex receivable issues. Positions allocated to this class will manage a small number of employer accounts determined to have the highest credit risk while supervising the other credit management personnel in the administration of his/her assigned accounts. The advanced nature of the position requires complex accounting and financial statement analysis knowledge. This position will be responsible for administering the standards, methods, laws, and forms utilized by the Receivables Management Department.

Examples of Work

Supervises the work of credit analyst, accountants, investigators, financial reporting specialists and support staff in relation to the completion of specific assignments.
Plans and organizes the work of the unit; provides leadership and direction to the staff.
Manages the unit based on the performance measures established for the department.
Assists in the formulation of individual performance goals and measures within the Receivables Management Department.
Mentors and provides training to the credit management staff and conducts staff meetings.
Serves as a consultant/resource on complex or unusual credit management issues.
Plans and directs meetings with employers to resolve delinquent and default accounts.
Serves as a liaison with state agencies and elected officials to resolve delinquent and default account.
Analyzes financial information from the employer, such as tax documentation and financial statements, in order to determine the collection strategy applicable to an individual account.Reviews credit management decisions for sound judgment and compliance with applicable rules and procedures.
Provides testimony in civil and criminal proceedings.
Conducts performance reviews of credit management staff; recommends salary increases, promotions, and other appropriate personnel action.
Communicates directly with representatives from Customer Accounting, Field Audit, Underwriting,

and Legal Services to ensure that all account activities related to the employer are completed timely and that employer information is communicated in the proper manner.

Negotiates repayment options with employers.

Demonstrates the ability to successfully collect large delinquent and default accounts.

Assists in the design of appropriate training classes.

Leads special projects.

Knowledge, Skills and Abilities

Knowledge of the functions, operations, and objectives of the Division.

Knowledge of workers' compensation laws, rules and regulations, policies and procedures.

Ability to interpret and properly apply written procedures, instructions, policies, laws, rules and regulations.

Ability to evaluate employer financial information and render appropriate decisions based on the results of the financial analysis.

Ability to exercise sound judgment in appraising situations and rendering decisions.

Ability to plan, assign, supervise, and review the work of professional and support staff.

Ability to establish and maintain effective working relationships with staff, employers, elected officials and the public in general.

Ability to communicate effectively both orally and in writing.

Ability to lead and motivate staff.

Ability to maintain a professional disposition when dealing with difficult situations.

Ability to speak in public.

Ability to operate a personal computer and use spreadsheet and word processing software in daily work.

Minimum Qualifications

Training:

Bachelor's degree from an accredited four-year college or university. Preference may be given to applicants with a degree in accounting, finance or a related field.

Substitution:

Additional qualifying experience as described below may be substituted on a year-for-year basis for the required college education.

Experience:

Five years of full-time or equivalent part-time paid experience in collections, financial analysis and/or accounting.

Established: 10/16/97

Effective: 12/01/97

As Grievants pointed out, their duties are similar to those of the Credit Analyst III, in that employees supervised by both groups are charged with trying to collect moneyowed to the state. However, there are distinctions between the Tax Unit Supervisor I and the Credit Analyst III which are significant to the issue at hand.

Lowell D. Basford, Assistant Director of Personnel's Classification and Compensation Section, explained that the Tax Unit Supervisor I is part of a class series, with the Tax Unit Supervisor II being the other classification in the series. He testified that these two classifications were “established as part of a classification study for the Department of Tax and Revenue that was implemented in September of 1993. The pay grade assignments for those classifications were established on the basis of a salary survey data collected by the Division of Personnel,” and based upon the duties and responsibilities of the position in relation to other classifications being developed at the time, and the “internal alignment with other positions within the Department of Tax and Revenue.” The pay grade was recently changed from 13 to 14 based upon salary survey data, and in consultation with Tax, as part of a statewide review and revision of pay grade assignments. Mr. Basford testified that Tax concurred with the new pay grade for the Tax Unit Supervisor I, but asked that the Tax Unit Supervisor II be placed in a higher pay grade, and that was done.

Mr. Basford explained that part of Personnel's responsibility is “to facilitate the recruitment and retention of employees in those job classifications that is consistent with Section 5.1 of the Division of Personnel Administrative Rule, which sets as a basis for the compensation plan that it attract and retain qualified employees in the classified service.” He testified that Personnel has not had any requests from Tax to change the pay grade for the Tax Unit Supervisor I, (See footnote 3) nor has Tax indicated that it has experienced anyrecruitment and retention problems in this classification. He

stated that this is a good indication that the pay grade assignment is correct.

Mr. Basford explained that the Credit Analyst series was established in late 1997 at the request of the Bureau of Employment Programs ("BEP"), following enactment of legislation which created the Employment Programs Performance Council. The Workers' Compensation Division was reorganized, and a number of job classifications were developed, including the Credit Analyst series. He stated that salary survey data from the Bureau of Labor Statistics for the private sector was used in assigning pay grades, because there were no comparable positions in the public sector. He stated Personnel fully consulted BEP throughout the process. He testified that BEP believed the pay grades assigned to the Credit Analyst series were necessary "in order to effectively attract and retain qualified employees in those classifications," and the pay grade assigned was actually lower than the salary survey data indicated it should be.

As to the distinctions between the Credit Analyst III and the Tax Unit Supervisor I, Mr. Basford explained that the former "performs in a quasi-managerial role," supervising Credit Analyst I's and II's, and other staff, as well as professional positions, such as Accountants and Auditors. He opined that Credit Analyst III's supervise "positions of greater complexity and difficulty in the analysis of the various financial statements of the premium holders or clients," than do the Tax Unit Supervisor I's. He stated the Tax UnitSupervisor I "supervises sub-professional, paraprofessional type work which, in turn, impacts upon the kind of work the position is responsible for."

This Grievance Board has previously addressed the distinction between supervision of professional employees, and supervision of para-professional employees, when Grievants Payne, Cremeans, Stanley, and Kinder challenged their classification, arguing they should be classified as Tax Unit Supervisor II's.

> 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. . . .
>
> 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 the public. 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 [v. Dep't of Health and Human Serv., Docket No. 93-HHR-392 (Apr. 29, 1994)].

Payne, et al., v. W. Va. Dep't of Tax and Revenue, Docket No. 94-T-064 (Jan. 8, 1997). At the time, the Tax Unit Supervisor II classification was a pay grade 15, while the Tax Unit Supervisor I classification was a pay grade 13.

Grievants argued that the duties of the Accountant/Auditor positions supervised by Credit Analyst III's were not as advanced as those of the Revenue Agents supervised by Grievants. This assertion was based solely upon the testimony regarding the responsibility of Accountant/Auditors for repayment plans. Grievants argued that the Revenue Agent II classification is, by nature, professional, citing Bebo v. West Virginia Department of Health and Human Resources, Docket No. 95-HHR-232 (December 14,1995). That grievance involved an Office Assistant I who believed she was misclassified. That decision does not address the definition of “professional,” nor was a definition of “professional” provided by either party during the course of the instant proceeding. The parties did not place the classification specification for Revenue Agent II or Accountant/Auditor in the record so that the undersigned could evaluate Mr. Basford's expert opinion in classification matters that the Revenue Agent II is a para-professional position. However, as noted above, this issue was specifically raised by four of the Grievants in a previous grievance, and the administrative law judge specifically found that the employees supervised by Grievants are not, by definition, professionals. Thus, Grievants have not demonstrated that they supervise professional employees, nor have they produced sufficient evidence from which the undersigned can could conclude that Credit Analyst III's do not supervise professional employees. This is a significant distinction between the two classifications. Payne, supra.

Mr. Basford stated the Credit Analyst III assists the Director of the Receivables Management Unit in the development of goals and procedures for the operation of the unit, and in planning, organizing, evaluating, and managing the work of the unit, which is what BEP wanted. He pointed out there are only 2 Credit Analyst III's, while there are around 20 Tax Unit Supervisor I's, and there is no mid-level management position above Credit Analyst III's comparable to Mr. Holcomb's, making Credit Analyst III's “the second line of responsibility in the Division.” In terms of responsibility for the unit and co-

management of it, Credit Analyst III's occupy the same position in the chain of command as Mr. Holcomb. He further noted that Credit Analyst III's are based at the Workers' Compensation Division, where they have a centralized function covering the entire state, whereas, Tax Unit Supervisor I's are located at offices throughout the state, with their work being localized, or covering a particular area of the state, or a particular unit. His conclusion from all of this was that the Credit Analyst III positions have a significant levelof responsibility for co-managing the Receivables Management Unit, which the Tax Unit Supervisor I position does not have, in addition to the role of supervision of subordinates. He noted that the classification and compensation system evaluates a managerial role at a higher level than a supervisory role.

Grievants concluded that they have more responsibility for management than Credit Analyst III's because they are responsible for an office which covers several counties. It is understandable that Grievants would be of this opinion, as they are away from the central operations, and no doubt must at times make decisions about the office on their own; but as noted, Personnel's views are entitled to substantial weight. Personnel views the management of an entire unit as a more responsible position than the management of an office housing five to ten employees. Further, not all Tax Unit Supervisor I's are responsible for an office, and this responsibility is not detailed in the classification specification for the Tax Unit Supervisor I. The Tax Unit Supervisor I classification specification speaks to the supervisory role of this classification, while the Credit Analyst III classification specification refers to the management role of the classification, as Mr. Basford testified. Grievants did not demonstrate Personnel's evaluation of the roles of the two classifications in this regard was clearly wrong or arbitrary and capricious, and this also is a significant distinction between the two classifications.

Mr. Basford further stated that the Credit Analyst III operates in an insurance company type of environment, and must be familiar with “a number of laws, regulations, procedures and units; such as, underwriting, [and] safety and loss control . . .. They must interact and utilize that comprehensive information base in making the decisions that they make on a daily basis regarding receivables management issues.” He noted that the Tax Unit Supervisor I does not have these same issues. Grievants pointed out that they have responsibility for enforcement of approximately 30 different taxes, and must be familiar with tax laws, and enforcement issues. Finally, Mr. Basford explained that the minimum qualifications of the Credit Analyst III are higher than those of the Tax Unit Supervisor I, because the stated preference for an accounting or finance degree, or a degree in a

related field, allows the agency to choose applicants with such a degree over other well-qualified applicants who may have a higher ranking on the applicant list. Grievants disputed Mr. Basford's conclusion, arguing that the requirement for six hours of accounting was greater. Mr. Basford's explanation is a reasonable interpretation of the requirements. (See footnote 4)

As pointed out by Mr. Basford, and discussed above, there are significant differences between the level of supervisory and management responsibilities of Grievants and Credit Analyst III's. While Grievants, who are not classification experts, may find such differences to be insignificant, they are important distinctions in the classification system developed by Personnel. Grievants have not demonstrated that their classification was wrongly placed in a pay grade 14. The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. Grievants have the burden of proof in this case to establish, by a preponderance of the evidence, that the assignment of the Tax Unit Supervisor I class title to pay grade 14 was clearly wrong, arbitrary, capricious, contrary to regulation, or otherwise illegal and improper. W. Va. Code §29-6A-6; Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997); Bennett v. Dep't of Health and Human Resources, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Resources, Docket No. 94-HHR-206 (June 15, 1995). To meet this burden Grievants must show Tax and Personnel had no rational basis for placing Grievants in their current pay grade, or that Respondents acted in bad faith by placing the Tax Unit Supervisor I classification in pay grade 14 despite overwhelming evidence indicating the classification should be otherwise placed.

2. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered, explained or reached the 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 opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id.

3. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of Personnel. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). 4. W. Va. Code § 29-6-10 authorizes the State Personnel Board to promulgate rules for the implementation and administration of the classified State employees' job classification and pay plans for which plans the Personnel Board is responsible. Frame v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-140 (Nov. 29, 1994). 5. 143 C.S.R. 1 § 4.01 requires Personnel to confer with the “appointing authority” when adopting and implementing a job classification plan for classified State employees, and requires Personnel to base its job classification plan upon “an investigation and analysis of the duties and responsibilities of each position.” Trimboli, supra.

6. The Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2).

7. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

8. Grievants did not demonstrate that the assignment of the Tax Unit Supervisor I classification to a pay grade 14 was arbitrary, capricious, clearly wrong, contrary to regulation, or otherwise illegal or improper, as the differences in the level of responsibility of the Tax Unit Supervisor I and the classification to which Grievants compared themselves, Credit Analyst III, are significant in the classification and compensation plan developed by Personnel.

Accordingly, this grievance is **DENIED**.

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. 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 18, 2001

Footnote: 1

The pay grade for the Tax Unit Supervisor I was changed by Personnel from a pay grade 13 to a pay grade 14 in August of 1999, as part of a study involving pay grade assignments for all classifications in the occupational group.

Footnote: 2

This grievance was filed on January 20, 1999. The grievance was denied at Level I on January 29, 1999, and Grievants appealed to Level II on February 1, 1999. A Level II decision denying the grievance was issued on February 26, 1999, and Grievants appealed to Level III on March 2, 1999. A Level III hearing was held on August 30, 1999, and the grievance was denied at Level III on November 17, 1999. Grievants appealed to Level IV on November 30, 1999. After several continuances granted for good cause shown, two days of hearing were held at Level IV, on September 14, and November 15, 2000. Grievants were represented by J. Steven Hunter, Esquire, Respondent Tax was represented by Jeffrey G. Blaydes, Esquire, and Respondent Division of Personnel was represented by Donald L. Darling, Esquire. This matter became mature for decision upon receipt of the last of the parties' post-hearing written arguments on March 28, 2001.

Footnote: 3

Grievants demonstrated that Mr. Basford's statement that Tax had not requested a change in pay grade for the Tax Unit Supervisor I is incorrect, although Tax has not recently made such a request. Grievants placed into evidence two letters addressed to the Director of the Division of Personnel, dated March 22, 1995, and January 31, 1996, from James H. Paige, Secretary of the Tax Department, and from the Assistant Tax Commissioner, Lydia S. McKee, respectively. Both letters asked that the pay grade bechanged to 15, in order to provide a career ladder for Tax and Revenue Auditor III's, and to enable Tax to recruit the best qualified employees into management positions. At the time, the Tax and Revenue Auditor III classification was a pay grade 14. The letters also proposed that the Tax Unit Supervisor I and II titles be changed so that they were no longer a class series. At a meeting on February 15, 1996, the State Personnel Board deferred action on the proposal, and placed it on the inactive calendar pending a decision on a related grievance. Neither Tax nor Personnel took further action on this proposal, and this proposal was made so long ago now that it is not useful here, particularly since Tax agreed with the new pay grade assignment in 1999.

Footnote: 4

Grievants argued for the first time in their post-hearing written argument that "Personnel has failed to follow their own policy that requires the State Tax Department to maintain current position descriptions on their job classifications. ***WV Code 29-6-10- (4.5)(c)(e)****." This Grievance Board does not consider such tardy arguments, as Respondents were not placed on notice of the issue and had no opportunity to present evidence in response. Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996). Further, Grievants did not explain the relevancy of this argument to this grievance, nor did they identify what position descriptions were not current.*

Grievants also argued for the first time in their post-hearing written argument that a default occurred at Level III. The issue has already been ruled upon by this Grievance Board in Stanley, et al., v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-155D (June 10, 1999), and no default was found. It is assumed that Grievants are merely assuring that this argument is preserved for appeal. The undersigned will not revisit this issue.