THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYLVIA BAKER,

Grievant,

v. DOCKET NO. 2008-0591-DOR

INSURANCE COMMISSION

and

DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant Sylvia Baker filed a grievance on September 28, 2007, in which she claims that her position of Tax Audit Clerk is misclassified, and should be classified as Tax Audit Clerk Senior. As relief, she is seeking reallocation to the Tax Audit Clerk Senior Classification, and “back pay for when I started with limited supervision at an advance level training and overseeing co-worker(s) work.”

A level three hearing was held in the Grievance Board's Charleston office on August 1, 2008. Grievant presented her own case, Respondent Insurance Commission was represented by counsel Gregory Elam, and Division of Personnel (DOP) was represented by counsel, Karen O. Thornton, Assistant Attorney General. The matter became mature for decision on September 5, 2008, the deadline for the parties to submit their proposed findings of fact and conclusions of law. No proposals were received from any of the parties.

Synopsis

Grievant has been employed as a Tax Audit Clerk since 1996, and in that time her job duties have changed. With the increasing complexity of her duties and the taxes with which she works, the predominance of her duties shifted to fall more within the Tax Audit Clerk Senior classification than her former classification. Grievance granted.

Findings of Fact

Based on a preponderance of the evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

1. Grievant has been employed by the Insurance Commission as a Tax Audit Clerk since June 19, 1996.

2. The DOP Classification Specification for Tax Audit Clerk reads in part [emphasis added]:

> **Nature of Work**
>
> Under *general supervision*, at the full performance level, examines tax returns and other documents for completeness, accuracy and compliance with *state 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 lead worker and train new employees. Performs related work as required.
>
> **Distinguishing Characteristics**
>
> Employee at this level performs full-performance audits of tax returns which require a working knowledge of state tax laws, filing requirements, deadlines and billing procedures. Performs audits not involving complex issues requiring as high of a degree of theoretical or as in-depth tax knowledge. Audit sources and steps are limited in comparison to the Tax Audit Clerk Senior level.

3. The DOP Classification Specification for Tax Audit Clerk Senior reads, in part [emphasis added]:

> **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 lead worker and train new employees. Performs related work as required.
>
> **Distinguishing Characteristics**
>
> Employee at this level performs advanced audits of more complex tax returns which require an in-depth knowledge of state tax laws, regulations, filing requirements, deadlines and billing procedures *and* a working knowledge of any related *federal* tax laws, filing requirements and deadlines. Requires a greater latitude of independent judgement and knowledge of theoretical principles in determining taxable status based upon complex issues and criteria as prescribed by state or federal laws. Requires the use of multiple sources and steps to perform

the audit functions.

4. In February 2006, Grievant submitted a new Position Description Form to the DOP for review. DOP determined the position was correctly classified as a Tax Audit Clerk. Grievant appealed that determination, and the classification was upheld by DOP in September, 2007.

5. The Position Description Form contains a section wherein the employee lists their duties, in order of importance, along with the estimated percent of time spent on each duty. Grievant attached a list of 13 duties to the form she filled out, but did not indicate how much time each duty consumed as a percent of her total work time. She does spend the majority of her time in contact with and answering questions from taxpayers, their accountants and their attorneys.

6. Grievant: 1) verifies that all licensed and unlicensed insurance companies, surplus lines licensees and risk retention groups file all tax returns, sends notices to them if they do not, and issues penalties for late or non filing; 2) posts quarterly filings to the Insurance Commission's database; 3) processes non filers and late filers for the computer database; 4) verifies that all filings that are posted to the lock box posted correctly, corrects those that did not by auditing the various forms submitted, and posts to the database; 5) verifies taxpayer year-end taxes for statutory compliance, mathematical accuracy and ensures accurate database entry; 6) verifies all taxes are filed in a timely manner; 7)processes over- and under-payment letters; 8) processes refunds; 9) assists in creating new tax forms; 10) responds to inquiries from taxpayer licensees by phone and letter to assist in proper filing and other problems; 11) separates mail for processing by clerical staff; 12) assists in writing procedures for the tax audit section; and 13) trains and oversees co-workers on tax issues.

7. The tax returns Grievant works with are varied, depending on the insurance entity that files them. They are filed either on paper or electronically, by residents or non- residents.

8. Since the Tax Procedures Act (See footnote 1) was passed by the legislature in 2001, Grievant has become responsible for taxes filed by non-residents as well as residents. In addition, her office receives tax returns filed both on paper and electronically, and all paper forms must be scanned into the computer system. Grievant also has the duty of explaining and interpreting state, multi-state, and federal tax and insurance laws for technical staff, certified public accountants, lawyers and tax filers. The audits she performs on many different types of tax returns are more in-depth than before the Act was passed.

9. Grievant is a lead worker, but does not supervise any other employees.

10. The enforcement provisions of the Tax Procedures Act added penalties for untimely filing, as well as the need for Grievant to work closely with the legal division to assist with their enforcement of her assessments against untimely filers.

Discussion

In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work she is doing is a better fit in a different classification than the one in which her position is currently classified. (See footnote 2)

When an employee requests reclassification or reallocation, DOP normally makes its classification determination based the Position Description Form completed by the employee. Classification is a highly technical matter, based on carefully drafted class specifications and a complex pay plan, using terms of art to describe duties and job types defined by the DOP. To do this, DOP fits positions into specifications based on a lengthy technical document, the Position Description Form, which is completed by a person the DOP invariably points out has no training or expertise whatsoever in the arcane field of classifying jobs. Therefore, while DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous, (See footnote 3) DOP's interpretation of what the employee is trying to communicate with the Position Description Form does not carry that weight.

DOP 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. (See footnote 4) For these purposes, the "Nature of Work" section of aclassification specification is its most critical section. (See footnote 5) In this case in particular, though, the “Distinguishing Characteristics” section is particularly instructive, as that section serves to differentiate the levels of the Tax Audit Clerk series, particularly between the two classifications at issue here. Compared to the Tax Audit Clerk, the Tax Audit Clerk Senior works with more complex tax returns, must refer to more sources and have a more in- depth knowledge of state tax law and related federal tax law. The Tax Audit Clerk Senior performs more complex, i.e., multi-step audits, and has a greater latitude for independent judgment. Conversely, the lesser classification only uses a “working” knowledge of state tax laws only, and performs audits not involving complex issues.

A comparison of the two job class specifications immediately distinguishes that, where a tax Audit Clerk works under “general supervision,” the Tax Audit Clerk Senior works under “limited supervision.” An additional distinction is that the Tax Audit Clerk “examines tax returns and other documents for . . . compliance with state tax laws.” The Tax Audit Clerk senior, however, “examines complex tax returns and other documents for . . . compliance with state tax laws and/or any related federal tax laws.” Grievant's current job duties are performed under very limited supervision, and she works not just with West Virginia tax and insurance law, but with those of other states and related federal laws and regulations.

Since Grievant's job began in 1996, it has evolved and changed over time to keep up with changing tax law and the changing responsibilities of the Insurance Commission. Although Grievant, in her Statement of Grievance, places emphasis on the fact the she is a lead worker and oversees and trains coworkers, this function is expressly included in both classifications. Instead, it is the changed nature of her job, the types of tax returns she audits and the laws to which she must adhere, that make her job more complex than it used to be. Grievant did not present much evidence of how much time she spends on which duties, but in this case the distinction between the classes is less a difference in duties than a difference in complexity of the tax returns and laws involved in those duties, plus an added level of independent judgment for the senior position.

The tax returns Grievant works with are not simple personal income tax returns filed by individuals. Instead, they are quarterly returns filed by licensed insurance companies, risk retention groups and surplus lines licensees. Many of these, if not most, are multi- state companies with extremely complex returns. She audits ten different taxes and 3 different fees. Grievant must audit and analyze these returns in compliance with state and federal tax, insurance and workers' compensation laws and regulations. Not all the filers have the same rate, and may have multiple rates. For at least the last three years, she has worked under very limited supervision with a high latitude for independent judgment. Since Grievant was first classified, the Tax Audit section in which she works has changed drastically, according to Leah Cooper, its Director/Chief Examiner and Grievant's supervisor. Originally, the clerks had a basically clerical function. Now, there are more and more types of licensees taxed, there have been many insurance and tax law changes, and the Tax Procedure Act was passed, giving the section more “teeth” to go after untimely filers and enforce the

laws. This evolution is poorly represented on the Position Description Form on which DOP relied.

Debbie Anderson of the DOP testified that the classification determination was made because Grievant's job was at the “full performance level,” had no complex issues, and her review of tax returns was simply to “verify information.” Ms. Anderson completed the initial review of the Position Description Form and made the original classification determination, which she passed on to her supervisor for approval. However, she admitted that, based on the evidence presented at the hearing, Grievant is working with more complex taxes and completing “more complex audits” than are apparent from the Position Description Form, and that a different classification may be warranted by the added complexity.

Given that Grievant's work has progressed to the stage where she predominately audits much more complex returns, does so under limited supervision, and has free authority to determine and assess penalties, interpret tax law for her work and to answer inquiries, and must apply state and federal tax law and tax code from several sources, she has met her burden of proving the Tax Audit Clerk Senior is a better fit for her position. However, she did not present sufficient evidence to determine exactly when the balance shifted, so it is impossible to determine whether she was entitled to reallocation at any time prior to the filing of her grievance. As previously stated, Grievant's Position Description Form did not adequately describe her duties in such a way an accurate determination could be made. Further, the 1999 date mentioned in her grievance as the time she began lead worker duties is insignificant, as that added duty is non-determinative.

The following Conclusions of Law support this decision:

Conclusions of Law

1. In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work he is doing is a better fit in a different classification than theone his position is currently in. *See Hayes v. W. Va. Dept. of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001).

2. DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. *See W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

3. DOP 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. Dep't of Health*, Docket No. 90-H-444 (Apr. 22, 1991); *See generally, Dollison v. W. Va. Dep't of Empl*. Security, Docket No. 89-ES-101 (Nov. 3, 1989).

4. Grievant has met her burden of proving her position is a better fit in the Tax Audit Clerk Senior classification.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is ordered to reallocate Grievant's position to Tax Audit Clerk Senior, retroactive to the date she filed her grievance, and to compensate her for all back wages and benefits she would have earned had she been reallocated at that time.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 ofthe appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

September 30, 2008

Figure

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M. Paul Marteney

Administrative Law Judge

Footnote: 1 *W. Va. Code §§ 11-10-1 et seq.*

Footnote: 2 *See Hayes v. W. Va. Dept. of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989); Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement, Docket No. 00-HHR-361 (Apr. 5, 2001).*

Footnote: 3 *See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).*

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