

September 3, 2010

TO: Anne-Marie Cavanaugh, Council Representative
Kathy Andruss, Classification Director
Washington Federation of State Employees (WFSE)

FROM: Teresa Parsons, SPHR
Director's Review Program Supervisor

SUBJECT: Bruce Keegan v. Employment Security Department (ESD)
Allocation Review Request ALLO-09-065

On May 6, 2010, I conducted a Director's review conference regarding the allocation of Mr. Keegan's position. In addition to both of you, Mr. Keegan attended the Director's review conference. Human Resources Manager Teresa Eckstein and Human Resources Consultant Amy Estes represented ESD. Lorenda Lillard, Director of Unemployment Insurance (UI) Tax Audits & Collections at the time of Mr. Keegan's position review and Bill Ward, the current Director, also attended the conference.

Director's Determination

This position review was based on the work performed for the six-month period prior to August 21, 2009, the date ESD's Human Resources (HR) Office received Mr. Keegan's request for a position review. As the Director's designee, I carefully considered all of the documentation in the file, the exhibits presented during the Director's review conference, and the verbal comments provided by both parties. Based on my review and analysis of Mr. Keegan's duties and responsibilities, I concur with ESD's September 22, 2009 determination that his position was properly allocated to the Tax Specialist 3 – ES classification for the period under review.

Background

Mr. Keegan is assigned to the Unemployment Insurance (UI) Tax – Seattle North District Tax Office (DTO). He reports directly to Kathy Loeb sack, Seattle North DTO Administrator. At the time relevant to this review, Ms. Loeb sack reported to Lorenda Lillard, Director of Unemployment Insurance (UI) Tax Audits & Collections. Prior to September 2008, Mr. Keegan's assigned work as a Tax Specialist 3 - ES included providing direct services for a variety of UI Tax sub-programs, which included auditing. The majority of his assigned work

at that time involved auditing employer records, which included planning, scheduling, and conducting complete audits of employer records to determine state and federal liability requirements had been met (Exhibit A-7-a).

In September 2008, Mr. Keegan began working for the Tax Discovery and Investigations Unit, also known as the Underground Economy Unit, with the working title of Underground Economy Auditor (Exhibit A-2). Mr. Keegan continued to work out of the Seattle North DTO and still reported to Ms. Loeb sack. During the Director's review conference, Ms. Lillard explained that the Underground Economy Unit resulted, in part, from a legislative initiative to locate and collect money from unregistered employers who had not been contributing to the UI Trust Fund. At the time relevant to this review, Mr. Keegan was one of approximately five Underground Economy Auditors, and he worked primarily in the Puget Sound Area and some of King and Pierce counties. Lael Byington, Tax Investigations & Specialized Collections Manager, served in an advisory role to the Underground Economy Auditors.

On August 21, 2009, ESD's HR Office received Mr. Keegan's Position Review Request (PRR), asking that his Tax Specialist 3 - ES position be reallocated to the Revenue Auditor 2 classification (Exhibit B-2). On September 22, 2009, HR Consultant Amy Estes determined Mr. Keegan's position remained properly allocated as a Tax Specialist 3 - ES. On October 22, 2009, Mr. Keegan requested a Director's review of ESD's September 22, 2009 allocation decision (Exhibit A-3).

Summary of Mr. Keegan's Perspective

Mr. Keegan asserts his position performs auditing functions; therefore, he asserts his position should be reallocated to an auditor class series. In particular, Mr. Keegan contends the auditing work he performs requires more investigation than audits performed by Tax Specialist positions. Mr. Keegan points out that he has been assigned a smaller number of businesses because his audits are more challenging and require in-depth investigation, which often include surveillance. Mr. Keegan further contends his audit span is larger because he audits a high volume of records that can go back several years. Mr. Keegan indicates that part of his job also includes going out and finding unregistered businesses and determining which research and tools to use. As a result, Mr. Keegan asserts his position performs research, analysis, pre-investigation and that he determines whether or not an audit of a business is necessary. While Mr. Keegan recognizes that money generated from ESD funds the UI Trust Fund rather than revenue for the state, he contends the body of work auditing businesses is the same. Therefore, Mr. Keegan believes the Revenue Auditor classification best describes the work he performs. He also points out that the Auditor class series provides a better fit for the duties assigned to his position than the Tax Specialist series.

Summary of ESD's Reasoning

ESD recognizes the uniqueness of the work assigned to the Underground Economy Auditors. However, ESD contends the overall work performed is still similar in nature to other Tax Specialist positions within Tax Audits & Collections. ESD indicates the primary distinction is that Tax Specialist positions working in the Underground Economy Unit audit

unregistered businesses, those that have never registered or reported, while other Tax Specialist positions audit registered businesses. ESD acknowledges that Underground Economy audits are more time consuming because they do not have an established starting point; however, ESD contends that once established, the Underground Economy Auditors perform the same functions, audit the same types of records, and follow the same UI laws. ESD considers the Underground Economy Unit one component of Tax Audits & Collections. ESD emphasizes the department does not have Field Audit Manager positions and does not generate revenue for the state. Instead, ESD stresses the money collected funds the UI Trust Fund for the purpose of paying UI benefits. Therefore, ESD contends allocation to the Revenue Auditor series is not appropriate. Further, ESD notes the Tax Specialist class series specifically encompasses auditing functions performed at ESD. As a result, ESD believes the Tax Specialist 3 – ES is a better fit for Mr. Keegan's position than the Auditor class series.

Rationale for Director's Determination

The purpose of a position review is to determine which classification best describes the overall duties and responsibilities of a position. A position review is neither a measurement of the volume of work performed, nor an evaluation of the expertise with which that work is performed. A position review is a comparison of the duties and responsibilities of a particular position to the available classification specifications. This review results in a determination of the class that best describes the overall duties and responsibilities of the position. Liddle-Stamper v. Washington State University, PAB Case No. 3722-A2 (1994).

Duties and Responsibilities

The Position Objective on the Position Description Form (PDF) current at the time of the position review describes, in part, the following (Exhibit B-3):

This position supports the mission . . . as it pertains to discovering those employers who have failed to register and pay their fair share of unemployment insurance contributions due to the UI Trust Fund.

. . . independently investigates businesses that are not registered with ESD and conducts audits of business financial records to determine tax liability for state unemployment taxes, exercising independent judgment in determining the outcome of the audit.

Performs on-site audits at the employers' facilit[ies] to determine if employer should be reporting to ESD. Documents the audit results and supports those results throughout the appeal process.

Ascertain whether or not the employer is in compliance with UI Tax and Wage Administration reporting requirements.

Provides professional consulting and technical assistance to educate employees regarding liability, recordkeeping, and reporting requirements.

In summary, the majority of work described as 85% includes the following:

- Independently screening, scheduling, coordinating, and conducting audits of business financial records to determine tax liability for state unemployment taxes;
- Actively identifying businesses suspected of non-compliance;
- Evaluating and verifying financial records to determine if employer is in compliance;
- Reviewing employer accounts with other taxing agencies and conducting fact-finding interviews prior to audit;
- Performing on-site audits;
- Consulting with and providing technical assistance to employers to educate them on UI liability and reporting requirements;
- Preparing extensive report of audit findings.

The Position Review Request (PRR) that Mr. Keegan completed describes duties similar to those identified on the PDF (Exhibit B-2). Mr. Keegan describes his position's purpose, in part, as working toward the detection and prevention of tax and wage/benefit fraud by completing audits and discovering employers who avoid reporting and paying UI taxes. While the percentage of job duties are further broken down, the overall description of work is similar to the work described on the PDF. Further, Mr. Keegan's supervisor, Kathy Loeb sack, agrees the information on the PRR is accurate and complete (Exhibit B-2).

Similar to the PDF, Mr. Keegan indicates that his position investigates employers not reporting or paying UI taxes. In summary, this includes investigating referrals to determine and build case files on unreported businesses; interviewing past or present employees, contractors, suppliers, owners, neighbors, and other agencies to document relevant facts; determining if there is a liability to the state; updating information in a tips and leads database; making initial calls, preparing introduction letters to businesses being audited and traveling to the businesses to conduct the audits; determining tax compliance and completing the final write-up of audits; preparing notice of assessment, liens and other collection legal documents; and dealing with any appeal or settlement issues.

It is undisputed that Mr. Keegan's position serves as an Underground Economy Auditor. Many of the exhibits he provided reference his work with the Underground Economy Unit. Mr. Keegan has highlighted the different tasks his position performs in comparison to tasks he previously performed before joining the Underground Economy Unit. However, the overall purpose of his position still involves investigating and auditing employee records and other business financial records to determine tax liability for state unemployment taxes. Further, the Director of UI Tax Audits & Collections, Ms. Lillard, disagrees with a number of the characterizations Mr. Keegan has made regarding work he asserts Tax Specialist positions do or do not perform. For example, Ms. Lillard states that any Tax Specialist may need to establish an account without a master business license. Ms. Lillard also points out that Tax Specialists may discover fraud or misrepresentation by an employer, assess penalties, and adjust tax records, regardless of whether the business is registered or unregistered.

While Ms. Lillard agrees there are some functions specific to underground economy, she indicates all Tax Specialist positions in UI Tax Audits & Collections enforce the expectation for employers to report and pay unemployment taxes to fund the UI Trust Fund. ESD acknowledges that tips and leads coming into the agency as unregistered businesses are assigned a zip code specific to underground economy. However, Ms. Lillard clarified the distinction is for tracking purposes to report information to the legislature. Ms. Lillard indicated that ESD encourages all Tax Specialists to build upon working relationships and exchange tips and leads with their counterparts in other agencies performing audits. Ms. Lillard emphasized that the Underground Economy Unit is one component of the overall tax collections program.

Class Specifications

When comparing the assignment of work and level of responsibility to the available class specifications, the class series concept (if one exists) followed by definition and distinguishing characteristics are primary considerations.

The **class series concept** for the **Revenue Auditor** classes reads as follows (Exhibit C-2):

This series is responsible for administering business and occupation taxes, sales and use tax, and public utility tax, deductions, exemptions, deferrals and credits. These positions conduct audits of businesses in diverse industry groups, including corporate, governmental and nonprofit organizations. A wide variety of financial and nonfinancial records are examined to verify that the business has reported its tax liabilities correctly in compliance with the technical requirements imposed by the Revised code of Washington (RCW), the Washington Administrative Code (WAC), Washington Tax Decisions (WTD), Interim Audit Guidelines (IAG), and Excise Tax Advisories (ETA) as administered by the Washington State Department of Revenue.

Audits are conducted in accordance with laws, regulations and applicable professional standards. These positions require the skills to deal with delicate issues, such as the examination of confidential records that may result in the assessment of tax; and the organizational skills to manage numerous ongoing audits while administering a wide variety of excise tax laws and rules.

The **definition** for **Revenue Auditor 2** indicates, in part, that auditors are fully qualified, work independently and are competent to resolve issues within their area of responsibility. Incumbents independently plan, coordinate, and conduct audits of small to mid-sized business at the taxpayer's location (Exhibit C-3).

The Revenue Auditor class series concept describes auditing duties as they relate to the administration of tax revenue generated as a result of conducting business in Washington State. This requires examination of a wide variety of financial and nonfinancial records for all types of industries and verification that tax liabilities reported are in compliance with excise tax laws and rules. While the Revenue Auditor 2 definition contains work functions

similar to Mr. Keegan's, such as independently planning, coordinating, and conducting audits, the auditing work is performed in the context of the class series concept. Revenue Auditor positions conduct a broader financial audit involving a wider variety of taxes and tax laws. This is further supported by a prior Personnel Resources Board (PRB) decision in which the PRB concluded that positions responsible for conducting audits and investigations for motor fuel tax "[did] not perform the scope or breadth of duties described in the Revenue Auditor class series concept" Cole et al v. Department of Licensing, PRB No. R-ALLO-09-022 (2010). Similar to the Appellants' positions in Cole et al, the Revenue Auditor class series is not appropriate for Mr. Keegan's position.

The **class series concept** for the **Auditor** classes reads as follows (Exhibit C-4):

Positions in this series conduct fiscal, performance or program audits to determine compliance with applicable laws, regulations, and standards utilizing Generally Accepted Auditing Standards and Generally Accepted Government Accounting Principles. This work can be conducted on or off site and includes the review and analysis of source documents to determine compliance with appropriate auditing standards by validating financial liabilities, payments, assets, fiscal, record or accounting systems. Positions prepare and recommend improved fiscal compliance and control procedures.

The **definition for Auditor 4** states, in part, that auditors plan, conduct, and coordinate financial and compliance internal audits by evaluating fiscal activities, procedures and processes in order to make recommendations regarding the effectiveness, efficiency and adequacy of state agencies' or institutions' financial controls (Exhibit C-5).

Again, there are similarities between the work described by the Auditor class series and Auditor 4 definition and the work assigned to Mr. Keegan's position. However, the concept of allocation to a specific rather than a general classification has been applied in numerous [Board] cases Waldher; Firouzi; Makari; Korndorfer v. Department of Transportation, PRB Nos. R-ALLO-08-026; R-ALLO-09-005, R-ALLO-09-006, and R-ALLO-09-009 (2009). For example, in Cerna v. Employment Security Dept., PAB No. ALLO-03-0014 (2003), the Board stated that "[i]t is not intended for a more generic classification to be used to allocate a position where the duties and responsibilities of the position are more precisely described by a more specific classification." [See also Nance v. Eastern Washington University, PAB No. 3769-A2 (1995)].

Additionally, the PRB has concluded that while one class appeared to cover the scope of a position, there was another classification that not only encompasses the scope of the position, but specifically encompassed the unique functions performed. Alvarez v. Olympic College, PRB No. R-ALLO-08-013 (2008). The Board has also consistently held that "[w]hen there is a definition that specifically includes a particular assignment and there is a general classification that has a definition which could also apply to the position, the position will be allocated to the class with the definition that includes the position" Mikitik v. Depts. of Wildlife and Personnel, PAB No. A88-021 (1989).

Although the **Tax Specialist – ES class series** does not have a class series concept, the definition for the Tax Specialist 1 – ES class at the entry level indicates that positions perform professional unemployment insurance (UI) tax work by participating in providing program administration and/or direct services (Exhibit C-1). At the **Tax Specialist 3 – ES** level, the definition reads as follows (Exhibit B-4):

Provides senior-level professional unemployment insurance (UI) tax services, requiring a high level of technical skill and program knowledge, to the Washington State business community, reporting agents, legal representatives, out-of-state businesses, unemployment benefit recipients, and other state and federal agencies. Performs program administration and/or provides direct services for inter-related tax programs (Status, Tax Accounting, Redetermination, Compliance, Audit, Experience Rating/Benefit Charging, Unified Business Identifier).

Tax Specialist 3 – ES distinguishing characteristics indicate “[t]his the fully skilled level of the series, and incumbents work independently with only general directions.”

The Tax Specialist 3 – ES job class involves work assignments specifically related to UI tax services, which include providing direct services for audit programs. Further, while examples of typical work identified in a class specification do not form the basis for an allocation, they lend support to the work envisioned within a classification. The Tax Specialist 3 – ES typical work statements that closely align with Mr. Keegan’s duties and responsibilities include but are not limited to:

- Determining employer liability within the Employment Security Act; registering liable employers and establishing accounts within Employment Security and Unified Business Identifier programs, rules and regulations . . . ;
- Planning and conducting complete . . . audits of employers' accounting records; reviewing and analyzing for conformity with Employment Security Rules and Regulations . . . ;
- Conducting detailed audit and analysis of employer records; acting on findings . . .
- Researching, gathering data and making decisions which will produce the annual tax rate assigned to employers;
- Reviewing employment contracts and performing fact-finding interviews to determine independent contractor status utilizing Employment Security rules, laws, regulations, policies and procedures;
- Researching and investigating appeal issues and preparing appeal memoranda; acting as agency representative and testifying at appeal hearings;
- Auditing, reviewing, and analyzing requests to adjust wages and/or taxes submitted from . . . employers and reporting agents to ensure and determine correct billings to the employer;
- Assisting in training;
- Making recommendations for Predecessor/Successor corrections and/or tax rate adjustments;
- Providing agency representation and education to public when requested;

- Researching and reviewing legal documents for compliance and conformity to RCW's, WAC's and policies.

I recognize Mr. Keegan's work focuses on audit and investigation. I also understand that a portion of Mr. Keegan's work involves targeting employers who have never reported or paid UI taxes, which may involve considerable investigation. In addition to finding businesses through his own resources, Mr. Keegan may also be assigned audits based on tips and leads coming into the department through the Internet or a toll free number. I understand that many of the duties described in the Auditor class series are similar to those Mr. Keegan performs. However, the Tax Specialist – ES class series includes auditing and investigating functions specific to UI tax services, including planning, conducting, and completing audits of employers' business records. Therefore, the overall duties and responsibilities assigned to Mr. Keegan's position best fit the Tax Specialist 3 – ES classification. I understand that a subsequent review of Mr. Keegan's position occurred after the September 22, 2009 allocation decision that is the subject of this appeal. ESD's subsequent allocation decision (Exhibit B-6) is a separate action, which is not part of this review.

Appeal Rights

RCW 41.06.170 governs the right to appeal. RCW 41.06.170(4) provides, in relevant part, the following:

An employee incumbent in a position at the time of its allocation or reallocation, or the agency utilizing the position, may appeal the allocation or reallocation to . . . the Washington personnel resources board Notice of such appeal must be filed in writing within thirty days of the action from which appeal is taken.

The mailing address for the Personnel Resources Board (PRB) is P.O. Box 40911, Olympia, Washington, 98504-0911. The PRB Office is located at 600 South Franklin, Olympia, Washington. The main telephone number is (360) 664-0388, and the fax number is (360) 753-0139.

If no further action is taken, the Director's determination becomes final.

c: Bruce Keegan
Teresa Eckstein, ESD
Lisa Skriletz, DOP

Enclosure: List of Exhibits

Bruce Keegan v. Employment Security Department (ESD)

ALLO-09-065

List of Exhibits

A. Bruce Keegan Exhibits

1. Request for Director' Review Form October 22, 2009
2. Letter dated October 21, 2009 from Bruce Keegan with explanation.
3. Agency Allocation Determination letter September 22, 2009

Exhibits 4 -36 reference Mr. Keegan's Exhibit Table of Contents, which has been renumbered. Mr. Keegan's Exhibit # is in parentheses. .

4. August 13, 2009 Memo and Position Review Request (*Exh 1*).
5. Amy Estes (HR) Classification Decision September 22, 2009 (*Exh 2 - Duplicate of A-3 above*).
6. Inter – Agency referral web – site (*Exh 3*).
7. Performance and Development Plan May 2008 (*Exh 4*).
 - a. Position Description Form dated May 2008
8. Performance and Development Plan May 2009 (*Exh 5*).
9. UE Meetings/Teleconferences for UE Auditors "Team" (*Exh 6*).
10. UE Auditors Group email Dist Lists and UE Auditors "Team" (*Exh 7*).
11. Underground economy database input and tracking log (*Exh 8*).
12. TS vs. UE Auditor Audits (*Exh 9*).
13. Addressed by Co-Workers & Managers throughout the State (*Exh 10*).
14. Training other UE Auditors (*Exh 11*).
15. Business Card (*Exh 12*).
16. Audit Corrections and Revisions (*Exh 13*).
17. UE Admin Manager and Admin Asst Audit Assignments examples (*Exh 14*).
18. Productivity Comparison of a UE Auditor to a Tax Spec (*Exh 15*).
19. Mgrs stmt Describing Keegan as an Underground Auditor (*Exh 16*).
20. Key differences between Tax specialist and Auditor(*Exh 17- written by Mr. Keegan as part of his argument*).
21. Tax Specialist Day in the Office Procedure (*Exh 18*).
22. Department Notes for Investigations Prior to Audit (*Exh 19*).
23. Samples of Post Audit Letters by Auditor for UE Audits (*Exh 20*).
24. Special Zip Code Assigned to Auditor for Draft (*Exh 21*).
25. Auditor Contacts with Department Head for Unregistered Businesses (*Exh 22*).
26. Clean Up of Previous Auditor for UE (*Exh 23*).
27. UE Audits of Unregistered Businesses & Procedures (*Exh 24*).
28. Types of UE Audits & Goals of UE Auditors (*Exh 25*).
29. UE Auditor Meetings & Special Mapped "P" Drive for UE Auditors (*Exh 26*).
30. Enforcement (*Exh 27*).
31. Timeline (*Exh 28*).
32. Underground Economy (*Exh 29*).

33. Key Differences between Tax Specialist and Auditor per PDP (*Exh 30- written by Mr. Keegan as part of his argument with references to PDPs attached to exhibit*).
34. Position Description form – Current position (*Exh 31- dated November 2009 after review period; unsigned*).
35. Position Description Form – Prior Position (*Exh 32 – May 2008; duplicate of A-7-a*).
36. Key Differences between Tax Specialist and Auditor per Position Description Form (*Exh 33- written by Mr. Keegan as part of his argument with references to PDFs included in exhibit*).

B. Employment Security Department Exhibits

1. August 13, 2009 Memo (Duplicate of A-4 above)
2. Position Review Request August 2009 (Included in A-4 above)
3. Position Description Form dated June 2009 – current at time of review
4. Class Specification: Tax Specialist 3 – ES (173L)
5. Class Specification: Revenue Agent 2 (174F)
6. Agency allocation decision dated November 24, 2009 (Informational but not the decision that is the subject of this appeal).

C. Director's Exhibits

1. Class Specification: Tax Specialist 1 – ES (173J)
2. Class Specification: Revenue Auditor 1 (155A)
3. Class Specification: Revenue Auditor 2 (155B)
4. Class Specification: Auditor 2 (152I)
5. Class Specification: Auditor 4 (152K)