



STATE OF WASHINGTON
OFFICE OF FINANCIAL MANAGEMENT
STATE HUMAN RESOURCES | DIRECTOR'S REVIEW PROGRAM
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February 10, 2015

TO: Connie Goff, PHR
Rules and Appeals Program Manager

FROM: Kris Brophy
Director's Review Program Investigator

SUBJECT: Gayle Carlson v. Department of Revenue (DOR)
Allocation Review Request ALLO-14-025

Director's Determination

This Director's review was based on a review of the updated Position Description forms (PDF) on file for Ms. Carlson's position which included added notes and comments from Ms. Carlson to DOR Human Resources in November 2013.

As the Director's designee, I carefully considered all of the documentation in the file, including the exhibits presented during the Director's review conference and the verbal comments provided by both parties. Based on my review and analysis of Ms. Carlson's assigned duties and responsibilities, I conclude Tax Policy Specialist 2 (TPS 2) is the appropriate classification for her position.

Background

Ms. Carlson's position remained allocated to the Tax Policy Specialist 2 (TPS 2) class following a management-initiated request for DOR's Human Resources (HR) Office to review Tax Policy Specialist positions in the Interpretations & Technical Advice (ITA) division of DOR. On February 10, 2014, DOR-HR issued its allocation decision, concluding that Ms. Carlson's position was properly allocated to the TPS 2 class. (Exhibit B-1)

On March 10, 2014, State HR received Ms. Carlson's request for a Director's review of DOR's allocation determination. (Exhibit A-1)

On January 14, 2015, I conducted a combined Director's review conference for Gayle Carlson and Richard Cason from the same work unit at DOR. Present for the meeting were Richard Cason and Gayle Carlson; Anna Vosk, Staff Representative, WPEA; Niki Pavlicek, Programs Manager, DOR HR; and Dylan Waits, Managing Senior Policy Council, DOR.

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

Ms. Carlson works as a Tax Policy Specialist in the Interpretations & Technical Advice Division of the DOR. Ms. Carlson reports to Dylan Waits, Managing Senior Policy Council.

Her position drafts and revises rules (WAC's) and interpretive Excise Tax Advisory (ETA) statements issued by the department relating to tax programs administered by the agency. She also provides technical policy advice to division management, agency staff, and the public on the application of the agency's complex tax laws and rules.

In exhibit A-2, Ms. Carlson indicates that each staff member in the ITA has primary taxation areas assigned to them. Ms. Carlson states her assigned areas include:

- General business and occupation, retail sale, and use taxes
- Public utility tax
- Food products
- Litter tax
- Warranties/service agreements
- Reseller permits
- Discount/customer reward programs.

Ms. Carlson provided input to the Position Description form (PDF) on file for her position. Her revisions are underlined and her comments are *italicized* in the description of her assigned duties and responsibilities as follows:

60% Rules and Interpretative Statement Programs

- Drafts and revises complex rules (WACs) and interpretative statements issued by the Department at the direction of the person's manager or assistant director. These rules and statements relate to tax programs that are administered by the Department under Title 82 RCW and ancillary statutes. This requires complex legal research and analytical skills, including analysis of statutes and the interaction of the various tax programs.
- As part of the rule making and ETA processes, shares drafts with agency staff, A.G.O., specific stakeholders for input prior to any public meetings, conducts public meetings and hearings to receive public comment regarding proposed rules in accordance with the Administrative Procedures Act. *These processes include working with staff from other agencies where their input may be warranted (example: Insurance Commissioner's Office, Dept. of Licensing, WSP).*
- Stakeholder work – involves leading meetings of departmental personnel,

taxpayers, business interest groups. Works with stakeholders via phone and email, sharing proposed rules and ETAs for feedback.

- Reviews drafts and advises less experienced staff on rule and interpretative statement drafting.
- Ensures outdated or no longer needed ETAs and rules are canceled or repealed as needed when working on related ETAs or rules.

(The "Reviews existing rules and interpretative documents as part of the Department's review program" should be removed as we no longer review just to review. This is done during the revision process.)

30% Technical Advice Program

- Provides technical policy advice on complex taxation issues to division management, agency staff, and the public. This involves reviewing, analyzing, and researching state statutes and their legislative history, state rules, court decisions, the Streamlined Sales and Use Tax Agreement, and Department administrative decisions. It may involve researching, reviewing, and analyzing statutes, rules, court decisions, and administrative decisions issued by other states, or the federal government. This involves participating in meetings with department personnel, taxpayers, and business interest groups.
- Areas of lead technical policy responsibility include, but are not limited to, the B&O tax, retail sales tax, use tax, public utility tax, litter tax, and syrup tax programs.
- Reviews and advises on technical advice requests assigned to less-experienced staff.
- Reviews draft executive-level determinations issued by the Appeals Division and determinations proposed for publication.
- Reviews draft letter rulings, special notices, tax fact articles, and industry guides proposed by Taxpayer Services division for correctness of tax application, etc.
- Special projects as assigned by manager and shown in the TAR system under the Dashboard

10% **Other Duties**

- Training Program – Participating in training programs or modules that target Department staff, including personnel in operations divisions. *(With budget cuts and new online training tools there hasn't been much of this in the last few years other than CLEs which are primarily for attorneys to earn needed credits.)*
- Legislative Program – Reviewing and analyzing draft legislation, including determining fiscal impact for ITA.

- Developing internal (ITA) training materials including, but not limited to, forms for the rule and interpretative statement programs.
- Drafting tax related articles for the Intranet. (All TPSs are asked to write articles.)
- Training and assisting other staff members on using agency systems such as Tandem and IDOCS.

(I've inserted the word "complex" as I believe some of my work falls under the description of complex. When assigned work in my areas, it is not reassigned if determined at some point to be complex. Also I have had work from TPS3s reassigned to me because they are behind in their work or have left ITA.)

Summary of Ms. Carlson's Perspective

Ms. Carlson asserts she performs senior level work which includes dealing with highly-complex issues and performing complex legal research and analysis consistent with the TPS 3 class. Ms. Carlson states she drafts complex WAC revenue rules. This includes conducting public hearings and receiving testimony on proposed rule changes. For example, Ms. Carlson provided documents pertaining to the revision of WAC 458-20-178. Ms. Carlson says she also develops, interprets and advises executive management on highly complex interpretative statements (ETAs) and technical advice requests (TARs) concerning tax policy issues having industry-wide and statewide significance. In her exhibits, Ms. Carlson provided examples of two ETA assignments she completed including, "Purchases made with Funds provided by the Federal Government", and "Prepared Food Sales – Applying the 75% Test Comparison to Multiple Business Establishments."

In total, Ms. Carlson states the overall scope of her duties includes performing complex technical legal and policy analysis and research work consistent with the requirements of the TPS 3 class. Ms. Carlson contends that her position should be reallocated to that class.

Summary of DOR's Reasoning

During the review conference Ms. Pavlicek clarified that the class specifications are out of date with respect to the division's current organizational structure. She stated that Ms. Carlson is assigned to the ITA Division which was formed out of the Legal and Policy (L&P) division. Ms. Pavlicek asserts that while DOR acknowledges Ms. Carlson's high level of expertise and technical knowledge providing technical advice to agency management and staff on highly complex taxation issues that at times can have industry-wide or statewide significance, she does not meet the primary allocating factor stated in the distinguishing characteristics of being a qualified legal practitioner performing complex legal research and providing technical legal advice as an attorney.

During the review conference Mr. Waits stated that work assignments for TPS staff are first reviewed by the Division's supervisors. This consists of looking at the nature, background history, and scope of the work assignment in addition to the primary tax areas assigned to each employee. Mr. Waits indicated there is often an overlap in the level of complexity between the TPS 2 and 3 work assignments, including the level of industry-wide or statewide impact and how big the issue is and what is involved to ultimately complete the work assignment.

Mr. Waits stated that the scope and level of technical legal analysis is the primary distinction between initially assigning it at the TPS 2 versus TP S 3 level. He indicated however, that once work is assigned to a TPS 2, it is not reassigned to a TPS 3 if it is found to be of a more complex nature. In that case, the TPS 2 employee works more closely with higher level staff to complete the project. Mr. Waits asserts the overall scope of legal analysis work assigned to Ms. Carlson does reach the TPS 3 requirement of being a qualified legal practitioner performing complex technical legal analysis as required.

For each of these reasons, DOR concluded Ms. Carlson's position is properly allocated to the TPS 2 class.

Comparison of Duties

When comparing the assignment of work and level of responsibility to the available class specifications, the Class Series Concept (if one exists) followed by the Definition and Distinguishing Characteristics are primary considerations. 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.

Comparison of Duties to Tax Policy Specialist 3

The Definition for the TPS 3 class states:

In the Department of Revenue, Tax Policy and Administration Branch, develops and interprets, and advises executive management on, highly complex tax policies and issues having industry-wide and statewide significance.

The Distinguishing Characteristics for the TPS 3 class state:

Incumbents at this level serve as senior policy analysts in a variety of tax policy disciplines.

Legislation and Policy Division:

- Incumbents are qualified legal practitioners. They analyze, review, and draft proposed taxation legislation for the agency, other agencies, taxpayers and legislators. They draft WAC revenue rules and conduct public hearings regarding proposed new rules and rule changes. They provide technical legal advice on taxation issues to agency management, staff and the taxpaying public.

Research Division:

- Incumbents conduct highly complex studies upon which they base recommendations concerning the characteristics, design, implementation and administration of various tax policies. Incumbents also prepare and present testimony to legislative committees and workgroups, and advise legislators and legislative staff regarding the impacts of various tax policy options.

Interpretation and Appeals Division:

- Incumbents are qualified legal practitioners. They preside over highly complex administrative taxpayer appeals. Decisions often set precedent and require extensive research and interpretation of tax law and tax policy. Incumbents argue informal cases on the agency's behalf before the Board of Tax Appeals.

Ms. Carlson's position reaches aspects of the requirements of this class of serving as a senior policy analyst. For example, Mr. Waits clarified during the review conference that Ms. Carlson's rule making and tax policy assignments vary in complexity and all are completed by Ms. Carlson once assigned. Therefore, a portion of her duties does include responsibility for developing, interpreting and advising executive management on highly complex tax policies and issues having industry-wide and statewide significance. Ms. Carlson provided examples of work demonstrating her responsibility for drafting complex WAC revenue rules, and also completing complex ETA and TAR assignments which can have industry-wide or statewide significance.

However, Ms. Carlson's position does not reach the TPS 3 requirement of being a qualified legal practitioner performing complex technical legal analysis as required. For example, the distinguishing characteristics for this class state that positions working in the division at this level are responsible for drafting WAC revenue rules and providing technical legal advice on taxation issues to agency management and staff as qualified legal practitioners. Ms. Carlson is not a legal practitioner and her position does not provide technical legal advice on taxation issues to agency management and staff as an attorney.

In total, Ms. Carlson provides a high level of expertise and technical knowledge in her position as a tax policy specialist. Her position drafts complex WAC rules and her position provides senior level technical tax policy advice to agency management and staff, but she is not a qualified legal practitioner as required and therefore is precluded from being allocated to the TPS 3 level class.

For this reason her position should not be allocated to the TPS 3 class.

Comparison of Duties to Tax Policy Specialist 2

The Definition for the TPS 2 class states:

In the Department of Revenue, Tax Policy and Administration Branch, researches, develops, analyzes, implements, or interprets tax policy.

The Distinguishing Characteristics for this class state:

Incumbents at this level independently perform professional level work in a variety of tax policy disciplines.

Legislation and Policy Division: Incumbents perform one of three kinds of work:

- Incumbents are responsible for the implementation and integration of new tax programs or changes to existing programs. They analyze proposed tax legislation, and formulate and present policy options to executive management and legislative staff. They serve as lead policy analyst and agency liaison to state and local government and industry, and prepare and present tax policy related testimony to legislative committees and workgroups. Or;

- Incumbents research, analyze, draft, and ensure compliance with Administrative Procedures Act (APA) requirements on mainstream excise tax WAC rules. Or;

Research Division:

- Incumbents conduct tax studies of major importance. They are responsible for the implementation, direction and review of all aspects of a study to include the assessment of impacts and policy implications from the agency perspective. Incumbents prepare and present testimony to legislative committees and workgroups.

Interpretation and Appeals Division:

- Incumbents, as qualified legal practitioners, assist a Tax Policy Specialist 3 in the analysis and development of administrative tax policy, perform legal research, and prepare draft decisions and determinations for less complex taxpayer appeals.

This class generally addresses the scope of Ms. Carlson's responsibility for independently performing professional level tax policy work. This includes developing rules and providing formal and informal technical policy advice to management and staff regarding tax policy issues. She researches, analyzes and drafts mainstream excise tax WAC rules and conducts public hearings and receives testimony regarding proposed rules. However, in addition, a portion of her duties includes responsibility as a senior policy analyst for developing, interpreting and advising executive management on highly complex tax policies and issues having industry-wide and statewide significance.

However, as a whole, when comparing the definition and distinguishing characteristics of the two classes, given the requirement at the TPS 3 level of having responsibility for being a qualified legal practitioner, the TPS 2 class provides an overall better fit for the majority of work that Ms. Carlson performs.

In *Salsberry v. Washington State Parks and Recreation Commission*, PRB Case No. R-ALLO-06-013 (2007), the Personnel Resources Board addressed the concept of best fit. The Board concurred with the former Personnel Appeals Board's conclusion that while the appellant's duties and responsibilities did not encompass the full breadth of the duties and responsibilities described by the classification to which his position was allocated, on a best fit basis, the classification best described the level, scope and diversity of the overall duties and responsibilities of his position. *Allegrì v. Washington State University*, PAB Case No. ALLO-96-0026 (1998).

Therefore, when determining the appropriate classification for a specific position, the duties and responsibilities of that position must be considered in their entirety and the position must be allocated to the classification that provides the best fit overall for the majority of the position's duties and responsibilities. *Dudley v. Dept. of Labor and Industries*, PRB Case No. R-ALLO-07-007 (2007).

In this case, the majority of the duties assigned to Ms. Carlson's position and her level of responsibility are best described by the Tax Policy Specialist 2 class. Her position should remain allocated to that class.

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 PO Box 40911, Olympia, Washington, 98504-0911. The PRB Office is located on the 3rd floor of the Raad Building, 128 10th Avenue SW, Olympia, Washington. The main telephone number is (360) 407-4101, and the fax number is (360) 586-4694.

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

c: Gayle Carlson
 Anna Vosk, WPEA
 Niki Pavlicek, DOR

Enclosure: List of Exhibits

A. Gayle Carlson Exhibits

1. DOR Desk Audit Results Letter
2. Memo from Gayle Carlson
3. Agenda – April 10, 2013 and October 30, 2013
4. Is Blanched Crab Raw Crab – September 16, 2013
5. Tax on Spirits Tasting Samples – December 12, 2013
6. Nonresident Vessel Brought into Washington for Repair – March 25, 2013
7. (City) Combined Sewer System Project – June 10, 2013
8. School Bus Operators – November 21, 2013
9. Washington Ports and the Taxability of “Dockage Fee” Income – October 2013
10. Port Charges for Dockage, Berthage, and Moorage of Ocean Vessels
11. How are Port Charges for Dockage Berthage and Moorage of Ocean Vessels Taxed? – April 20, 2014
12. Purchases Made with Funds Provided by the Federal Government – July 18, 2013
13. Prepared Food and Sales Applying the 75% Test Computation to Multiple Business Establishments – November 27, 2013
14. Rule 178 CR 101 Meeting Agenda – October 23, 2013
15. Rule 178 CR 102 Hearing Agenda – January 15, 2014
16. Memo to Agency Head from Gil Brewer to Gail Carlson – March 12, 2014
17. Concise Explanatory Statement Prepared by Gayle Carlson
Exhibit submitted during the review conference
18. Talking points for the review conference prepared by Gayle Carlson

B. DOR Exhibits

1. Allocation determination letter (includes position description relevant to the time period and an organizational chart)
2. Position description with added notes to identify differences between previous position description and Ms. Carlson's current duties (provided via email 11/04/13) includes notes from desk audit conducted 11/13/13
3. Classification criteria considered, includes the following:
 - Tax Policy Specialist 2 job specification
 - Tax Policy Specialist 3 job specificationExhibit added during the review conference
4. ITA Division staff assignment list

C. Class Specifications

1. State HR Class Specification for Tax Policy Specialist 2
2. State HR Class Specification for Tax Policy Specialist 3