February 5, 2009

TO: Edward E. Younglove, III
Younglove Lyman & Coker, P.L.L.C

FROM: Teresa Parsons
Director's Review Program Supervisor

SUBJECT: Brittany Grove v. Department of Transportation (DOT)
Director's Review Request No. RULE-08-004

On January 6, 2009, I conducted a Director's review telephone conference regarding Ms. Grove's allegations that DOT violated civil service laws and rules. Besides you and Ms. Grove, the following individuals participated in the telephone conference on behalf of DOT: Kermit Wooden, Director of Human Resources, and Niki Pavlicek, Classification and Compensation Manager.

Nature of Alleged Violation

On July 16, 2008, Ms. Grove filed a request for a Director's review alleging DOT violated rules regarding her reversion from an in-training position to another position in the agency. Specifically, Ms. Gove alleges DOT violated the following rules:

WAC 357-19-115, which provides, in part, that:

> A permanent employee who does not satisfactorily complete the trial service period . . . or has failed to progress to the next step of an in-training plan in accordance with WAC 357-19-285, has reversion rights with the current employer at the time of reversion. An employee has the right to revert to a position, if available, in accordance with the following:
>
> (1) For employees reverting from trial service following a promotion, transfer or elevation, the employer must revert the employee to a vacant position, or a position filled by a nonpermanent appointee as defined in WAC 357-01-210, for which the employee satisfies competencies and other position requirements and which is:
>
> (a) Allocated to the class the employee last held permanent status in; or

> (b) If no positions are available, allocated to a class which has the same or lower salary range maximum.
>
> . . .

WAC 357-28-150, which provides, in part, that:

> When an employee is being reverted following a promotion or transfer, the employee's base salary is set at the step the employee would be at if he/she had not left the position.
>
> . . .

Background

Ms. Grove began her employment with DOT in a non-permanent, on-call position on July 16, 2006. In December 2006, Ms. Grove promoted to a project position as an Office Assistant 3 (OA 3). On June 15, 2007, Ms. Grove gained permanent status as an OA 3. On August 1, 2007, Ms. Grove was appointed to a Human Resources Consultant Assistant 2 (HRCA 2) position. Ms. Grove completed a trial service period for her HRCA 2 position on January 31, 2008. On February 1, 2008, Ms. Grove promoted to a Human Resources Consultant 1 (HRC 1) in-training position, number 01451 (Exhibit 14).

As part of the in-training plan, Ms. Grove remained classified at the HRCA 2 level in position #01451. While assigned to position #01451, Ms. Grove worked in the Human Resources Division located in the Headquarters Office in Olympia and reported to two supervisors: Ms. Stephanie Price (also her previous supervisor) for labor and employee relations issues and Mr. Tam Le for operational issues. The in-training plan related only to the operational functions supervised by Mr. Le, such as processing personnel actions.

On June 19, 2008, DOT notified Ms. Grove she was not able to complete her in-training program and that she was being reverted to an OA 3 position, citing WAC 357-19-115. In the June 19 letter, DOT indicated there were no vacant, funded HRCA 2 positions available (Exhibit 4).

Summary of Ms. Grove's Allegations

Ms. Grove asserts she had successfully completed a trial service period and gained permanent status as an HRCA 2 prior to accepting the promotion to the HRC 1 in-training position (#01451). Therefore, Ms. Grove contends the class in which she last held permanent status prior to her promotion to the HRC 1 in-training was the HRCA 2 class. As a result, Ms. Grove asserts DOT was first obligated to look for a vacant HRCA 2 position, including all statewide positions, before reverting her to the OA 3 position. Ms. Grove believes she meets the competencies required of an HRCA 2 position, as reflected in her previous performance evaluation completed by Ms. Price (Exhibit 20). Ms. Grove further asserts there are vacant or non-permanent HRCA 2 positions for which she qualifies

outside of the Olympia area (Exhibit 16). In addition, Ms. Grove contends that even if her reversion is to the OA 3 class, DOT is still required to pay her the same salary she had prior to leaving the HRCA 2 position.

Summary of DOT's Response to Alleged Rule Violations

DOT contends there are no vacant, non-permanent positions for which Ms. Grove meets the competencies at the HRCA 2 level in the Headquarters region. DOT asserts the agency is not required to consider positions agency-wide when reverting an employee from a trial service or in-training position. Instead, DOT contends the agency has consistently followed the WAC and internal procedures related to a layoff unit when processing a reversion. Specifically, DOT contends "a person being reverted is not offered more than a person being laid off" (Exhibit 5). DOT's internal layoff policy defines a layoff unit as "[t]he geographical or administrative units from which RIF [reduction in force] options are derived . . ." (Exhibit 11). DOT maintains that since 2002, the agency has consistently looked at the relevant layoff unit when determining available positions for both non-represented and represented employees who revert from a trial service or in-training program following a promotion. In addition, DOT asserts the agency paid Ms. Grove the appropriate salary following her reversion to the OA 3 position. DOT asserts Ms. Grove was paid the same base salary and step she was earning as an OA 3 prior to her appointment to the HRCA 2 position on August 1, 2007. DOT maintains the agency has not violated any civil service laws or rules.

Director's Determination and Rationale

Ms. Grove has met her burden of proving DOT violated WAC 357-19-115(1)(a) and WAC 357-28-150.

At the time of her reversion, Ms. Grove had been appointed to an HRC 1 in-training position (#01451). Even though the position was an HRC 1 in-training, Ms. Grove had not yet achieved HRC 1 status and was essentially working and being compensated as an HRCA 2 in position #01451. Position #01451, however, differs from the HRCA 2 position she held just prior to promoting to the HRC 1 in-training. Therefore, when considering the highest class of position Ms. Grove held prior to promoting to the HRC 1 in-training, the HRCA 2 is the correct classification.

WAC 357-19-115 provides an employee not completing a trial service period or progressing to the next step of an in-training plan the right of reversion. In relevant part, WAC 357-19-115(1) first provides:

> . . . the employer must revert the employee to a vacant position, or a position filled by a nonpermanent appointee as defined in WAC 357-01-210, for which the employee satisfies competencies and other position requirements and which is:
>
> (a) Allocated to the class the employee last held permanent status in;

. . .

In this case, the HRCA 2 class is the last class in which Ms. Grove held permanent status.

During the Director's review conference, DOT indicated the agency's practice has been to consider the employee's layoff unit, as defined by DOT policy, when reverting an employee to a position in a class previously held. DOT also indicated this practice has been applied to employees covered by a collective bargaining agreement, as well as employees covered by the civil service rules. Since Ms. Grove's HRC 1 in-training position (#01451) was not covered by a collective bargaining agreement at the time of her reversion, the civil service rules apply. As such, there is no language in the rule that indicates that a position in the class the employee last held permanent status in is limited to a geographical area or particular layoff unit. Furthermore, an agency practice or policy cannot provide less than the rules. The only connection a reverted employee has to a layoff action is the right of the reverted employee to request placement on the employer's internal layoff list, if not returned to a permanent position in the class he/she last held permanent status (WAC 357-19-117) (Exhibit 8). It is undisputed that Ms. Grove did not ask to be placed on an internal layoff list.

At the time of Ms. Grove's reversion, DOT only considered vacant, non-permanent HRCA 2 positions available in the Headquarters region. Therefore, Ms. Grove has proven DOT violated WAC 357-19-115(1)(a) by not considering all vacant, non-permanent (as defined in WAC 357-01-210) positions allocated to the class in which she last held permanent status and satisfied the competencies. During the Director's review conference, I asked DOT to provide a list of statewide positions at the HRCA 2 level, as well as classes with the same or lower salary range maximum. On January 6, 2009, Ms. Pavlicek provided the list of statewide positions, effective June 2008, in an email attachment with a copy to you (Exhibit 21). As a remedy, DOT should first consider the list of statewide positions that are vacant or non-permanent (as defined in WAC 357-01-210 and WAC 357-19-360) that Ms. Grove satisfies the competencies for in the HRCA 2 classification. If no positions are available, then DOT should consider positions allocated to a class which has the same or lower salary range maximum, as stated in WAC 357-19-115(1)(b).

With regard to salary, WAC 357-28-150 provides, in relevant part, that the base salary for an employee who is reverted following promotion or transfer "is set at the step the employee would be at if he/she had not left the position." In this case, *the position* Ms. Grove left to take the HRC 1 in-training (#01451) position was the HRCA 2 position she was appointed to on August 1, 2007, gaining permanent status on January 31, 2008. Accordingly, Ms. Grove has proven that DOT violated WAC 357-28-150 by not setting her base salary at the step she was at when she left the HRCA 2 position on February 1, 2008. It is important to note that the base salary of a reverted employee following promotion or transfer differs from a reverted employee following voluntary demotion.

In summary, DOT's obligation is to revert Ms. Grove to a position the agency determines she meets the competencies for in a classification consistent with the criteria outlined in WAC 357-19-115(1). This will be accomplished by first considering agency-wide positions

in the HRCA 2 classification. If no available positions exist, then DOT has met the obligation of reverting her to a position in a class with the same or lower salary range maximum with the appointment to the OA 3 position. In either case, DOT is obligated to compensate Ms. Grove at the salary level she would be at if she had not left the HRCA 2 position on February 1, 2008, consistent with WAC 357-28-150.

Appeal Rights

WAC 357-49-018 provides that either party may appeal the results of the Director's review to the Personnel Resources Board (board) by filing written exceptions to the Director's determination in accordance with Chapter 357-52 WAC.

WAC 357-52-015 states that an appeal must be received in writing at the office of the board within thirty (30) calendar days after service of the Director's determination.

The address for the Personnel Resources Board is 2828 Capitol Blvd., P.O. Box 40911, Olympia, Washington, 98504-0911.

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

c: Brittany Grove
Kermit Wooden, DOT
Niki Pavlicek, DOT
Connie Goff, DOP

Enclosure: List of Exhibits