SUSAN BUCHANAN,

Grievant,

v. DOCKET NO. 94-BOD-078

BOARD OF DIRECTORS/CONCORD COLLEGE,

Respondents.

D E C I S I O N

Grievant, Susan Buchanan, was employed by Respondent, Concord College, in June 1990 and assigned the job classification title of Secretary IV with a rate of pay (Paygrade 6) commensurate with that title. Grievant was assigned work duties within the college library and reported to her immediate supervisor, Mr. Thomas Brown, librarian at both Concord and Bluefield State Colleges. Grievant filed a grievance on October 25, 1993 contending that her classification as Secretary IV was inappropriate and requesting reclassification with back pay from her date of hire. (See footnote 1) Prior to the filing of the grievance, Respondent Concord College ("Concord"), in response to Grievant's formal reclassification request in July 1993, agreed to reclassify the Grievant effective December 1993 and to give her a lump sum back pay award of$6,000.00. The Grievant agreed to reclassification as a Systems Programmer III, Pay Grade 12, but declined the back pay award.

Background

1. Concord is a state-owned institution of higher education and is governed by the Respondent Board of Directors. The job description of Secretary IV was promulgated by the West Virginia Board of Directors of the State College System and Respondent Concord was bound by that job description.

2. Grievant began her employ as Secretary IV/Acquisitions Supervisor, paygrade 6, in the Library at Concord in June 1, 1990. 3. Several efforts had been made in the past to have the position in the Library upgraded. Former Director of the Library, Michael Pate, had advised then-

Academic Dean Donald Bronsard that then-secretary, Margaret Almeda Pettrey, had taken on the duties of library acquisitions. Ms. Pettrey was then a Secretary III. Mr. Pate attempted to have the position upgraded on or about April 30, 1984. G. Ex. 14. No action was taken at that time. A subsequent request for upgrade was made by the subsequent Director of the Library, Mr. Thomas Brown, on September 9, 1985. Again, no action was taken by Respondent concerning that request. G. Ex. 24.

4. Mary Alice Schaeffer replaced Ms. Pettrey in the Library. Mr. Brown asked that Ms. Schaeffer be reclassified to Library Associate: Office Supervisor at Paygrade 8, on May 6, 1988, June 9, 1988, and July 7, 1988. G. Ex. 24, 26. Mr. Brown noted that, in addition to the acquisitions responsibilities which had been added when Ms. Pettrey held the position, further additionalresponsibilities of managing the computer operation in the library had been added once Ms. Schaeffer assumed the position. G. Ex. 25. No action was taken by Concord concerning this request.

5. Ms. Schaeffer completed a job analysis questionnaire on October 10, 1988, which reflected that her duties included the library's ongoing automation efforts and the computerized communications systems used by the library. G. Ex. 29.

6. Thereafter the personnel officer, after noting that the state specified job descriptions did not contain the title of Library Associate: Office Supervisor, did recommend that the position be upgraded to Secretary IV. G. Ex. 30. Mr. Brown responded to the recommendation of the personnel officer in writing to then-Academic Dean John Carrier. Mr. Brown advised Dr. Carrier that the acquisitions duties and automation duties were not at the same level as the work performed by a Secretary IV and "that this position is at the highest level of non-professional activity in the library's operation." Mr. Brown also informed Dr. Carrier that he spent at least half of his time at the library at Bluefield State College and greatly depended on Ms. Schaeffer's expertise and skill level in maintaining the Concord library in his absence. G. Ex. 31.

7. Concord reclassified the position to Secretary IV. Mr. Brown wrote again to Dean Carrier and to the personnel office expressing his dissatisfaction with the classification, noting that when the time came to replace Ms. Schaeffer, the new employee wouldrequire extensive training with the automated aspects of the library operation. G. Ex. 32, 33.

8. Ms. Schaeffer subsequently left Concord College in 1990. Concord posted the vacant position as "Secretary IV/Acquisitions Supervisor". The posting set forth the following qualifications:

"High school graduate with relevant background in a library of some complexity, specific understanding of dBase, Wordstar, and VTLS software are essentials." The duties and responsibilities were described on the posting as "Acquisitions supervisor, department office supervisor, and liaison between the library and VTLS." G. Ex. 34.

9. Grievant assumed the duties of the position on June 1, 1990. G. Ex. 8. Her evaluations from June 1991 to the current date have been very good or exceptional. G. Ex. 8-10.

10. Grievant began informal discussions with Kathy Prince, Director of Personnel, and Mr. Brown, about the possibility of reclassification almost immediately after her hire and continuing through July, 1993, when she made a formal written request for reclassification to Dr. Beasley.

11. Mr. Brown never sought Grievant's reclassification by formal written request as he had for Ms. Schaeffer.

12. During this time, the "Mercer Study", an attempt to review all job classifications in higher education throughout West Virginia, was being conducted. Apparently, the Board of Directors in essence imposed a "freeze" on all reclassification requests pending the outcome of the Mercer Study. Ms. Prince informedGrievant of this situation, but told her that if she could show that her job responsibilities had changed more than 25% since she assumed the position, she could be considered for reclassification. There apparently was some misunderstanding and confusion with regard to this conversation. Grievant believes that Ms. Prince told her and the campus staff representative, Amy Pitzer, that she could not file a grievance unless her job responsibilities had changed more than 25%. Ms. Prince denies telling Grievant or Ms. Pitzer that Grievant could not file a grievance.

13. Grievant learned that other employees were being considered for reclassification at some point and wrote to Dr. Jerry Beasley on July 16, 1993 requesting reclassification. This was her first formal written reclassification request. G. Ex. 36. In support of her request she attached a copy of a Position Information Questionnaire (PIQ) which she had prepared in November 1991 as part of the Mercer Study. The PIQ was approved by her supervisor and then-Vice President John Carrier. This document reflected her duties and responsibilities at the time it was completed.

14. The onset of computer operations within the library at Concord and the extent of those operations over the years, including the changing configuration of equipment and software, have been well-documented by the Grievant and the College has taken little exception with that

documentation. G. Exs. 1, 2, 11-13, 16-23, 27, 28, 29, 50, 55, 62, 64-66.

15. Grievant also submitted a ten-year overview of the history of her position. The ten-year overview supported Grievant's assertions that she spent the majority of her time performing computer-related duties.

16. Grievant requested a response from the President within 60 days as set forth in the staff handbook.

17. Kathy Prince reviewed the documentation submitted by Grievant, and in a letter dated October 12, 1993 to President Beasley, recommended that Grievant be reclassified somewhere between a paygrade 8 and 10. This was based on all of the information that Grievant provided at that time.

18. Kathy Prince forwarded this recommendation to Grievant on October 14, 1993. In that memorandum, Ms. Prince acknowledged that no positions on Concord's campus had been upgraded while the Mercer study was ongoing except where reclassifications had been mandated by grievance decisions. Ms. Prince advised Grievant that she felt she was improperly classified but was reluctant to make a final recommendation until certain updated information could be obtained from Grievant. Ms. Prince advised Grievant that whatever action was taken would relate back to October 18, 1993, the next payroll period following the sixty-day period for the President's consideration of the reclassification request. G. Ex. 38. Grievant did submit a revised PIQ requested by Ms. Prince.

19. Dr. Beasley offered to reclassify Grievant's position based upon the recommendation of Ms. Prince. Grievant rejected the offer and the parties thereafter attempted to negotiate anagreeable outcome to the reclassification request. They were unable to do so and Grievant filed the instant grievance on October 25, 1993. G. Ex. 39.

20. As a result of this grievance, Ms. Prince conducted a desk audit of Grievant's position in November 1993. Based on the desk audit, Ms. Prince determined that as of that date Grievant's position more closely matched that of a Systems Programmer III than that of a Secretary IV.

21. As a result of the settlement of Grievant's proper classification, Respondent began paying her, as of January 1, 1994, at a rate equivalent to that paid to Systems Programmer III, Paygrade 12, although her title was not changed. The change in pay did not relate back to October 18, 1993 as earlier represented by Ms. Prince.

22. The Grievant proceeded through the appropriate grievance levels. Academic Dean Turner

acknowledged at Level II that Grievant's proper classification as of the desk audit in November 1993 was more closely aligned to that of a Systems Programmer III. However, Dean Turner found that Grievant was not entitled to back pay.

Discussion

The parties are in agreement that, as of the time of the desk audit, Grievant's position was more closely aligned to that of a Systems Programmer III. Grievant accepted the upgrade of her position effective January 1, 1994. The only contention remaining is that of back pay. Grievant believes that she was a SystemsProgrammer III from her June 1, 1990 date of hire. Grievant requests back pay with interest from June 1990 to December 31, 1993; interest from January 1, 1994 until award, if any; and 6% matching contributions to TIAA CREF, the higher education pension fund.

Respondent argues that Grievant's job duties evolved over time to her current classification and she was not performing the duties of Systems Programmer III when she was hired. Alternatively, Respondent argues that even if she was performing those duties, she is barred by the doctrine of laches from recovering back pay to her date of hire because she unduly delayed pursuing her rights through the grievance process until October, 1993.

Based on the many exhibits presented by Grievant and the testimony of Grievant and her supervisor, Mr. Brown, the undersigned finds that Grievant was performing the duties of Systems Programmer III at the time she was hired by Concord on July 1, 1990. While it is true that computer technology has grown and become more sophisticated over the years, it is not necessarily true that Grievant was not performing the same trouble-shooting and programming duties in 1990 with the then-available equipment. The Systems Programmer III classification specification speaks to the duties performed in relation to the equipment, rather than the nature of the equipment itself. G. Ex. 57.

Grievant testified that she began having conversations with Mr. Brown and Ms. Prince "almost immediately" after she was hired regarding the possibility of reclassification. There is no disputethat Grievant was informed that Concord was not reviewing reclassification requests while the "Mercer Study" was on-going unless employees could show that their job duties had changed by at least 25%, and that she was advised to wait until the study was completed.

Grievant, however, contends that Ms. Prince told her that she could not file a grievance over her

classification until the Mercer Study was completed. Ms. Prince does not deny that she told Grievant it would be better to wait to pursue her reclassification until the completion of the Mercer Study. Ms. Prince does not remember telling Grievant or her representative, Amy Pitzer, that she could not file a grievance. Ms. Prince opined that had she made that statement, it was unlikely that Ms. Pitzer, the employee representative, would have calmly acquiesced.

It was not until Grievant found out that other Concord employees had been reclassified that she formally requested reclassification. Ms. Prince informed Grievant that those employees had been reclassified as a result of favorable grievance decisions. Thus, it is apparent that employees were permitted to file grievances over their classifications while the Mercer Study was being conducted. Therefore, while it appears that there was some misunderstanding or miscommunication, the undersigned does not find that Concord deliberately denied Grievant the opportunity to file a grievance over her classification.

A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as theexpenditure of public funds. Failure to do so constitutes laches. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987). "Laches" is a delay which operates prejudicially to another person's rights. Carter v. Carter, 148 S.E. 378 (W. Va. 1929); Bank of Marlinton v. McLaughlin, 1 S.E.2d 251 (W. Va. 1939). It is well-established that for laches to attach two elements must be established: lack of due diligence on the part of the party asserting its claim and prejudice to the opposing party resulting from the delay. Dollison v. W. Va. Dept. of Emp. Sec., Docket No. 89-ES-101 (Nov. 3, 1989).

In the instant case, Ms. Buchanan may have been misinformed about her options, or merely misunderstood them, but she had a duty to pursue the matter further. This she did not do until she filed her grievance in October, 1993. Therefore, Ms. Buchanan did not excerise due diligence in pursuing her claim through the grievance process.

However, "delay alone does not constitute laches; it is delay which places another at a disadvantage". Maynard v. Bd. of Educ. of Wayne County, 357 S.E.2d 246, 253 (W. Va. 1987). Thus, even though the undersigned has found that Grievant failed to diligently pursue her claim, Respondent is not entitled to relief under the doctrine of laches because it has failed to establish prejudice. Respondent's primary argument appears to be that it will suffer financial hardship should back pay be awarded, relying on Maynard, supra. However, Respondent has offered no evidence

that it is prejudiced in any way, e.g., financially or in its ability topresent a proper defense against the claim. In contrast, the defendant in Maynard proved that is was unable to compensate the plaintiffs for the ten-years' accumulated supplemental payments they requested, for compensation for all the payments would have to had to come out of one year's budget, which was limited by the taxes collected therefor. See also, Cart v. W. Va. Dept. of Veterans Affairs, Docket Nos. 88-VA-070, 071, 180 (Aug. 3, 1989); Gary v. W. Va. Div. of Human Services, Docket No. 89-DHS-299 (Dec. 27, 1990).

Based on the evidence presented in this matter, including substantial evidence on damages, the undersigned makes the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant has demonstrated that the duties of her position since the date of her hire on July 1, 1990, more closely match the class specification for Systems Programmer III than those for Secretary IV.

2. Grievant was informed by Kathy Prince, Director of Personnel, that Concord was not reviewing reclassification requests while the "Mercer Study" was being conducted unless employees could show their duties had changed by at least 25%. Ms. Prince advised Grievant that it might be better to wait until the Study was completed to submit a reclassification request.

3. Ms. Prince did not tell Grievant that she could not file a grievance over her reclassification.

4. Grievant waited until July 1993 to formally request reclassification and did not file her grievance until October 1993.

Conclusions of Law

1. A higher education employee may challenge her current position classification and will prevail if she can prove by a preponderance of the evidence that there is a BOD classification that more closely matches her current duties. Lusk v. Concord College, Docket No. 91-BOD-364 (Jan. 28, 1993); Elkins v. Southern W. Va. Comm. College, Docket No. 90-BOD-124 (Mar. 4, 1991).

2. Grievant has shown by a preponderance of the evidence that her duties more closely matched that of a Systems Programmer III than that of a Secretary IV at the time of her hire on July 1, 1990.

3. Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of the expenditure of public funds. Failure to do so constitutes laches. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987).

4. "Delay alone does not constitute laches; it is delay which places another at a disadvantage". Maynard, supra.

5. It is well-established that for laches to attach two elements must be established: lack of due diligence on the part of the party asserting its claim and prejudice to the opposing party resulting from the delay. Dollison v. W. Va. Dept. of Emp. Sec., Docket No. 89-ES-101 (Nov. 3, 1989). While Grievant failed todiligently pursue her claim through the grievance process, Respondent likewise failed to show by the evidence that it will be prejudiced by Grievant's delay.

Accordingly this grievance is **GRANTED**. Respondents are hereby **ORDERED** to compensate Grievant for the difference in salary between Secretary IV, Paygrade 6 and Systems Programmer III, Paygrade 12, for the period June 1, 1990 through December 31, 1993, plus allowabe interest. Respondents are further **ORDERED** to compensate Grievant for interest for the period January 1, 1994 until November 30, 1994, the date of this award. Grievant is further entitled to all benefits, including retirement benefits, which may have accrued as a result of the salary differential from June 1, 1990 until December 31, 1993.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: November 30, 1994

Footnote: 1 *Grievant's classification grievance arises out of events that preceded the "Mercer Study", thus her grievance is not included with grievances filed as a result of the Study.*