**TERRI COLLINS, ET AL.**

**v.** **Docket No. 94-BEP-1080**

**BUREAU OF EMPLOYMENT PROGRAMS/**

**WORKERS' COMPENSATION DIVISION**

## D E C I S I O N

Grievants, Terri Collins, Janet Miller, Brenda Knight, Brenda Hamon-Potter, Lisa Bragg, Pamala Hill and Charles Ray, grieve the Level III decision which reclassified them from Office Assistant II ("OA II") to Office Assistant III ("OA III"), but failed to grant them back pay from the filing of the original grievance. A Level IV hearing (See footnote 1) was held on February 2, 1995, and the case became mature for decision on February 28, 1995, after the submission of proposed findings of fact and conclusions of law.

### Background

This instant grievance was part of another grievance styled Agnew, et al. v. Bureau of Employment Programs/Workers' Compensation Div. and W. Va. Div. of Personnel, originally filed on July 20, 1992. The Agnew grievants requested they be reclassifiedfrom OA IIs to OA IIIs, and receive all appropriate back pay. The Grievants in this case ("Collins Grievants") joined the Agnew grievance on September 15, 1994. The original Agnew grievants were reclassified and received back pay from December 1, 1991, the date of their original reclassification as the result of a Level III decision. The Collins Grievants, as a result of this same Level III decision, were reclassified and received back pay only to September 1, 1994, the ten day time period preceding their filing.

### Issue

The Collins Grievants argued they relied upon statements by their supervisors and other employees in the Agnew group that there was no need for them to join the grievance as they would be included in all requested relief if the grievance was granted.

Respondent argued the supervisors' comments were not "authoritative statement[s]" and "did not in any reasonable way prevent the Grievants from obtaining information regarding actions required by the grievance procedure or dissuade the Grievants from joining the grievance at an earlier date." Resp. Finding of Fact at 4.

## Findings of Fact

The following finding of facts are undisputed:

1. The Agnew grievants filed their grievance on July 20, 1992.

2. The Collins Grievants joined the Agnew grievance on September 15, 1994, after being told by Ms. Thomas, an originalgrievant, that they would not be included in the grievance unless they signed the correct form.

3. All of the Collins Grievants joined their Division, Claims Information, after the positions had been reclassified: Bragg - March, 1992; Collins - May 17, 1992; Knight - February, 1993; Miller - January, 1993; Hamon-Potter - August, 1993. Only Grievant Collins was in the Division at the time the grievance was filed.

4. None of the Collins Grievants received any information about the grievance procedure from their supervisor.

5. These Grievants were told or found out at various times after their arrival, that there was a grievance in process, and they would be included in the relief if it were granted.

6. Grievants submitted a notarized affidavit signed by both former supervisors and Ms. Ramona Agnew, an original grievant. This affidavit states:

TO: JANIS I. REYNOLDS, ADMINISTRATIVE LAW JUDGE
WEST VIRGINIA EDUCATION AND STATE EMPLOYEES
GRIEVANCE BOARD

FROM: VICKI SMOOT, HERSHEL SLAPPE, MARGIE THOMAS (See footnote 2) AND
RAMONA AGNEW

DATE: FEBRUARY 8, 1995

THIS IS TO CERTIFY THAT WE, THE UNDERSIGNED, HAD NO KNWLEDGE [SIC] THAT THE SECOND PARTY OF NEWLY-JOINED GRIEVANTS WERE REQUIRED TO TAKE ANY STEPS TO

BE MADE PART OF THE GRIEVANCE ORIGINALLY FILED BY RAMONA AGNEW AND OTHERS. WE ALSO WERE UNDER THE ASSUMPTION THAT ONCE THE FIRST GROUP OF GRIEVANTS PREVAILED, THAT THE SECOND GROUP WOULD BE INCLUDED IN WHATEVER DECISION WAS HANDED DOWN, ALSO INCLUDING THE BACK PAY AWARDED.
IF WE WERE QUESTIONED BY A MEMBER OF THE SECOND GROUP OF GRIEVANTS, WE TOLD THEM THAT THERE WAS NOTHING THAT WE WERE AWARE THAT THEY NEEDED TO DO TO BE MADE PART OF THE GRIEVANCE.

There was no rebuttal to this sworn statement.

7. Grievant Bragg called the Division of Personnel, shortly after her hiring, and asked what action she should take to join the grievance. She was told no action was necessary.

## Discussion

This Grievance Board has repeatedly ruled that misclassification is an ongoing practice, and as such may be alleged at any time. Haley v. Dept. of Transportation/Div. of Highways, Docket No. 93-DOH-148 (Apr. 29, 1994); Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052/169 (Sept. 27, 1991). "Depending on the circumstances surrounding the filing W. Va. Code §29-6A-4 may limit the amount of damages." Haley at 10. "As a general rule, where a state employee is aware of the facts constituting a grievable matter and delays filing[,] relief is limited to the ten-day period preceding the filing of the grievance." Hatfield at 5.

On the other hand, this Board has refused to bar relief to employees who have made "a good faith, diligent effort to resolve a grievable matter" and have "relie[d] in good faith upon the representations of [their supervisor] that the matter will be rectified." Blevins v. Fayette County Bd. of Educ., Docket No. 10-87-161 (Oct. 22, 1987); Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987). Subsequent to these decisions, the West Virginia Supreme Court stated "equitable estoppel isavailable only if the employees otherwise untimely filing was the result 'either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.'" Indep. Fire Co. v. Human Rights Comm'n, 376 S.E.2d 612, 615 (W. Va. 1988) (citing Mull v. Arco Durethene Plastics, Inc. 784 F.2d 284, 291 (7th Cir. 1986) citing Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir.

1982)); See also Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843, 846 (W. Va. 1989).

The evidence in this case is sufficient to support a finding of equitable estoppel. The actions of the two supervisors in telling the Grievants there was no need to join the grievance, and that a favorable result would include all people in their Division currently working as OA IIs clearly caused the Grievants to delay filing.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. Grievants have the burden of proving their case by a preponderance of the evidence. Haley v. Dept. of Transportation/Div. of Highways, Docket No. 93-DOH-148 (Apr. 29, 1994).

2. Grievants, who rely in good faith on the actions of their supervisor, that a grievable matter will be rectified and no further action is required by them, will not be time barred from pursuing a grievance for complete relief. Indep. Fire Co. v. HumanRights Comm'n, 376 S.E.2d 612, 615 (W. Va. 1988); Blevins v. Fayette County Bd. of Educ., Docket No. 10-87-161 (Oct. 22, 1987); Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987).

3. Grievants have demonstrated by a preponderance of the evidence that they relied in good faith and to their detriment on the representations of their supervisors in not filing this grievance sooner.

Accordingly, this grievance is **GRANTED**. The Grievants are entitled to full back pay from the time they became OA IIs in the Claims Information Division to the present.

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.

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**JANIS I. REYNOLDS**

**Administrative Law Judge**

**Dated: April 28, 1995**

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*Footnote: 1Ms. Hill and Mr. Ray elected not to proceed to hearing as their pay level prevented them from receiving a back pay award pursuant to W. Va. Administrative Rule 5.04(f)(2)(a)(2).*

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*Footnote: 2Ms. Thomas was unable to sign the affidavit due to illness.*