DENISE HARDY

v. **DOCKET NO. 94-MBOD-963**

BOARD OF DIRECTORS,

WEST VIRGINIA INSTITUTE OF TECHNOLOGY

D E C I S I O N

This grievance, filed at Level III by Grievant, Denise Hardy (See footnote 1), against Respondent, the Board of Directors, West Virginia Institute of Technology, on July 26, 1994, arises out of the Mercer reclassification, (See footnote 2) and challenged Grievant's classification as Business Manager II, pay grade 19, from January 1, 1994. Grievant sought as relief a higher pay grade of 21 for her position.

This matter was set for hearing at Level IV on September 25, 1995. On September 13, 1995, Respondent filed a Motion to Dismissthis grievance. The grounds for dismissal were that Grievant had not followed the internal procedures for challenging her classification. Grievant did not file a request for review form with the president of the college by January 31, 1994 (See footnote 3), as required by 131 C.S.R. § 62-18, so the classification could first be reviewed by the Job Evaluation Committee ("JEC"), which had been charged by the governing boards of higher education with classifying all employees affected by the reclassification project.

The undersigned notified the parties prior to the hearing that evidence would be taken on the Motion to Dismiss at the beginning of the Level IV hearing. After taking evidence on the Motion to Dismiss, the undersigned announced to the parties on September 25, 1995, that this grievance would be dismissed, and evidence on the grievance was not taken. The following findings of fact are made from the Level IV hearing on the Motion to Dismiss, and support the conclusion that this grievance could not be filed by Grievant.

Findings of Fact

1. Grievant is a classified employee of the Board Of Directors, West Virginia Institute of

Technology.

2. On November 30, 1993, Grievant was notified of her classification as Business Manager II, pay grade 19. The notification directed employee questions about the appeals process to the Human Resources Office.

3. The President of West Virginia Institute of Technology, John P. Carrier, sent a memorandum to all classified employees of the college, dated January 7, 1994, in which he explained, "[i]f employees do not file an internal review [of their classification] by January 31, they forfeit their right to file a grievance under Section 18-29 of the State Code." Grievant did not request an internal review of her classification by January 31, 1994.

4. Grievant was aware that a co-worker, Catherine Aquino, was filing a request for review by the JEC of her Mercer classification in January 1994. Ms. Aquino was also classified as a Business Manager II, pay grade 19. Grievant thought that if Ms. Aquino were reclassified she would also be reclassified, and made a conscious decision not to file a request for review herself. Ms. Aquino withdrew her grievance at Level IV.

5. Brenda Nutter, Director of Human Resources at West Virginia Institute of Technology, who was a member of the JEC, was available to answer questions about the reclassification process. Her office was next door to Grievant's office.

Discussion

The process which must be used by an employee challenging her Mercer reclassification is set out in the legislative rules adopted by the Board of Directors of The State College System of West Virginia. These legislative rules, promulgated first as emergency rules, control the outcome of this grievance. 131 C.S.R. §18.1 makes it clear that failure on the part of an employee to go through the internal review procedure precludes the employee frompursuing a grievance on her reclassification. That provision states:

> An employee may seek a review of his/her initial classification under the new program implemented pursuant to this rule and may appeal such initial classification through the procedures of W. Va. Code §18-29 after completing such review. Such review or appeal shall be governed by the provisions of this rule and to the extent these provisions are inconsistent with W. Va. Code §18B-9-7 or W. Va. Code §18B-9-4, those code provisions are deemed null and void pursuant to the authorization contained in W. Va. Code §18B-9-4(c). <u>If an employee does not first seek a review of his/her initial classification through the internal procedures set out herein, they shall be prohibited from grieving that classification under W. Va. Code §18-29</u>. (Emphasis added.) (See footnote 4)

131 C.S.R. § 18.2 explains the internal procedures referred to in § 18.1 as follows:

> An employee may seek a review of his/her initial classification, job title or pay grade by filing a request for review form after formal notification of his/her title and pay grade under the new program, but no later than January 31, 1994. Request for review forms shall be available at each institution and shall be in a form prescribed by the governing boards.

The regulations continue, explaining the request for review form was to be filed with the president of the institution, or hisdesignee, who would then make a recommendation to the JEC by March 31, 1994.

Grievant argued that the classification process and the employee appeal process was confusing, and, therefore, she should be allowed to pursue her grievance even though she did not file a request for review of her classification by January 31, 1994. Grievant proved the process was indeed long and confusing. Grievant received notification on three occasions of the status of her classification, and that her classification continued to be Business Manager II, pay grade 19. The first notification, in February 1993, referred to her classification as "preliminary". The second notification indicated that Grievant would receive "official" notification of her new classification around October 15, 1993. It was actually November 30, 1993, when Grievant received the final notification of her classification. Grievant could request some type of internal review of her classification with each notification, and was told this. Grievant requested that her classification be reviewed after the first notification in February 1993, but not thereafter, until she filed this grievance at Level III.

Respondent, and particularly Ms. Nutter, told classified employees as clearly as was possible how and when they could challenge their classification. Ms. Nutter was available next door to Grievant if she had any questions.

Regardless of whether the information supplied to Grievant could have been confusing, the undersigned is not convinced thatGrievant was, in fact, confused. Grievant knew that Ms. Aquino was filing a request for internal review in January 1994, but chose not to file herself, relying instead on Ms. Aquino's efforts, who chose not to pursue her grievance.

Conclusion of Law

Any person reclassified in accordance with the directives of W. Va. Code §18B-9-4, as amended, who did not submit a request for review to the president of the institution or his designee by January 31, 1994, for the Job Evaluation Committee's review of the initial classification, may not file a grievance using the grievance procedure set forth in W. Va. Code §§ 18-29-1, et seq.. Grievant did not file a request for review by January 31, 1994, and therefore, cannot grieve her classification.

Accordingly, this grievance is **ORDERED D ISM ISSED** and **STRICKEN** from the docket of this Grievance Board.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Fayette County, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: December 21, 1995

Footnote: 1 Grievant's last name was legally changed to Kirby after she filed this grievance. For purposes of this Grievance Board's records, she will still be referred to as Denise Hardy in this decision.

Footnote: 2 The reader is referred to Burke, et al., v. Bd. of Dir., Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995), for a detailed background and procedural history of the Mercer reclassification and the grievances arising from the reclassification. It should be noted that all Mercer grievances began at Level III in accordance with the procedure outlined in the Legislative Rules adopted by the governing boards of higher education pursuant to the authority granted them in W. Va. Code § 18B-9-4.

Footnote: 3 Due to inclement weather, James Rowley, the Interim Chancellor of the State College System of West Virginia, allowed employees to seek an extension to February 7, 1994, for filing a review request.

Footnote: 4 W. Va. Code § 18B-9-4(a) sets forth the mechanism by which an employee may grieve his classification,

stating only that the employee's "assignment may be appealed in accordance with article twenty-nine [§ 18-29-1 et seq.], chapter eighteen of this code . . ." Code § 18B-9-4(c) gave the governing boards broad authority to establish emergency rules "to implement the provisions of this article, after approval by the legislative oversight commission on education accountability . . . Any other provisions of this article inconsistent with said rule shall be deemed null and void and without the force and effect of law. Any other provisions of this article inconsistent with said rule shall be deemed null and void upon lawful implementation of the rule . . ." Grievant did not challenge the validity of the legislative rules adopted by the Board of Directors.