MARY ANN UZELAC,

Grievant,

v. **DOCKET NO. 98-BEP-431**

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS/LEGAL SERVICES DIVISION,

Respondent.

DECISION

This grievance was filed by Grievant Mary Ann Uzelac against her employer, Respondent West Virginia Bureau of Employment Programs, on or about August 25, 1998. (See footnote 1) The grievance states:

> I have been placed on probation with my re-employment in the classified service even though I worked in the classified service as a permanent employee who served a probationary period in the same classification and with the same appointing authority.

As relief she requested:

> Restoration of permanent non-probationary status and all benefits which accrue therefrom for myself and any co-workers (See footnote 2) who have reinstatement eligibility.

The parties agree that this grievance involves a legal issue. The material facts are not in dispute, only the proper interpretation of the regulations applicable to the facts. The following findings of fact necessary to the Decision reached are made based upon the record developed at Level III.

FINDINGS OF FACT

1. Grievant was employed as a paralegal in the Workers' Compensation Legal Division from December 1985 to June of 1987. Grievant successfully completed the six month probationary period, and was considered a permanent full-time classified employee. She resigned her position in good

standing.

2. Grievant accepted at-will employment as a paralegal in the Attorney General's Office on February 2, 1997, after a ten year absence from state employment.

3. By Executive Order 5-98, executed by Governor Underwood on June 10, 1998, effective July 1, 1998, Grievant and 22 other employees of the Attorney General's Office were added to the classified service as employees of the Bureau of Employment Programs ("BEP"). See W. Va. Code § 29-6-4(b). 4. Grievant is now employed as a paralegal in the Workers Compensation Legal Services Division of BEP. She was given a six month probationary period (See footnote 3) by BEP, through December 31, 1998.

DISCUSSION

In nondisciplinary matters, the grievant has the burden of proving her case by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).

Grievant's movement to BEP was affected pursuant to the provisions of § 9.1 of the Division of Personnel's Administrative Rules, which provides as follows:

> 9.1 Appointees in Positions Added to the Classified Service.
>
> (a) When additional state agencies or parts of state agencies are added to the classified service by executive order of the Governor with the consent of the Board and the appointing authority concerned, and when additional county or municipal agencies are added to the classified service by agreement between the local government and the Director with the approval of the Board, a date for the addition shall be fixed by agreement.
>
> (b) All appointments made on and after that date to the positions added to the classified service shall be made in accordance with this rule.
>
> (c) A person employed in such a position continuously for six months immediately preceding that date may take a qualifying examination administered by the Director and may be given a probationary or permanent appointment in the position if he or she passes the examination. Ifrecommended by the appointing authority, he or she may be admitted to an examination regardless of the minimum qualifications for the class to which the position is allocated. The qualifying examinations shall be held within six months after the date of addition of the position to the classified service. The

> examinations shall include appropriate written and performance tests where these tests are included in open-competitive examinations for the class. The appointing authority shall, within thirty days after the examination, separate from employment any employee who fails to pass the qualifying examination unless there are no available eligibles on the register for the class, in which case his or her employment may be continued but he or she must be separated from employment within thirty days after certification of available eligibles.

> (d) The appointing authority shall, within thirty days of the date of affiliation, separate from employment any person employed in such a position for less than six months preceding that date of affiliation unless there are no available eligibles on the register for the class, in which case his or her employment may be continued but he or she must be separated from employment within thirty days after certification of available eligibles, provided, however, that he or she may be given a probationary appointment if he or she has passed an open-competitive examination for the class and is eligible for appointment within the provisions of Subsection 9.2 of this rule.

> (e) In making the appointments provided for in Subdivision 9.1(c) and (d) of this rule the appointing authority may count employment in the agency immediately prior to the appointments as part or all of the probationary period required under Section 10 of this rule. The appointing authority shall promptly report to the Director his or her decision for the records.

The parties agree that this Administrative Rule gave BEP the discretion to decide whether employees with more than six months' service with the Attorney General's Office, who were moved to BEP pursuant to Executive Order 5-98, would be subject to a probationary period.

Grievant argued, however, that the Division of Personnel's Administrative Rule § 12.7(a) supercedes § 9.1 in her situation, because of her state government service 11 years ago, and should have been applied to her. That Rule provides:

> An employee with permanent status under the Division of Personnel or a comparable system of personnel administration existing in the agency priorto the agency's affiliation with the Division of Personnel, who has resigned while in good standing or who has been released without prejudice is eligible for reinstatement, provided that he or she has been certified by the Director as meeting the current minimum qualifications as to training and experience of the class status of [the] position to which he or she is being appointed. Prior to making the certification, the Director may require the employee to pass a qualifying examination.

Reinstatement is defined in § 3 as, "[a] type of re-employment of a former permanent classified employee." That same Section defines probationary period as, "[a] specified trial work period prescribed by the State Personnel Board designed to test the fitness of an employee selected from a competitive list of eligibles for the position for which an original appointment has been received." Original appointment is defined in § 3 as "[i]nitial employment of an individual into the classified

service as a result of selection from a certification of names from a register."

Grievant argued that "nothing in Section [9.1] specifically grants the Respondent the authority to void the reinstatement rights of employees hired under [9.1] in direct conflict with Section [12.7]."

First, it is questionable whether Grievant was "re-employed," as her current employment with BEP was a result of her position being "added" to the classified service by executive order. If she was not "re-employed," then she was not, by definition, reinstated.

Regardless of whether Grievant was re-employed or not, however, Grievant has misread the Administrative Rule on reinstatement. It does not provide for reinstatement "rights." It provides reinstatement eligibility. As Joe Smith, Senior Assistant Director for Employee Relations with the Division of Personnel, aptly pointed out in his testimony at Level II, eligibility does not equate to a right which can be demanded. Grievant pointed to no requirement that she be reinstated as a permanent employee, and Mr. Smith was aware of no such requirement, except where an employee had left the classified service to pursue military service. He testified that whether a former employee's permanent status is reinstated when that person is hired again is within the agency's discretion. He explained the agency exercises this discretion when a decision is made as to whether to hire a former employee for a posted position by reinstatement, rather than appointment from a register. He stated that a reinstated employee is not placed on probationary status. Mr. Smith's explanation of the Division of Personnel's Administrative Rules on this matter is consistent with the language of the rules and the definitions provided. Grievant has not proven that BEP was required to treat her as a permanent, non-probationary employee.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. In nondisciplinary matters, the grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).

2. Grievant failed to prove that BEP violated any statute, rule, regulation, or policy when she was placed on probationary status, or that BEP was required to reinstate her to permanent, non-probationary status.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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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BRENDA L. GOULD

Administrative Law Judge

Date:

December 18, 1998

Footnote: 1

Grievant's supervisor responded at Level I on August 26, 1998, that he was without authority to decide this grievance. Grievant appealed to Level II on August 27, 1998, and her second-level supervisor responded on September 4, 1998, that he had no authority to change policy to grant the requested relief. Grievant appealed to Level III, where a hearing was held on September 29, 1998. Grievant represented herself, and Respondent was represented by Jeffrey G. Blaydes, Esquire. The grievance was denied at Level III on October 20, 1998, and Grievant appealed to Level IV on October 27, 1998. Both parties agreed to have the case decided based on the record developed at the lower levels of the grievance procedure. This case became mature for decision on December 4, 1998, upon receipt of the last of the parties' written arguments.

Footnote: 2

Grievant did not indicate who these co-workers were, what the employment history of her co-workers was, or that any co-worker had authorized her to pursue a grievance on his or her behalf. Accordingly, this relief is not available to this Grievant.

Footnote: 3

Section 10.1 of the Division of Personnel's Administrative Rules states:

> *The probationary period is a trial work period designed to allow the appointing authority an opportunity*

to evaluate the ability of the employee to effectively perform the work of his position and to adjust himself to the organization and program of the agency. It is an integral part of the examination process and shall be utilized for the most effective adjustment of a new employee and the elimination of those who do not meet the required standards of work.