BETTY LILLY, et al.,

Grievants,

v. **Docket No. 97-17-330**

HARRISON COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, (See footnote 1) employed as Secretary IIs and Secretary IIIs within the Harrison County school system, are requesting that they be reclassified to the multiclassification of Secretary [II or III]/Accountant II, because of the accounting duties they perform as part of their everyday duties. However, many, but not all, of the grievants have made their request for reclassification contingent upon the existence of a county salary supplement for Accountants, which will be addressed herein. In the alternative, if there is no supplement, certain grievants would like to have the accounting duties removed from their assignments. After denials at the lower levels, a level four hearing was held in this Grievance Board's office in Morgantown, West Virginia, on November 20, 1997, where Grievants appeared in person and by counsel, John Roush, and Respondent appeared by its counsel, Basil Legg. This matter became mature for decision upon receipt of the parties' post-hearingsubmissions on January 12, 1998.

Procedural Issues

The parties disagree regarding certain issues involving the procedural history of this matter, which require determinations by the undersigned before the merits of the case can be addressed. In the spring of 1996, through their principals, all of the grievants requested reclassification to reflect their accounting duties. (See footnote 2) However, after being informed that they would not receive a salary supplement along with their reclassifications, on

September 17, 1996, Grievants withdrew their request for reclassification. Shortly thereafter, on September 27, 1996, Grievants filed a level one grievance.

The first issue which must be resolved is Respondent's counsel's contention that the prior request for reclassification and its subsequent withdrawal constituted a level one grievance. If it was, then Respondent argues that W. Va. Code § 18-29-3(d) would prevent the same grievance from being reinstated without the consent of the grievance evaluator. However, Respondent's argument is without merit. As defined by W. Va. Code § 18-29-2, a "grievance" is a "claim" by employees that there has been a misapplication, misinterpretation, etc., of a policy, law, rule or regulation under which the employees work. Grievants' request for reclassification was merely that, a request, and had not reached the stage of a claim that a misapplication, etc., had occurred. Since the request had not yet been granted or denied at the time it was withdrawn, no level one grievance had been initiated. Second, Respondent has raised the issue of whether the grievance was appealed from level one to level two in compliance with statutory requirements. The written level one grievance that was filed on September 27, 1996, was referred to Victor Gabriel, Administrative Assistant for Service Personnel. (See footnote 3) Mr. Gabriel initially responded to the grievance in a memorandum dated October 2, 1996, entitled "Level II Response" stating "I am not vested with the authority to resolve your grievance. Therefore I am denying it at Level II." Obviously Mr. Gabriel meant to say "level one," not "level two," so he issued a corrected response on October 4, 1996, reflecting that he was denying a level one grievance. (See footnote 4)

On October 16, 1996, Betty Lilly, on behalf of all Grievants, appealed the level one response to level two, and it was received by the superintendent on October 17, 1996. W. Va. Code § 18-29-4(b) requires that the level one decision be appealed to level two within five days of receipt. There can be no dispute that there are more than five working days (See footnote 5) between October 4 and October 16. However, there is a dispute between the parties as to when the level one response was actually received by Grievant Lilly. (See footnote 6) RobertSkidmore, Administrative Liaison for the Harrison County Board of Education, testified that he hand delivered the response to Grievant Lilly by placing it on her desk, because she was not in. Grievant Lilly testified at level four that she never received the hand-delivered document, and that she received the corrected level one response in the mail, but she did not

know on what date.

The burden of proof is on the party asserting that the timeline requirements were violated to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). Since the statute requires that a grievant appeal to level two within five days of receipt of the level one response, the date of that receipt is the crucial issue. Although Mr. Skidmore attempted to hand deliver the response to Grievant Lilly, he could not say for sure that she actually received it, because she was not there when he left it on her desk. Grievant Lilly has stated that she received it at some point in the mail, but there is no evidence of the exact date, such as a certified mail receipt, and it easily could have been some time between October 4 and October 16. In order to meet its burden of proof in proving untimely filing or appeal, a respondent must provide evidence of the actual date of receipt. See Baker v. Cabell County Bd. of Educ., Docket No. 96-06-317 (June 9, 1997); Eastham v. Cabell County Bd. of Educ., Docket No. 95-06-317/318 (Apr. 9, 1996). Respondent has not proven that the appeal to level two was untimely.

Findings of Fact

1. Grievants are regularly employed at various schools in Harrison County in the Secretary II and Secretary III classifications.

2. Grievants requested reclassification in May of 1996 to be multiclassified as Secretaries and as Accountants, because they had discovered that Accountants employed by the Harrison County Board of Education (HCBOE) received a salary supplement in prior years. After being informed by HCBOE that the Accountant supplement no longer existed, Grievants withdrew the request for reclassification on September 17, 1996.

3. Grievants filed a written level one grievance on September 27, 1996, requesting that their accounting duties be removed or, in the alternative, that they be granted reclassification with a salary supplement. This grievance was filed by all the named grievants, with Betty Lilly serving as spokesperson.

4. Victor Gabriel, Administrative Assistant for Service Personnel, responded to the level one grievance in a written memorandum dated October 4, 1996, denying the grievance.

5. Mr. Gabriel's response was hand delivered to Grievant Lilly's office, but she did not receive it. It was also mailed to Grievant Lilly, and she received it some time between October

4, 1996, and October 16, 1996.

6. A level two appeal was filed by all Grievants on October 16, 1996, which was received by the HCBOE on October 17, 1996.

7. During school years between 1989 and 1996, HCBOE provided a salary supplement to all employees in the Accountant classification. The only employees who had held the Accountant title and, therefore, received the supplement were employed as Accountants in HCBOE's central office. 8. At a meeting of the HCBOE on May 8, 1996, a $2000 salary supplement for Accountants was approved.

9. In the spring of 1996 (exact date unknown), HCBOE reclassified its central office Accountants to Auditors, which is a higher classification. Accordingly, at the time of the approval of the Accountant supplement, no employees were employed in that classification.

10. At a meeting on June 4, 1996, HCBOE voted to change the title of "Accountant" in the salary supplement schedule to "Auditor," to make sure that the newly reclassified employees in the central office would receive a $2000 supplement. No other employees were affected by the reclassification or the supplement.

11. Although their duties vary slightly, all of the grievants spend from three to seven hours of their workday, every single day, performing some or all of the following:

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collecting lunch money, counting and depositing the money collected, issuing receipts, balancing the lunch bank accounts, and preparing monthly and yearly financial reports regarding the lunch accounts;

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managing all matters relative to the school's various clubs' bank accounts, including keeping track of the money in the account, issuing checks and receipts, preparing purchase orders, making deposits, balancing the accounts, making all entries into the ledgers for the accounts, and preparing periodic financial reports regarding club accounts; and

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managing all matters regarding the school's finances from levy funds, fundraisers, snacks and other sales, including all information input into the accounts, maintaining a ledger of accounts receivable and payable, preparing inventory, reconciling bank accounts, writing checks for bills to be paid, and

preparing financial reports reflecting all these activities.

12. All Grievants have performed the above duties, along with secretarial tasks,since they were first employed in their secretarial positions.

13. HCBOE's Service Personnel Salary Schedule places Secretary II and Accountant II in Pay Grade E; Secretary III and Accountant III are in Pay Grade F, per W. Va. Code § 18A-4-8a.

Discussion

Because misclassification is a non-disciplinary matter, Grievants bear the burden of proving their claims by a preponderance of the evidence. Midkiff v. Lincoln County Bd. of Educ., Docket No. 95-22-262 (March 3, 1996); Purdue v. Mercer County Bd. of Educ., Docket No. 92-27-280 (March 29, 1993). In order to prevail in a misclassification grievance, an employee must establish that her duties more closely match those of a classification defined by W. Va. Code § 18A-4-8 other than the classification she currently holds. Pope v. Mingo County Bd. of Educ., Docket No. 91-28-0678 (July 31, 1992). However, an employee who simply performs some duties normally associated with a higher classification may not be considered misclassified per se. Hatfield v. Mingo County Bd. of Educ., Docket No. 91-29-077 (April 15, 1996). Incidental duties which require an inconsequential amount of an employee's time will not warrant a higher classification, if the remainder of one's duties are accurately described by one's current classification. Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994).

In the instant case, Grievants are seeking multiclassification, which is defined by W. Va. Code § 18A-4-8 as “personnel employed to perform tasks that involve the combination of two or more class titles.” When a worker regularly performs work in her own and another classification, multi-classification is required. Bailey v. Mercer County Bd. of Educ., Docket No. 91-274-158 (Jan. 31, 1992). Nevertheless, if an employee is performingassignments which are reasonably related to the duties contemplated by the statutory description of the presently-held classification, reclassification or multi-classification is not required. See Boyer v. Wood County Bd. of Educ., Docket No. 90-54-196 (Jan. 29, 1991).

All of the grievants are classified as either Secretary II or Secretary III, which class titles

are defined by W. Va. Code § 18A-4-8 as follows:

> 'Secretary II' means personnel employed in any elementary, secondary, kindergarten, nursery, special education, vocational or any other school as a secretary. The duties may include performing general clerical tasks, transcribing from notes or stenotype or mechanical equipment or a sound-producing machine, preparing reports, receiving callers and referring them to proper persons, operating office machines, keeping records and handling routine correspondence. There is nothing implied herein that would prevent such employees from holding or being elevated to a higher classification.

> 'Secretary III' means personnel assigned to the county board of education office administrators in charge of various instructional, maintenance, transportation, food services, operations and health departments, federal programs or departments with particular responsibilities of purchasing and financial control or any personnel who have served in a position which meets the definition of "Secretary II" or "Secretary III" herein for eight years.

All of the grievants who hold the Secretary III classification were granted the title after having served as a Secretary II for eight years; none are or have been employed in the central office. The Accountant class title pertinent to this grievance is also defined in the cited statute, as follows:

> 'Accountant II' means personnel employed to maintain accounting records and to be responsible for the accounting process associated with billing, budgets, purchasing and related operations. (See footnote 7)

W. Va. Code § 18A-4-8 also requires county boards of education to “review eachservice personnel employee's job classification annually and . . . reclassify all service employees as required by such job classifications.” A board of education is obligated to classify school service personnel according to the duties performed by said employees. Taflan v. Hancock County Bd. of Educ., Docket No. 15-86-099-2 (Jan. 12, 1987). Of particular note in the instant case is that all of the grievants have performed the above- described “accounting” duties as part of their normal assigned responsibilities for years without protest. However, this does not excuse HCBOE's obvious failure to reclassify these employees as required by the statute.

Prior Grievance Board decisions have addressed the identical issue presented here, and were resolved in favor of the employees involved. In three cases, school secretaries brought grievances claiming they should be multiclassified, because their everyday duties involved

banking, reconciling bank statements, collecting monies, filing financial reports, and various other duties similar to those described by Grievants in the instant case. See Higgins v. Randolph County Bd. of Educ., Docket No. 94-42-1111 (Dec. 27, 1995); Ellison v. Fayette County Bd. of Educ., Docket No. 97-10-258 (Sept. 18, 1997); Akers v. Raleigh County Bd. of Educ., Docket No. 97-41-301 (Oct. 30, 1997). In finding that such tasks are more accurately described by the "Accountant II" class title, the administrative law judge in Akers, supra, stated:

> While preparing financial reports and reconciling of accounts could possibly be construed as 'preparing reports' and 'keeping records' under the Secretary II definition, they are much more specifically described by the Accountant II definition. While the accounting tasks performed by Grievant may be relatively simple, bookkeeping functions, that distinction does not indicate that they are secretarial tasks.

Accordingly, the undersigned finds that Grievants have proven by a preponderanceof the evidence that they should be multi-classified as Secretary/Accountant. The duties they perform are virtually identical to those discussed in the cases cited above, and they do not constitute "incidental" or "inconsequential" tasks. See Akers, supra.

The more problematic issue in this case is the appropriate relief to be granted. Grievants have requested varying remedies; while some would be satisfied with reclassification alone, others only want reclassification if there is an Accountant supplement to go along with it. (See footnote 8) Those grievants want to have the accounting duties removed from their responsibilities, which would obviously entail requiring HCBOE to either transfer the duties to some other employee (which is not feasible in a school with only one secretary_the situation for many Grievants) or hire new employees as Accountants for virtually every school in the county.

While this Grievance Board has held that service workers cannot be assigned to perform duties not contemplated by their currently-held classifications, this does not mean that the appropriate relief in every case is to remove the duties from the employee's assignments. See Britton v. Preston County Bd. of Educ., Docket No. 90-39-015 (Aug. 31, 1990). In a case such as the instant one, where Grievants have specifically requested reclassification, that is the logical and appropriate remedy. The burden which would be placed upon HCBOE if it had to

hire an accountant to perform bookkeeping duties at every school in the county would be overwhelming. Moreover, for many of the grievants, removal of their accounting duties would leave them with only one or two hours of work per day,placing them in the precarious position of possibly facing a reduction-in-force for lack of need. Certainly, this is not what Grievants intended.

W. Va. Code § 18-29-5 provides authority to an administrative law judge of the Grievance Board to "provide such relief as is deemed fair and equitable." Grievants have raised the issue of their misclassification and cannot make their request for reclassification conditional upon a supplement which no longer exists. In addition, it cannot be overlooked that Grievants performed these same duties for many years without complaint, and only claimed misclassification when they discovered there was a supplement. As discussed above, a board of education is obligated to properly classify all of its employees. It would place an extraordinary hardship upon HCBOE to provide the relief requested by some of the grievants, so Grievants should be appropriately reclassified to reflect all of their duties.

Because Accountant II and Secretary II are in the same pay grade, and Secretary III is in a higher pay grade, no monetary award can be granted in this case. Grievants have requested relief retroactive to July 1, 1996. Although Grievants requested reclassification in May of 1996, that request was withdrawn in September, so it would not be appropriate to grant Grievants relief dating back prior to that withdrawal. Accordingly, Grievants' reclassification shall be effective fifteen days prior to September 27, 1996, the date of the filing of this grievance, and they shall all be granted seniority credit in the Accountant classification from that date. See Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

In addition to the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In a misclassification grievance, Grievants bear the burden of proving their claims by a preponderance of the evidence. Midkiff v. Lincoln County Bd. of Educ., Docket No. 95-22-262 (March 3, 1996); Purdue v. Mercer County Bd. of Educ., Docket No. 92-27- 280 (March 29, 1993).

2. The burden of proof is on the party asserting that the timeline requirements were violated to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. Respondent failed to prove by a preponderance of the evidence that Grievants failed to file their level two appeal in a timely manner.

4. When a worker regularly performs work in her own and another classification, multi-classification is required. Bailey v. Mercer County Bd. of Educ., Docket No. 91-274- 158 (Jan. 31, 1992).

5. Secretaries who perform banking and related bookkeeping duties have been deemed to be entitled to multi-classification as Secretary/Accountant. See Higgins v. Randolph County Bd. of Educ., Docket No. 94-42-1111 (Dec. 27, 1995); Ellison v. Fayette County Bd. of Educ., Docket No. 97-10-258 (Sept. 18, 1997); Akers v. Raleigh County Bd. of Educ., Docket No. 97-41-301 (Oct. 30, 1997).

6. Grievants proved by a preponderance of the evidence that a significant amount of their duties more closely match those described in the class title for Accountant II, rather than Secretary II or Secretary III.

7. Relief in misclassification grievance is limited to prospective relief and to back relief from and after fifteen days prior to the filing of the grievance. See Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Accordingly, this grievance is hereby GRANTED, and Respondent is ordered to reclassify Grievants as Secretary II/Accountant II or Secretary III/Accountant II, effective fifteen days prior to September 27, 1996, with retroactive seniority in the Accountant II classification.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Harrison 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.

Date: April 13, 1998

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

This grievance was filed at level one by Betty Lilly, Julie Hill, Shirley Strother, Rebecca Robey, Donna Criss, Marianne Martin, Nancy Loretta, Carolyn George, Patricia Watkins, Constance Deiriggi, Dorothy Gola, Deborah Ciesla, Wanda Hickman, Cheryl Fratto, Nancy Petitto, Carol Gaynor, Mildred Leuliette, Jane Post, Paulette Bierer, Linda Fragmin, Pamela Hunt, Betty Michaels, Esther Messenger, Mary Jackson, Linda Gabriel, Nancy Preston, and Rebecca Sprout, and has proceeded through all levels as a "class action" pursuant to W. Va. Code § 18-29-2. All of the grievants have testified at either level two or level four.

Footnote: 2

Although all Grievants have performed these "accounting" duties for several years as part of their normal assigned duties, they did not seek reclassification until discovery of the Accountant supplement.

Footnote: 3

Each Grievant's immediate supervisor was her principal, and the next level supervisor for secretaries would be Mr. Gabriel. Because each grievant's principal supported the reclassification, level one was filed with Mr. Gabriel, and no party has challenged the propriety of his jurisdiction at level one.

Footnote: 4

Mr. Gabriel's conduct in this regard provides further support for the notion that Respondent was not operating under the misconception that a prior grievance had been instituted and withdrawn.

Footnote: 5

"Days," as defined by W. Va. Code § 18-29-2(b), excludes weekends, holidays and school closings.

Footnote: 6

Respondent's counsel has argued that, because the incorrect level one response of October 2 was received by Sharon Douglas, Grievants' representative at that time, thatwas sufficient to begin the running of the timelines. However, Respondent chose to issue a corrected level one response, so the prior incorrect one was superceded and is irrelevant.

Footnote: 7

"Accountant III" refers only to central office employees, and none of the grievants are claiming entitlement to that classification.

Footnote: 8

At level four, Grievants disputed whether the Board of Education had actually eliminated the Accountant supplement. However, as set forth in this Decision, the facts clearly show that the supplement was transferred to the newly-classified Auditors, leaving no supplement for Accountants.