TAMMY J. BAILEY,

Grievant,

v. **Docket No. 98-HHR-352**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Tammy J. Bailey (Grievant) is employed by the West Virginia Department of Health and Human Resources (DHHR), as an Information Systems Assistant at DHHR's Mercer District Office. Grievant was formerly classified as an Equipment Coordinator. Grievant argues that she is entitled to back pay, from December 1, 1995, until April 1, 1998, when she was reclassified as an Information Systems Assistant.

This grievance was filed on March 31, 1998. On April 2, 1998, this grievance was denied at Level I by Immediate Supervisor Linda M. Pinter. On April 13, 1998, it was denied at Level II by Administrator John J. Najmulski. Following a Level III hearing on August 19, 1998, it was denied at Level III by Grievance Evaluator Marteney on or about September 1, 1998.

This grievance was appealed to Level IV, where it was agreed that it could be submitted on the record developed at the lower levels. The parties were given until January 7, 1999, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision at that time. The following Findings of Fact pertinent to theresolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant has been employed by the West Virginia Department of Health and Human Resources for some twenty-two years.

2. On or about December 1, 1995, Grievant was classified as an Equipment Coordinator.

3. As DHHR increased its use of computers, Grievant's job duties evolved, and she began spending more than ninety percent of her work time working on computers.

4. Grievant was reclassified as an Information Systems Assistant on April 1, 1998.

5. DHHR concedes that, for some period of time before her reclassification, Grievant performed the functions of an Information Systems Assistant.

6. This grievance was filed on March 31, 1998.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as “evidence which is of greater weight ormore convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant argues that she is entitled to back pay in the amount of the difference between the pay she received as an Equipment Operator and the pay she now receives as an Information Systems Assistant, from December 1, 1995, when she was classified as an Equipment Coordinator, until she was reclassified. DHHR concedes that, for some period of time before her reclassification, Grievant performed the functions of an Information Systems Assistant. This happened as DHHR gradually increased its use of computers, and she began spending more than ninety percent of her work time working on them. Grievant's evidence also supports this conclusion. However, DHHR has raised a timeliness defense.

W. Va. Code § 29-6A-4(a) provides as follows:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the

> grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant.

"Days" is defined as "working days exclusive of Saturday, Sunday or official holidays." W. Va. Code § 29-6A-2(c). A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Pryor, et al. v. W. Va. Dep't of Transportation/ Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997);West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

A misclassification, however, is a continuing practice, and thus, a grievance may be initiated at any time during which the misclassification continues. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). A grievant must file her grievance no later than ten days after her misclassification ends. Gaskins v. W. Va. Dep't of Health/Div. of Personnel, Docket No. 90-H-032 (Apr. 12, 1990). A grievant can not wait until she discovers a legal theory to support her grievance, long after the misclassification began. Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052 (Sept. 27, 1991, Pryor, supra. Back pay is limited to the ten day period preceding the filing of the grievance. Martin supra.

Grievant was reclassified on April 1, 1998. She filed this grievance on March 31, 1998, during the period of her misclassification. Thus, DHHR has not met its burden of proving that the grievance was not timely filed. As this grievance was timely filed, and DHHR concedes that Grievant was working out of her classification before she was reclassified, Grievant has met her burden of proof. She will be granted back pay in the amount of the difference, if any, between the pay she received as an Equipment Operator and the pay she would have received as an Information Systems Assistant, for the period of ten working days preceding the filing of her grievance, plus interest.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-

6A-6. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

2. The burden of proving that a grievance was not timely filed, which is an affirmative defense, rests upon the party asserting that defense. Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996).

3. A grievance must be filed within ten days of the grievable event, or ten days from the time the grievant becomes aware of the grievable event, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. W. Va. Code § 29-6A-4(a).

4 Misclassification is a continuing practice, but where a timeliness defense is raised, the right to back pay is limited to ten days preceding the filing of the grievance. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

5. DHHR failed to prove, by a preponderance of the evidence, that this grievance was not timely filed.

6. Grievant proved, by a preponderance of the evidence, that she was misclassified as an Equipment Operator before being reclassified as an InformationSystems Assistant.

Accordingly, the grievance is **GRANTED,** and DHHR is ordered to pay Grievant back pay in the amount of the difference, if any, between the pay she received as an Equipment Operator and the pay she would have received as an Information Systems Assistant, for the period of ten working days preceding the filing of her grievance, plus interest.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated January 22, 1998