`JAMES OSBORNE,

Grievant,

v. Docket No. 02-BEP-391

BUREAU OF EMPLOYMENT PROGRAMS/

EMPLOYMENT COMPENSATION DIVISION,

RESPONDENT.

DECISION

Grievant, James Osborne, is employed as a Supervisor 3 in the Employment Compensation Division, a Division of the Bureau of Employment Programs ("BEP"). He filed this grievance on June 3, 2002, alleging he was misclassified, and the relief sought was, "I request to be reclassified to a Program Manager I, salary increased accordingly, back pay as deemed appropriate, to be made whole in every way, including any legal fees incurred during the grievance procedure." This grievance was granted at Level III, and Grievant was granted reallocation to a Program Manager I. Back pay was limited to ten days preceding the filing of the grievance as Grievant was aware of the facts constituting a grievable matter and delayed filing. Level III Decision.

Grievant filed to Level IV on November 27, 2002, and stated the relief sought as failure "to award [Grievant] the back pay to which he is entitled." A Level IV hearing was held on October 24, 2003. This grievance became mature for decision on November 20, 2003, after receipt of BEP's proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a supervisor with BEP for many years.

2. In 1993, he filed a grievance seeking to be reclassified to a Program Manager I. This grievance did not request back pay. It was granted at Level IV on April 30, 1993, and the

agency was directed to either reclassify Grievant to a Program Manager I or reduce his duties.

3. This grievance was appealed to the circuit court, and in June 1993, the parties agreed to settle this grievance by promoting Grievant to a Supervisor III, and giving him an award of back pay. Grievant did not want his duties decreased. (See footnote 2)

4. In 1997, Grievant received responsibility for the New Hires program. At this time he does little with this program as the main work is performed by Department of Health and Human Resources. This is not considered a secondary program.

5. In February 1998, Grievant completed another Position Description Form, again seeking to be reclassified to Program Manager I. Grievant's supervisor, Janet Catsonis disagreed with some of Grievant's assertions in this document, attached her comments, signed the form on March 10, 1998, and sent the form to her supervisor, Daniel Light. Mr. Light signed the form on March 10, 1998.

6. BEP's typical practice is for the employee to send the form to BEP's Human Resources Department. The Human Resources Department then reviews the document and sends it to the Division of Personnel for its assessment.

7. The Human Resources Department never received Grievant's 1998 Position Description Form. Grievant never checked on the progress of his 1998 reallocationrequest with anyone until he called the Division of Personnel in January 2003, after he had filed to Level IV protesting the back pay award in this grievance. (See footnote 3)

8. Richard Burton became Grievant's supervisor on July 16, 1998. Six months later, Grievant came to Mr. Burton and asked if it he could pursue reclassification. Mr. Burton agreed, and he told Grievant he would support this request if the facts supported Grievant's petition. Grievant did not tell Mr. Burton about the form he had completed six months earlier.

9. Grievant never completed the Position Description Form he discussed with Mr. Burton in January 1999.

10. Over time Grievant was assigned additional duties, and Mr. Burton encouraged Grievant to complete a new Position Description Form to see if he should be reallocated. Grievant did not do so because he found the form to be time-consuming and cumbersome, and he had already filled out a Position Description Form in 1998. He did not give these reasons for his failure to fill out the form to Mr. Burton.

11. In January 2001, Grievant assumed the duties for the Trade Readjustment ["TRA"] Program. Mr. Burton saw this as a significant change, and he again encouraged Grievant to complete a new Position Description Form. Mr. Light also encouraged Grievant to complete a new Position Description Form. Grievant did not. 12. Grievant finally completed a Position Description Form on January 22, 2002. Mr. Burton signed the form on January 25, 2002, and Mr. Light signed the form on January 28, 2003. The form was then returned to Grievant, who sent it to the Human Resources Department.

13. On February 25, 2002, Lowell Basford, Assistant Director of Classification and Compensation, found Grievant was correctly classified as a Supervisor III. Commissioner Robert Smith informed Grievant of this decision.

14. Grievant appealed this ruling, and on May 22, 2002, Nichelle Perkins, Director of the Division of Personnel, affirmed Mr. Basford's conclusion. Grievant then filed this grievance on June 6, 2002.

15. At the Level III hearing on August 26, 2002, BEP strongly supported Grievant's request to be reallocated, and mirrored Grievant's language for relief on the back pay issue when it asked the Grievance Evaluator, "to use [his] best discretion determining what kind of back pay, if any, [Grievant is] entitled to." Level III Trans. at 65.

16. During the Level III hearing, Grievant testified he was asking to be reallocated from January 2001, when he assumed the duties of the TRA Program.

17. In his closing statement at Level III, Grievant's attorney asked for Grievant to be reclassified from 1997 or 1998.

18. At the Level III hearing, Grievance Evaluator Jack McClung found Grievant's position should be reallocated, but back pay should be limited to ten days preceding thefiling of the grievance, as Grievant was aware of the facts constituting a grievable matter and delayed filing. Grievant's reallocation resulted in a 15 percent pay increase. (See footnote 4)

Discussion

The only issue to be decided in this grievance is whether or not Grievant is entitled to additional back pay beyond the ten days prior to filing his grievance. Respondent contends that it was aware misclassification may be grieved at any time, pursuant to the holding in

Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), and that back pay is limited to the ten-day period preceding the filing of the grievance, and it was unaware Grievant was seeking back pay from 1997/1998.

Grievant asserts this is a timeliness defense and because it was not asserted until Level IV, it must be disregarded. He cites to Stollings v. Division of Environmental Protection, 209 W. Va. 194, 544 S.E.2d 700 (2001), to support his argument for back pay. Grievant also asserted for the first time at Level IV that BEP violated the Division of Personnel's Administrative Rules when it did not submit a new Position Description Form when it changed Grievant's job duties, and therefore should be required to give Grievant back pay to 1997.

First, the undersigned Administrative Law Judge finds Grievant's interpretation that Respondent's argument is about timeliness is incorrect. Respondent asserts it was not on notice of the extent of the relief Grievant was seeking from the Statement of Grievance, and from the evidence presented at the Level III hearing. While Respondent stronglysupported Grievant's reallocation, it never agreed with Grievant's assertion that he had been misclassified since 1997 or 1998. Both parties asked the Grievance Evaluator to grant back pay as he deemed appropriate. The Grievance Evaluator found Grievant had knowingly delayed filing, and limited back pay to ten days before filing citing the holding in Martin, supra.

To be perfectly honest, this case seems to be an example of the old adage, "No good deed goes unpunished." BEP strongly supported Grievant's request for reallocation, taking a stand against two rulings of the Division of Personnel. Grievant did not ask for back pay to 1997 in his Statement of Grievance or in his Level III testimony. Respondent was unaware of this claim by Grievant until he filed at Level IV. (See footnote 5)

A review of Stollings finds that case to be inapplicable to the facts of this case. In Stollings, the grievant was found to have retained the same duties for many years and was misclassified. His position was reclassified, and because his salary fell within the new Pay Grade, he did not receive a pay increase. The West Virginia Supreme Court of Appeals stated grievant's position had been " re-designated." In this case, Grievant's duties were changed over the years resulting in a need to reallocate the position, at which time Grievant received a 15 percent pay increase with back pay. (See footnote 6) **The next issue to address is BEP's**

failure to submit a new Position Description Form for Grievant, and whether this dereliction of duty should result in back pay to 1997. Pursuant to Division of Personnel's Rule 4.5(e) and (f):

> **(e) Position descriptions shall be kept current by the appointing authority for each position under his or her jurisdiction. When the appointing authority significantly alters the duties and responsibilities of a position, the appointing authority shall prepare and forward a revised position description to the Director.**

> **(f) If an appointing authority fails to notify the Director of significant alterations in the duties and responsibilities of a position, the incumbent in the position may file with the Director a written request for a review of his or her position.**

(Emphasis added).

The first thing to note is that the Director of the Division of Personnel did not find a significant change had occurred that would result in the reallocation of Grievant's position. Mr. Burton felt the change in 2001 could be significant. At that time, he increased his encouragement for Grievant to fill out the Position Description Form he had said he was going to complete. Nonetheless, Grievant did not complete the form.

In this case, the undersigned Administrative Law Judge does not find any violation on BEP's part. BEP thought a significant change may have occurred and encouraged Grievant to complete the Position Description Form to see if the Division of Personnel agreed. Additionally, Section (f) makes it clear that if Grievant felt his position was incorrectly classified, he could file directly with the Division of Personnel for a review of his position. Grievant did not do this, and he offered no valid excuse for his failure. (See footnote 7) **In order to fashion relief that would appear fair to both parties the undersigned Administrative Law Judge has turned to W. Va. Code § 29-6A-5(b) which discusses the authority of administrative law judges and states an administrative law judge may:**

> **provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.**

A review of the evidence of record demonstrates Grievant's duties did not change significantly enough to warrant reallocation before January 2001. After that time, Grievant did receive an additional program, and this change was considered significant by his supervisor. (It should be noted the Division of Personnel did not find this change to deserve reallocation.) Still, Grievant did not file a new Position Description Form as requested by his supervisor, and it was clearly in his best interest to file one. This failure is difficult to understand especially in light of Grievant's ill-founded belief he had been misclassified since 1997.

In examining all these factors, the undersigned Administrative Law Judge finds Grievant should receive back pay from January 2001. This is what Grievant said he was seeking at the Level III hearing, and Respondent was aware of this request during this hearing. If the Agency did not agree with this request, it could easily have said so at thattime, and raised an argument about this time frame. It would be unfair to grant back pay back to 1997, as Grievant's duties at that time did not warrant the Program Manager I classification. Additionally, Grievant's failure to complete a Position Description Form when requested by his supervisors, and when he believed his duties had changed should not be rewarded. Grievant's dilatory behavior should not result in additional back pay during a time when his duties were still in the Supervisor III category.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Stollings v. Division of Environmental Protection, 209 W. Va. 194, 544 S.E.2d 700 (2001), is not applicable to this case as Grievant had a significant change in his duties over time, was reallocated, and received a 15 percent pay increase. 3. No violation of Division of Personnel's Rules 4.5(e) and (f) is found in this case.

4. W. Va. Code § 29-6A-5(b) gives an administrative law judges the authority to fashion relief that fair and equitable and to provide appropriate remedies that make an employee whole.

Accordingly, this grievance is GRANTED, in part, and DENIED, in part. BEP is directed to grant Grievant back pay to January 1, 2001.

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. However, the appealing party is required by W. Va.Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 13, 2004

Footnote: 1

Grievant was represented by Attorney Brent Wolfingbarger, and Respondent was represented by its attorney, Mary Healey.

Footnote: 2

The undersigned Administrative Law Judge disagrees with the finding of the Grievance Evaluator that Grievant entered into this settlement agreement under duress.

Footnote: 3

At the Level IV hearing, there was much discussion and finger pointing by Grievant about his supervisor's failure to file the 1998 Position Description Form with the proper staff. Grievant did not prove any wrongdoing on the behalf of anyone, and it appears the problem may have been caused by Grievant's belief Mr. Light would forward the Position Description Form, and Mr. Light's belief that this was Grievant's responsibility. Grievant did not check to see if the Division of Personnel received his 1998 Position Description Form until 2003, and never checked with BEP's Human Resources Division or in his personnel file.

Footnote: 4

At the Level IV hearing, Grievant informed the undersigned Administrative Law Judge that this increase had not yet been received. Mr. Thomas Rardin, Director of Human Resources, explained he had been off sick for quite some time and just found out about the reallocation upon his return, and this problem would be corrected shortly.

Footnote: 5

While the undersigned Administrative Law Judge is aware Grievant's attorney argued for back pay to 1997 in his closing argument at Level III, this statement directly contradicted his client's testimony.

Footnote: 6

Division of Personnel Rule 3.78 defines reallocation as "Reassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position."

Footnote: 7

Grievant's assertion that he was absolutely precluded from filing a grievance about his 1998 reallocation request until he heard back from the Division of Personnel is specifically rejected. Further, his assertion that he did not know about procedures relatingto grievances until the Division of Personnel placed its Rules on the Internet in 2000, is also found to be less than truthful. (Grievant still did not file this grievance until June of 2003.) Grievant has been a supervisor for years, is required to take training on grievances, and the Division of Personnel Rules have been available in Mr. Light's office for years, but Grievant never asked to see them. Additionally, Grievant never asked anyone what he should do because he had not heard back from the 1998 Position Description Form. Grievant's assertions are not credible.