THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRENDA POWELL,
Grievant,

v. **Docket No. 2010-0592-LinED**

LINCOLN COUNTY
BOARD OF EDUCATION,
Respondent,

and

TRINA BARRETT, et al.,
Intervenors.

DECISION

Grievant Brenda Powell filed a grievance against her employer, Lincoln County Board of Education, on November 5, 2009. Her statement of grievance reads:

> As provided for in W. Va. Code § 18A-4-5b uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county. The duties and responsibilities assigned to Brenda Powell are similar enough to all other employees holding the multiclassification of Executive Secretary/Coordinator to cause a uniform classification and appropriate salary supplement as Executive Secretary/Coordinator of Board Services.
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> For relief Grievant seeks:
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> To approve by action of the State Superintendent of Schools, acting on behalf of the local Board of Education in all matters relating to personnel action, a reclassification as Executive Secretary/Coordinator of Board Services with appropriate monthly salary, as well as back pay retroactive to a date that all similarly situated Executive Secretaries/Coordinators were awarded the same salary supplement previously only paid to the Executive Secretary to the Superintendent, 9/13/05.

A level one conference was held on December 17, 2009, and a denial was issued January 12, 2010. The parties participated in a level two mediation on March 18, 2010. Grievant appealed. Intervenors, Trina Barrett, Angela Prichard, and Marsha Weaver

requested to intervene on September 8, 2010, which was granted. A level three hearing was held at the Grievance Board's Charleston office on September 14, 2010. Grievant was represented by John Roush, Esq., West Virginia School Service Personnel Association. Respondent was represented by Rebecca Tinder, Bowles Rice McDavid Graff & Love, and Intervenors were represented by Ben Barkey, West Virginia Education Association. This case became mature on October 20, 2010, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievant asserts she performs similar duties to Intervenors and therefore should hold the classification title of Coordinator of Services, which would allow Grievant to go from a paygrade G to a paygrade H.

Respondent argues that W. Va. Code §18A-2-5 limits the number of positions a county can have in the H paygrade. For Respondent, that number is five, and there are currently five filled positions in the H paygrade. Respondent does not dispute that Grievant is performing as much or more work than Intervenors, and that her supervisor, the Superintendent, holds a position characterized by significant administrative duties, as stated in W. Va. Code, and therefore Grievant should be paid at the same or a higher paygrade as the employees who hold both the Executive Secretary and Coordinator classifications. However, Respondent avers there are few options available. Those options are: provide a salary supplement to the Grievant in excess of that paid to the coordinators and/or reclassify employees so that at least one current coordinator was reclassified to eliminate such class title or remove the coordinator class title from all employees.

Intervenors have no issue with the requested upgrade of Grievant. They joined merely to ensure they were not adversely affected, as they all hold the title of Coordinator/Executive Secretary.

This grievance is hereby GRANTED reclassifying Grievant, while leaving Intervenors in their current classifications.

Findings of Fact

1. Grievant is employed by Respondent as the secretary to the county school superintendent. She is classified as an Executive Secretary.

2. Grievant:

   - works pursuant to the job description of Executive Secretary to the Superintendent, which is different from the job description of Executive Secretary.

   - represents the board of education, the superintendent, the board members, and is the first person the public speaks to next to the county superintendent.

   - works with board members, coordinating the meetings and times.

   - works as the secretary to the Board, despite the superintendent holding that title, assisting in drafting agendas, preparing notices and drafting minutes of meetings.

   - functions as a member of the Cabinet, contributing to the discussion and preparing the notes of the meetings.

   - works with parents, resolving school problems relating to every aspect of the system, including curriculum and instruction.

   - works with policies, maintaining and sometimes drafting proposed policies.

   - uses her independent judgement to determine when a member of the public needs to speak directly with the superintendent.

   - maintains grievance files and confidentiality of all work.

   - attends continuing education through an association of Executive Secretaries.

- is compensated at paygrade G.

- receives a salary supplement paid to all employees who hold the classification of Executive Secretary.

3. Intervenor Trina Barrett:

   - has been employed by Respondent in the Finance Department at the central office since September 14, 1988.

   - is currently classified as a Payroll Coordinator/Accountant III/Executive Secretary.

   - is the only Payroll Coordinator and is responsible for the $22 million annual payroll, including both the professional and service payroll.

   - does not directly supervise any other employee but does train school service personnel on following policy.

   - is supervised by the Director of Finance/Treasurer, Birdie Gandy, who is assigned to direct the Finance Department and is in charge of finance and purchasing.

   - has held the Accountant III classification since December 1, 1993; the Executive Secretary classification since September 30, 1996; and the Coordinator classification since August 22, 2001.

   - received the Payroll Coordinator position by bidding on a posted position during the superintendency of William Grizzell during the State control of the Lincoln County Board of Education.

   - has experienced an increase in the amount of work over the course of her employment in the Finance Department.

   - is compensated at paygrade H, since her classification includes the coordinator title, the highest paygrade in her multi-classified position.

   - receives the salary supplement mentioned above, paid to all Executive Secretaries, and also receives an additional salary supplement payable to all Coordinators of Services.

4. Payroll is not considered a department by Respondent. It is part of the Finance Department.

5. Intervenor Angela Prichard:

   - has been employed by the Respondent for 24 years and was originally assigned to a position at the Central Office on August 23, 1999, having assumed the position pursuant to a posting for half time Food Service Secretary and half time Vocational School Secretary; she became full time Food Service Secretary III and then Food Service Executive Secretary on August 22, 2001.

   - became Food Service Billing Coordinator in August 2005 via reclassification, while retaining the Secretary classification.

   - is the only Coordinator for Centralized Food Service Billing.

   - supports the food service program as it relates to billing and secretarial services by maintaining accounting records and by being responsible for the accounting process associated with billing, budgets, purchasing and related operations of the food service program.

   - does not directly supervise any other employee but does respond to inquiries from school secretaries regarding food service billing.

   - is supervised by Diane Miller, the Food Service Director, who is responsible for managing and supervising the county school system's food service program, including such duties as preparing in-service training programs for cooks and food service employees, instructing personnel in the areas of quantity cooking with economy and efficiency and maintaining aggregate records and reports and timely submitting all food service reports to the federal government.

   - is compensated at paygrade H, since her classification includes the coordinator title, the highest paygrade in her multi-classified position.

   - receives the salary supplement mentioned above, paid to all Executive Secretaries, and also receives an additional salary supplement payable to all Coordinators of Services.

6. Centralized Billing is not considered a department by Respondent. It is a part of the Food Services Department.

7. Intervenor Marsha Weaver:

   - has been employed by Respondent for approximately 37 years, starting at the Central Office in 1973.

- received the Accountant classification in 1981; Secretary III classification in 1984; the Executive Secretary classification in 1993; the Coordinator of Employee Benefits classification in 2005.

- is currently classified as an Executive Secretary/Coordinator of Employee Benefits/Accountant III.

- does not directly supervise any other employee but does assist employees in enrolling for various benefits and in resolving inquiries regarding benefits.

- is supervised by the Director of Finance/Treasurer, Birdie Gandy, who is assigned to direct the Finance Department and is in charge of finance and purchasing.

- has experienced an increase in work duties over the years as a result of the addition of benefits available for employees.

- is compensated at paygrade H, since her classification includes the coordinator title, the highest paygrade in her multi-classified position.

- receives the salary supplement mentioned above, paid to all Executive Secretaries, and also receives an additional salary supplement payable to all Coordinators of Services.

8. Employee Benefits is not considered a department by Respondent. It is a part of the Finance Department.

9. Phyllis Miller:

- is assigned to the Director of Special Education, a position characterized by significant administrative duties, whose particular responsibilities involve overseeing the Medicaid program billing process.

- hold the classification titles of Coordinator of Medicaid Services and Clerk II.

- is the only Coordinator of Medicaid Services.

- received the position pursuant to a posting for the Coordinator position.

- does not supervise or evaluate any other employees.

- has received additional work as the duties of the Coordinator of Medicaid Services have increased due to the increase in paperwork and electronic documentation.

- is supervised by the Director of Special Education, formerly Doug Smith.
- is compensated at paygrade H, since her classification includes the coordinator title, the highest paygrade in her multi-classified position.
- receives the salary supplement mentioned above, paid to all Executive Secretaries, and also receives an additional salary supplement payable to all Coordinators of Services.

10. Darlene Neil:

- has been in the finance office for over 15 years.
- holds the classification titles of Executive Secretary/Accountant II/Coordinator of Purchasing.
- is the only Coordinator of Purchasing.
- does not supervise or evaluate any other employee.
- is assigned to and supervised by the Director of Finance/Treasurer, Birdie Gandy, as position characterized by significant administrative duties.
- is compensated at paygrade H, since her classification includes the coordinator title, the highest paygrade in her multi-classified position.
- receives the salary supplement mentioned above, paid to all Executive Secretaries, and also receives an additional salary supplement payable to all Coordinators of Services.

11. Purchasing is not considered a department by Respondent. It is a part of the Finance Department.

12. W. Va. Code §18A-2-5 limits the number of paygrade H positions to no more than the county had on March 1, 1988. Respondent had five paygrade H positions on March 1, 1988, and currently has five. Respondent has in the past employed seven in paygrade H.

13. In an attempt to correct the perceived pay disparity between those positions listed above and the Executive Secretary to the Superintendent position, former

Superintendent William Grizzell increased the salary supplement to the Executive Secretary to the Superintendent. When the sum was not paid to every service employee classified as an Executive Secretary, a grievance was filed.[1] The grievance was denied at the Grievance Board, upholding Superintendent Grizzell's actions. The Grievance Board decision was reversed by the Lincoln County Circuit Court holding that the county supplement for all employees in the executive secretary class title should be uniform.[2]

14. The job description of the Executive Secretary to the Superintendent is different than the job description of Executive Secretary.

15. The current Superintendent, David Roach, sent letters to Intervenors and others, in advance of the personnel deadline in the 2008-2009 school year advising them of proposed changes in classifications. Those persons notified immediately made it known that the proposed change was objectionable, even though the proposal was to retain each employee at his/her current salary.

16. Because of the objections, the reclassification plan was abandoned.

17. Currently, the issues of pay and classification are being resolved through attrition and posting.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the

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[1] *See Swanson/Swann v. Lincoln Co. Bd. of Educ.*, Docket No. 05-22-387 (Jan. 13, 2006).

[2] *See Swanson/Swann v. Board of Education of Lincoln County*, Civil Action Number 06-AA-1.

undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

Generally, in order to prevail in a misclassification grievance, the employee must establish that his or her duties more closely match those of another classification than that under which the employee's position is categorized. *Sammons/Varney v. Mingo County Bd. of Educ.*, Docket No. 96-29-356 (Dec. 30, 1996); *Savilla v. Putnam County Bd. of Educ.*, Docket No. 89-40-546 (Dec. 21, 1989). A school service employee who establishes, by a preponderance of the evidence, that he is performing the duties of a higher WEST VIRGINIA CODE §18A-4-8 classification than that under which he or she is officially categorized, is entitled to reclassification. *Gregory v. Mingo County Bd. of Educ.*, Docket No. 95-29-006 (July 19, 1995); *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (Apr. 15, 1991); *Holliday v. Marshall County Bd. of Educ.*, Docket No. 89-25-376 (Nov. 30, 1989); *Scarberry v. Logan County Bd. of Educ.*, Docket No. 89-23-63 (Oct. 30, 1989). However, simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render him or her misclassified *per se*. *Carver v. Kanawha County Bd. of Educ.*, Docket No. 01-20-057 (Apr. 13, 2001).

Grievant asserts she should be multi-classified as Executive Secretary/Coordinator of Board Services. Pursuant to WEST VIRGINIA CODE § 18A-4-8(l)(34), a "Director or Coordinator of Services" must be assigned to "direct a department or division." When used

as a verb, "direct" generally means to cause something to move on a particular course, to guide or govern, and/or to instruct with authority. BLACK'S LAW DICTIONARY 370 (Abridged 7th Ed. 2000).

Grievant further asserts that by not receiving the classification and not being placed in paygrade H she has been a victim of discrimination and favoritism. "Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. *See* W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant compares herself to Intervenors, as well as others who hold the coordinator classification and are paid in paygrade H. Grievant has demonstrated that she performs

like duties and assignments to Intervenors. While neither Grievant nor Intervenors are head of a department, they each have a specific area or procedure for which they are totally responsible from start to finish. Each of the individuals is responsible to an administrator who has ultimate decision-making authority, but who relies heavily upon the experience and expertise of these employees.

Respondent puts forth an argument that Grievant has not met her burden of showing she should be given the coordinator classification. Respondent's next argument is that, even if it were concluded that Grievant should be placed in the coordinator classification, Respondent would not be able to compensate Grievant at paygrade H, as it has met its quota as set out in W. Va. Code §18A-2-5. Respondent suggests that the only ways in which to compensate Grievant in accordance with the employed coordinators, is to provide a salary supplement to the Grievant in excess of that paid to the coordinators and/or reclassify the employees so that Grievant's paygrade is the same or higher than that of the current employee coordinators. Respondent calls reclassification of current employee coordinators an "attractive option in that, for example, the description of the duties of the intervenors and the additional employees who hold both classifications belie the classification titles held, and could be considered erroneous." *See Respondent's Proposed Level Three Findings of Fact and Conclusions of Law*.

Intervenors have no issue with Grievant receiving the requested upgrade. They do, however, point out that based on W. VA. CODE §18A-4-8(l) county boards are required to review each service person's job classification annually and "shall reclassify all service persons as required by the job classifications." In addition, Intervenors cite to W. VA. CODE §18A-4-8(m) which states that without a service person's written consent, that employee

cannot be reclassified by class title or "relegated to any condition of employment which would result in a reduction of his or hers salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years." Intervenors argue that Respondent is attempting to have the Grievance Board move outside the bounds of requested relief and violate the provision cited above.

The undersigned will not be reclassifying Intervenors. First, Respondent attempted to reclassify Intervenors and others in advance of the personnel deadline for the school year 2008-2009. Testimony was that Respondent intended to change the title of those affected, but not the pay. Intervenors and others immediately made it known that the proposed change was objectionable, and the plan was abandoned. It appears as though Intervenors are correct in their assessment that Respondent wants this Grievance Board to do what it abandoned during the 2008-2009 school year. If Respondent believes Intervenors are misclassified, Respondent must take its action after the annual review of the job classifications, and that action must be within the confines of the law.

With Respondent in essence arguing Intervenors are misclassified, yet the undersigned finding Grievant has proven she does like duties and assignments as Intervenors, the question then becomes how Grievant must be classified. "A county board of education may utilize its own expanded job descriptions for various service personnel positions but those descriptions must be consistent with and not contrary to those contained within W. VA. CODE §18A-4-8." *Fogus v. Greenbrier County Bd. of Educ.*, Docket No. 29-88-204. *See also Hancock County Bd. of Education v. Hawken*, 546 S.E.2d 258 (W.Va. 1999). In this instance that is exactly what Respondent has done with respect to

Intervenors' positions. Therefore, the undersigned takes Intervenors' classifications at face value, and Grievant must be reclassified as Coordinator of Services.

The next issue is that, since Grievant has proven under W. VA. CODE §18A-4-8(m) that she should be classified as a coordinator, what is the appropriate relief with respect to salary. W. VA. CODE §18A-2-5 states that the board of education is limited to the number of personnel compensated under paygrade H as it had on March 1, 1988. The Grievance Board has addressed this issue in *Miller v. Preston County Bd. of Education*, Docket No. 05-39-308 (Jan. 20, 2006), where it held that W. VA. CODE §18A-2-5 does not allow more employees paid in paygrade H than the county had on March 1, 1988. This decision was upheld at the circuit court level.

Respondent argues that based on both the statute and *Miller*, it cannot lawfully employ Grievant at paygrade H. This case creates quite a quandary, in that Respondent either must go over the allotment of five (5) individuals paid in paygrade H, or allow Grievant to continue to be discriminated against. Under the in *pari materia* rule of statutory construction, statutes which relate to the same subject matter must be read and applied together so that the Legislature's intent can be discerned from the whole of the enactment. *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); *Farley v. Zapata Coal Corp.*, 167 W. Va. 630, 281 S.E.2d 238 (1981); *Eastham v. Cabell County Bd. of Educ.*, Docket No. 92-06-397 (Apr. 16, 1993). In circumstances where there is an apparent contradiction of the law, the law should be interpreted in such a way as to give each part their meaning. *See Osborne v. U.S.*, 567 S.E.2d 677 (W.Va. 2002).

The best way to view the statutes so as to give each part meaning is to hold that the prohibition of W. Va. Code §18A-2-5 precludes state funding for more paygrade H employees than were employed by the March 1, 1988, date. However, it does not preclude the county from utilizing its funds to compensate her at paygrade H. It should be noted that this argument was rejected in *Miller*, as discussed above. However, there was no finding in *Miller* that Grievant had proved discrimination. This makes the above entitled action unique from *Miller*, and the principles of equity require that Grievant be placed in the appropriate classification and paid at paygrade H, to be paid out of the appropriate funds. This case is based solely on the specific facts and circumstances of this situation.

Therefore, this grievance is GRANTED.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. Generally, in order to prevail in a misclassification grievance, the employee must establish that his or her duties more closely match those of another classification than that under which the employee's position is categorized. *Sammons/Varney v. Mingo County Bd. of Educ.*, Docket No. 96-29-356 (Dec. 30, 1996); *Savilla v. Putnam County Bd.*

of Educ., Docket No. 89-40-546 (Dec. 21, 1989). A school service employee who establishes, by a preponderance of the evidence, that she is performing the duties of a higher WEST VIRGINIA CODE §18A-4-8 classification than that under which he or she is officially categorized, is entitled to reclassification. *Gregory v. Mingo County Bd. of Educ.*, Docket No. 95-29-006 (July 19, 1995); *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (Apr. 15, 1991); *Holliday v. Marshall County Bd. of Educ.*, Docket No. 89-25-376 (Nov. 30, 1989); *Scarberry v. Logan County Bd. of Educ.*, Docket No. 89-23-63 (Oct. 30, 1989). However, simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render him or her misclassified *per se*. *Carver v. Kanawha County Bd. of Educ.*, Docket No. 01-20-057 (Apr. 13, 2001).

3. Pursuant to WEST VIRGINIA CODE § 18A-4-8(l)(34), a "Director or Coordinator of Services" must be assigned to "direct a department or division." When used as a verb, "direct" generally means to cause something to move on a particular course, to guide or govern, and/or to instruct with authority. BLACK'S LAW DICTIONARY 370 (Abridged 7th Ed. 2000).

4. "Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

5. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee"

unless agreed to in writing or related to actual job responsibilities. *See* W. VA. CODE § 6C-2-2(h).

6. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

7. W. Va. Code §18A-4-8(l) county boards are required to review each service person's job classification annually and "shall reclassify all service persons as required by the job classifications."

8. W. Va. Code §18A-2-5 states that the board of education cannot employ more paygrade H positions than it had on March 1, 1988.

9. "A county board of education may utilize its own expanded job descriptions for various service personnel positions but those descriptions must be consistent with and not contrary to those contained within W. Va. Code §18A-4-8." *Fogus v. Greenbrier County Bd. of Educ.*, Docket No. 29-88-204. *See also Hancock County Bd. of Education v. Hawken*, 546 S.E.2d 258 (W.Va. 1999).

10. Under the in *pari materia* rule of statutory construction, statutes which relate to the same subject matter must be read and applied together so that the Legislature's intent can be discerned from the whole of the enactment. *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); *Farley v. Zapata Coal Corp*., 167 W. Va. 630, 281 S.E.2d 238 (1981); *Eastham v. Cabell County Bd. of Educ*., Docket No. 92-06-397 (Apr. 16, 1993).

11. In circumstances where there is an apparent contradiction of the law, the law should be interpreted in such a way as to give each part their meaning. *See Osborne v. U.S.*, 567 S.E.2d 677 (W.Va. 2002).

12. Grievant has met her burden of proof in this case.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to add the classification title of Coordinator of Service classification title to Grievant's contract. She is entitled to back pay with interest, benefits, and seniority as a Coordinator of Services retroactive to at least fifteen days before she initiated the grievance. This is to be paid from the appropriate funds.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: February 14, 2011

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Wendy A. Elswick
Administrative Law Judge