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**CAROLYN BANNISTER and
ELAINE ROLLINS**

v.

Docket Nos. 89-DHS-251/252

**WEST VIRGINIA
DEPARTMENT OF HUMAN SERVICES**

DECISION

Grievances brought by Carolyn Bannister on April 26, 1989, and Elaine Rollins on May 8, 1989, allege that as employees of Respondent West Virginia Department of Human Services (DHS) in its Parkersburg offices they were working out of classification from June 1979 to July 1984. Both were denied at Level II and at Level III in May and June, 1989. Grievants appealed to Level IV, and, upon their motion, their cases were consolidated. A hearing was held July 18, 1989. Proposed findings of fact and conclusions of law, with briefs, were received from both parties on and before September 27, 1989.

Respondent initially contends that these alleged misclassifications were never grieved before the West Virginia Civil Service Commission (CSC) during the entire period of time 1979 to 1984 and therefore are untimely. However, in AFSCME v. CSC, 380 S.E.2d 43 (W.Va. 1989)

("AFSCME IV"), the West Virginia Supreme Court of Appeals created a jurisdictional window for state employees with misclassification disputes that arose before July 1, 1988, allowing them to file grievances thereon under the procedures of W.Va. Code §§29-6A-1 et seq. for ninety days after its decision, issued March 28, 1989. Epling v. W. Va. Dept. of Health, Docket No. 89-H-109 (April 13, 1989). Since these claims were filed within the timeframes created by the Court, they are timely. While Respondent's contention of untimeliness must therefore be rejected, nevertheless the heart of that argument, that "grievants knew or had reason to know of the grievance procedure at the time the grievance events allegedly transpired," Res. Brief 28, must be addressed in considering its second argument, that the claims should be denied on the basis of laches.¹ The Court recognized in AFSCME IV, at n. 10, "As to those employees who have filed no grievance[s], we note that the doctrine of laches may, in appropriate cases, raise a bar to relief."

It has been recognized that laches may apply in grievance proceedings involving misclassification disputes where the grievant has not exercised diligence in bringing his or her claim and where the respondent agency has been prejudiced by the delay. Cart v. W. Va. Dept. of Veterans

¹Respondent moved for dismissal on the basis of laches at the hearing. The motion was denied at that time without prejudice to Respondent to reassert the defense in its post-hearing submissions, which it has done.

Affairs, Docket Nos. VA-88-070/071, 89-VA-180 (Aug. 3, 1989), citing Maynard v. Bd. of Educ. of Wayne Co., 357 S.E.2d 247 (W.Va. 1987). "[W]hat constitutes laches depends upon the facts and the circumstances of each particular case." Id. at 254.

Both grievants were assigned to DHS when employed under the federal CETA program in the mid-1970's. In June 1979 they were regularly employed by DHS and classified as Case Aide II's (CA II). The next January they were promoted to the Economic Service Worker I (ESW I) classification, and in October 1983 to Economic Service Worker II (ESW II). Grievants' basic contention is that they were doing the same work as Economic Service Worker III's (ESW III) from June 1979, when they were hired, to July 1, 1984, when the ESW III position was eliminated as part of a reorganization of DHS.²

The record is clear that, throughout their DHS employment, Grievants knew that the ESW III's, while making a higher salary than theirs, were doing the same work as they were. Grievants testified that they did not find out they could grieve the matter however until 1986, when they were so advised by CWA (Communications Workers of America) and apparently brought an action before the CSC,³ and that prior

²Grievants remain ESW II's.

³Each grievant stated she filed a grievance in 1986,
(Footnote Continued)

to then they thought that advancement was only through promotion when a position was available.⁴ Grievant Rollins, while unclear as to when she first heard that other employees were asserting their rights, stated, "I didn't think too much about it until after the others had already got theirs settled, which wasn't too long, I don't believe, until we did file." Tr. 87. Moreover, both grievants testified that they had been issued copies of the employee handbook but did not read them. The handbook then in effect included a section properly advising the employees of their right to file grievances through the CSC and notifying them that copies of the grievance procedures could be obtained through Respondent's personnel office. Res. Ex. 18.

It has been held that "lack of activity and diligence does not affect the rights of a party, when such party had no knowledge of his rights, and knew no fact or facts putting him on inquiry." Bank of Mill Creek v. Elk Horn Coal Corp., 133 W.Va. 639, 57 S.E.2d 736 (1950). It is clear that Grievants indeed did not know their rights until

(Footnote Continued)

and a December 1986 letter from a CWA employee representative to the Acting Director of Personnel, CSC, which includes both grievants' names on what is labelled a "list of DHS employees making application for backpay based on misclassification," was submitted into the record (Gr. Ex. 27). No information on what happened to that case or other information on it was provided.

⁴Grievant Bannister testified that she had asked for promotion to ESW III in 1984 but was denied the position on the grounds that there was no opening.

apprised of them by CWA. However, they certainly knew the facts "putting [them] on inquiry," and nevertheless had no interest in finding out what were their rights to rectify any unfair disparity in pay.⁵ Moreover, since under the grievance procedures of CSC an employee could grieve allegedly working out of classification until April 1984, when CSC began disallowing such grievances, Grievants could have pursued their claims anytime up until then.⁶ That they did not do so constitutes a failure to exercise diligence from 1979 to 1984 and therefore supports the application of laches.⁷

⁵Indeed, this record indicates that Grievants did not consider any disparity in pay unfair or unjustified prior to being advised by CWA.

⁶Grievants rely on footnote 5 of AFSCME IV, which states that prior to AFSCME I, AFSCME v. CSC, 324 S.E.2d 363 (W.Va. 1984), "CSC took the position that 'out of classification' disputes were not grievable." The footnote's statement is overbroad, for even in AFSCME II, AFSCME v. CSC, 341 S.E.2d 693 (W.Va. 1985), the Court recognized that such cases had been processed under those procedures.

⁷In Cart the grievant did not find out she was doing the work of a higher classification until June 1984, when she was correctly told she was educationally unqualified for a position in the higher classification. No lack of diligence was found because at that time CSC did not consider misclassification disputes to be grievable and, when CSC later instituted new procedures under which such disputes would be considered, no remedy was available unless the grievant was eligible for promotion. No such considerations apply here, for Grievants could have pursued their claims before the CSC from 1979 to April 1984 and were eligible for promotion during that time. Since it is found that they did not exercise diligence for almost five years, it is not necessary to address whether their further delay in asserting their rights thereafter was reasonable.

The Court's finding of prejudice in Maynard was based on the fact that the defendant therein "was unable to compensate the plaintiffs for ten-years' accumulated supplemental payments they requested, for compensation for all the payments would have had to come out of one year's budget, which was limited by the taxes collected therefor." Cart.⁸ Maynard also recognized that a defendant may be prejudiced by loss of evidence over the time the plaintiff delayed in bringing his claim.

Mary Jo Thomas, Quality Control Director of DHS, testified that DHS has purged old case files, although she did not know what the schedule has been.⁹ Joe Smith, until recently Assistant Commissioner in charge of Personnel, testified that when he asked Grievants' supervisor for the records needed to establish the level of their work, he was told that those records could not be reconstructed. He also testified that the passage of ten years' time would create a hardship on the agency to provide back pay. He stated that if it had been known that a higher wage was required for

⁸The Court itself has characterized Maynard as involving "substantial prejudice to the public's fiscal integrity resulting from a large retroactive monetary award." West Virginia Inst. of Tech. v. West Virginia Human Rights Comm'n., #18608 (W. Va. June 28, 1989), Slip op. n. 15.

⁹She knew that it had been the practice at the time at issue here to purge the quality control files every three years and that the agency has recently begun to keep them for ten years.

certain employees in 1979 such pay could have been budgeted on a yearly basis but it would be much more difficult for the agency to pay out of one year's budget the accumulated back wages of ten years.

While this record does not establish that the loss of records showing Grievants' level of work materially hampered Respondent in defending against these grievances, as shown by the later discussion of the merits of the case,¹⁰ the evidence that Respondent would be financially prejudiced by being required to provide back pay does support finding laches. As Mr. Smith indicated, the ten years' combined back pay for the two grievants here alone would be substantial. Furthermore, it must be officially noticed that more than one hundred sixty misclassification cases against DHS, almost all of which were filed like this one pursuant to the jurisdictional window AFSCME IV opened, are pending at Level IV.¹¹ Those cases also request back pay, usually for a number of years. Since laches is a product of equity, which

¹⁰ Respondent's theory on the merits is that, while Grievants did the same work as the higher-paid ESW III's, the quality of their work was inferior and they required greater supervision and therefore Respondent was justified in retaining them in lower classifications. It accordingly argues that the records on how well Grievants did their work were necessary for a determination whether they were properly classified. It is not necessary to address this argument since Grievants failed to establish their case but it may be stated that the argument is not compelling.

¹¹ It is not known by the undersigned how many others are pending at other levels of the grievance procedure.

above all involves fairness, the cumulative effect of payment of back wages in those cases may properly be considered in this individual matter. Each supplemental payment demanded in Maynard alone also would not have monetarily prejudiced the defendant in that case; it was the cumulative effect of payment to all plaintiffs. Just because all misclassification cases have not been consolidated does not warrant a different result, for the effect on Respondent is the same. Accordingly, it is found that Respondent has been prejudiced by the delay and laches should apply.

Moreover, even if laches did not attach, Grievants would not be entitled to relief because they failed to establish that they were carrying out the duties of the ESW III classification. Grievants contend that the Court held in AFSCME v. CSC, 324 S.E.2d 363 (W. Va. 1984) ("AFSCME I"), that, where the work performed by employees classified as ESW I's or II's is indistinguishable from the work performed by ESW III's, as is true in this case, the ESW I's and II's are entitled to the difference in compensation between their classifications and the ESW III classification. Quite simply, AFSCME I makes no such ruling. While the Court noted that a study conducted by CSC did reveal that employees in the three classifications were performing essentially the same duties, it made no determination that that fact alone entitled the employees at the lower classifications to back pay. Rather, it merely accepted that the CSC had "recognized the legitimacy of the petitioners' grievances"

but had failed to provide back pay. 324 S.E.2d at 366. Accordingly, the only issue before the Court was whether, when an employee has been working out of classification, he is entitled to back pay, and the Court ruled thereon in plaintiffs' favor. In this case, in contrast, Respondent disputes that Grievants were working out of classification, and the merits must be addressed.

It has recently been held,

In a classification-related complaint, a grievant must show that she was performing the duties of one professional categorization, as revealed by the official CSS [Civil Service System] specifications thereof, while being assigned to another. In essence, this may be accomplished by demonstrating that a position more closely matches one CSS classification description than another. Hayes v. DNR & CSS, Docket No. NR-88-038 (Mar. 28, 1989).

Boggs v. West Virginia Tax Dept., Docket No. 89-T-174 (Sept. 22, 1989). Boggs also noted that its approach was consistent with rulings of the CSC that rejected the approach Grievants urge here, i.e., that merely because an individual's work is indistinguishable from another's in a higher classification he should be compensated at the higher pay. Boggs referred to the following explanation of the CSC in Cooksey v. DNR, Docket No. 923 (July 18, 1984),

To allow a position to be misclassified simply because other positions are misclassified would legitimize such actions and serve to undermine the basis of the classification plan and the principle of personnel and pay administration on which it is founded.

Accordingly, the issue on the merits is whether the work Grievants did as CA II's, ESW I's, and ESW II's more properly fits the classification description of an ESW III than

the descriptions of the classifications at which they worked.¹² That others in the office, classified as ESW III's, did the same work, which is hereby accepted, is immaterial to the inquiry.

The evidence clearly establishes that Grievants' duties have always involved processing applications for the various programs DHS administers, AFDC, AFDCU, Medicaid, food stamps, and nursing home care, and maintenance of those cases. Grievants, like all the CA II's and ESW I's through III's, were given "generic" caseloads, i.e., each employee is assigned a certain part of the alphabet and handles all cases in all programs for applicants whose names begin with the letters in that part of the alphabet. Grievant Bannister testified that on a typical day the employee would talk to the client to find out what the client's needs were, would give the client the appropriate application, and would process the application. The taking of an application would consume approximately thirty minutes and about fifteen clients would be seen on a typical day. The employee would make the determination whether the client was eligible for the program, although the determinations of the employees of all classifications had to be approved by a supervisor, who

¹²Since Grievants make no arguments alternative to their contention that they are entitled to compensation at the rate of pay for a ESW III, this decision does not address whether they were doing the work of another classification.

was at a higher classification than ESW III. There was no formal training; the employees relied on the manuals they were issued and their supervisors and fellow employees for information and guidance on how to process applications. The number of cases assigned to each employee was in no way dependent on the employee's classification, for the evidence showed that some employees of higher classifications had at times smaller caseloads than others of lower classifications. Indeed, Grievant Bannister said that the caseloads were switched around approximately once a year, clearly without regard to the classifications of the employees.

The CA II classification description provides in pertinent part,

An employee in this class, under the supervision of a professional staff member, performs sub-professional case aide work in the areas of health, welfare, employment service, vocational rehabilitation, mental health or a field directly associated with the rendering of a human service.

The "Examples of Work Performed" essentially relate to assisting professionals in providing services to applicants. It must be determined that Grievants have never had sub-professional duties of the type covered by the CA II description and therefore the record supports that they were working out of classification for the first six months of the time at issue here.¹³ However, the question remains

¹³See n. 12. Any contention that Grievants' work was that of an ESW I or II is accordingly deemed waived.

whether at that time or later they were doing the work of an ESW III, as they contend.

The classification descriptions for ESW I, II, and III are very similar. The description of the "Nature of Work" of an ESW I is as follows:

An employee in this class, under the general supervision of an Area Administrator or an Economic Service Worker II or III, performs a variety of tasks and duties of a technical nature in an Area Welfare Office. Such tasks and duties involve primarily the determination of eligibility for financial assistance under a simplified method for all public assistance applicants for any of the Department of Welfare's services or benefits.

The description of the "Nature of Work" of an ESW II differs therefrom only by stating that the employee "may supervise" ESW I's or Aides. The correlative description for the ESW III also provides that the individual may supervise subordinate ESW's and Aides, and otherwise differs from the descriptions of the ESW I and II by omitting any reference to a "simplified method" and by stating that the employee works under the "general direction" of a supervisor rather than under "general supervision." Finally, the ESW III also provides that, in addition to assistance for applicants for the Department of Welfare's services, the employee is to aid applicants for the "Office of Economic and Community Development's Housing of Mountaineer Efforts program loans."

Similarly, all three classification descriptions list the following "Examples of Work Performed":

Analyzes information on forms and other necessary documents supporting applicants for financial assistance and determines the completeness, consistency and arithmetic accuracy of such information.

Computes applicant budgets and reviews and evaluates client data to determine approximate extent of entitlement in accordance with Agency policies and standards, and notifies the clients as to the Agency decisions.

Assists in completion of authorization for financial, medical, food stamps or other assistance and may close cases when client is determined ineligible.

Assists person applying for assistance and secures such supporting data as necessary about the application through personal or group interviews with applicants.

Maintains records, data, furnishes necessary reports and performs such other related duties as may be required.

The ESW II and III descriptions add, "Entertains questions and or complaints about assistance payments, makes adjustments where possible, assists individuals in applying for a fair hearing and participates in such hearings as may be required." The ESW III description finally adds,

Identifies applicant's or client's need for additional services or assistance provided by the Department and arranges for consultation between the Social Service Workers and the client.

Aids recipients in utilizing grants or loans to best meet needs.

Performs field work to inspect property location, aid in obtaining necessary permits, and plan house construction.

Finally, each of the three classification descriptions list these "Required Knowledges, Skills and Abilities":

Ability to work from a formula or standard instructions.

Ability to work with facts and figures and perform[] tasks involving a high degree of accuracy.

Ability to perform work involving careful review and work of a computational nature.

Ability to exercise tact in dealing with people and rendering assistance to others.

Ability to conduct interviews, communicate clearly both orally and in writing and to plan and organize work independently and efficiently.

The ESW II and III descriptions add a requirement of "knowledge of Department rules and regulations and policies

relating to eligibility for assistance." The ESW III description also requires "Knowledge of grants and loans available to clients" and "Knowledge of financial, medical, and food program qualifications" and also adds a requirement of ability to "handle complaints."

There is no indication that Grievants or the other employees had any duties involving the "Office of Economic and Community Development's Housing of Mountaineer Efforts program loans" referred to by the ESW III description. The evidence further supports that the employees worked under "general supervision" rather than "general direction" of the supervisor since all work required approval. While there was no direct evidence of two types of methods for determining eligibility, i.e., the "simplified method" referred to by the ESW I and II description and some more complex method, this record tends to indicate that a fairly simple method was utilized since all workers depended on the manual and there is no indication that they referred to regulations. It would appear that determinations based on departmental regulations themselves would require more independent and complex work. While Grievant Bannister, in answer to leading questions of her counsel, affirmed that she had knowledge in most of the areas described by the ESW III description, her testimony otherwise failed to show that she had any particularly detailed knowledge, for example, of grants or loans. Moreover, while she affirmed that she handled complaints, there was no evidence that they were not

of a type that would fit into the nature of work of an ESW I or II, while the ESW III description indicates that the complaints referred to thereby were more complex and required more analysis and independent action. Finally, while it is recognized that the "Examples of Work Performed" of a particular classification are exactly that, examples, and that an employee working in that classification may not have the same duties as those listed, the examples provided in the ESW III description do indicate more independent work than that Grievants performed. For example, there was little indication of Grievants' working with social service workers, there was no evidence of field work, aid in obtaining permits, or planning house construction, and the only "participation" in a hearing testified to was one time Grievant Bannister was a witness at such a hearing. Rather, this record supports that the work that Grievants did much better fits the examples of work common to all three classifications.

It is accordingly found that the evidence tends to support that Grievants' work fit the description of the nature of work common to the ESW I and ESW II classification and that the evidence did not establish that Grievants' work would properly be classified as ESW III work. It must therefore be determined that Grievants failed to establish their case by a preponderance of the evidence.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion and analysis, the following are also made:

Findings of Fact

1. Grievants were employed as Case Aide II's from June 1979 to January 1980, when they were promoted to Economic Service Worker I's. They were further promoted to ESW II's in October 1983.

2. Grievants knew that employees classified as Economic Service Worker III's were doing the same work they were doing throughout 1979 to 1984 but did not investigate their rights, taking no action until advised to do so by their union in 1986.

3. From 1979 to 1984 Grievants took applications for AFDC, AFDCU, Medicaid, food stamps and nursing home programs; processed the applications; and maintained their caseloads. Grievants handled generic caseloads.

Conclusions of Law

1. Grievants did not "exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds," Maynard v. Bd. of Educ. of Wayne Co., 357 S.E.2d 246 (W.Va. 1987), since they had "facts putting [them] on inquiry," Bank of Mill Creek v. Elk Horn Coal Corp., 133 W.Va. 639, 57 S.E.2d 736 (1950), but did nothing until 1986.

Moreover, Respondent has been monetarily prejudiced by the delay in bringing this action. Accordingly, laches applies. Maynard; Cart v. W.Va. Dept. of Veterans Affairs, Docket Nos. 88-Va-070/071, 89-VA-180 (Aug. 3, 1989).

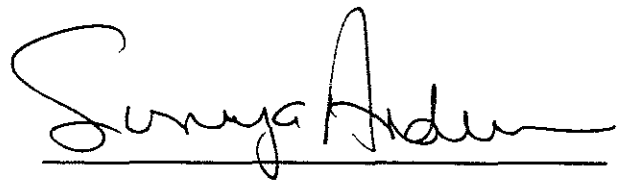
2. A grievant must prove, by a preponderance of the evidence, the allegations of his or her complaint. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). "In a classification-related complaint, a grievant must show that she was performing the duties of one professional categorization, as revealed by the official CSS specifications thereof, while being assigned to another. In essence, this may be accomplished by demonstrating that a position more closely matches one CSS classification description than another. Hayes v. DNR & CSS, Docket No. NR-88-038 (Mar. 28, 1989)." Boggs v. W. Va. Tax Dept., Docket NO. 89-T-174 (Sept. 22, 1989).

3. Grievants failed to establish by a preponderance of the evidence that they were performing the duties of an Economic Service Worker III from 1979 to 1984.

Accordingly, the grievances are **DENIED**.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Wood County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board

nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

A handwritten signature in cursive script, reading "Sunya Anderson", written over a horizontal line.

SUNYA ANDERSON
HEARING EXAMINER

Dated: November 3, 1989