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SANDRA CART

V.

WEST VIRGINIA DEPARTMENT OF  
VETERANS AFFAIRS and  
WEST VIRGINIA CIVIL SERVICE SYSTEM

Docket Nos. 89-VA-070  
89-VA-071  
89-VA-180

D E C I S I O N

On October 31, 1988, Grievant, an employee of Respondent West Virginia Department of Veterans Affairs at the Barboursville Veterans Home, filed grievances alleging (1) that from August 1983 to February 1985 she performed the duties of a Social Service Worker I while she was classified as a Clerk I and (2) that from February 1985 to September 1988, while remaining a Clerk I, she performed the duties of a Clerk III. The two grievances were considered together and denied at Level I on November 1, 1988, at Level II on November 9, 1988, and at Level III on December 9, 1988. The Level IV appeals were filed December 20, 1988, and hearings were held February 15 and March 23, 1989.<sup>1</sup>

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<sup>1</sup>Hearings scheduled for January 24 and March 6, 1989,  
(Footnote Continued)

On January 6, 1989, Grievant filed a third grievance alleging discriminatory and retaliatory denial of a schedule adjustment for school. It was denied at Level I on February 10, 1989, at Level II on February 27, 1989, and at Level III on April 17, 1989.<sup>2</sup> Grievant appealed to Level IV on April 24, 1989. On April 28, 1989, the grievance was consolidated with the other two and a hearing was held May 22, 1989, where evidence was taken on all three grievances. Proposed findings of fact and conclusions of law were received from Grievant and Respondent West Virginia Department of Veterans Affairs on and before July 6, 1989. The three grievances will be separately discussed herein.

Docket No. 89-VA-070

While Grievant's appeal form alleges that she was doing the work of a "Social Service Worker I" from August 1983 to February 1985, at the Level IV hearing Grievant was allowed to amend her complaint to allege that she was doing the work of a "Social Worker I" at that time. See W.Va. Code

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(Footnote Continued)

were continued at the requests of the parties.

At the Level IV hearing Grievant contended that since September 1988 she has continued to be misclassified and requested that the issue be considered. See W.Va. Code §29-6A-3(j). Grievant was allowed to submit evidence on the issue. However, because Grievant's proposed findings of fact and conclusions of law make no reference to the issue, it is therefore accepted that Grievant has removed the issue from consideration and it is not addressed in this decision.

<sup>2</sup>The evidentiary record of the Level III hearing is of record.

§29-6A-3(j). Grievant requests back pay plus interest.<sup>3</sup> Respondent makes the alternative contentions that Grievant was educationally unqualified for a social worker position; the doctrine of laches bars recovery to her; and her duties were clerical, those of a Clerk I.

It is not necessary to address whether Grievant was educationally unqualified for the Social Worker position<sup>4</sup>

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<sup>3</sup>On Grievant's appeal form filed in Docket No. 89-VA-070 she also asked to be "promoted," apparently to the social worker position, and similarly in Docket No. 89-VA-071 she requested promotion, apparently to the Clerk III position. Since Grievant cannot be requesting promotion at this time to both positions and Grievant's proposed findings of fact and conclusions of law make no request of promotion, it is accepted that Grievant is only asking for back pay plus interest as a remedy.

<sup>4</sup>The job description for Social Worker I submitted into evidence, which according to Respondent was in effect until July 1, 1984, provided the following "Minimum Training and Experience Requirements,"

TRAINING: Completion of two years' work (60 semester hours) in an accredited college or university.

SUBSTITUTION: Full-time paid professional experience in any public or private social welfare agency, including the Food Stamp Program and/or the Donated Food Program, may be substituted on a year-for-year basis for the required college training.

Respondent further states,

On July 1, 1984, the minimum requirements of the Social Worker I class changed to require a Bachelors of Art [sic] degree from a four-year college or university in the field of social work.

While that fact was not established, if Respondent is correct Respondent also is correct in arguing,

In June, 1984, grievant had completed thirty (30) hours of work in an accredited college or university and had  
(Footnote Continued)

because being unqualified for a position does not bar a claim for back pay for fulfilling the duties of the position.<sup>5</sup> In AFSCME v. CSC of W.Va., 341 S.E.2d 693 (W.Va. 1985) ("AFSCME II"), the West Virginia Supreme Court of Appeals held that all petitioners were entitled to back pay for all times they were fulfilling the duties of positions in higher classifications, although some petitioners did not have the minimum qualifications for the positions. If such grievants were disallowed back pay, they would have no remedy whatsoever and state agencies would be free to abuse the system by requiring employees to work outside their classifications without any compensation for doing the work for which other employees are paid a higher salary.

As to its laches argument, Respondent proposes the following as a conclusion of law:

That prior to April, 1984, a grievance procedure existed through the Civil Service Commission to challenge misclassifications. The doctrine of laches is

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(Footnote Continued)

worked at the Barboursville Veterans Home for approximately ten (10) months. Ms. Cart had no previous "full-time paid professional experience in any public or private social welfare agency." Hence, even if the ten months grievant had worked at the Barboursville Veterans Home is considered proper and relevant experience, she still did not meet those qualifications until August, 1984. By that time, the minimum requirements had changed, requiring a Bachelors of Art [sic] degree from an accredited college or university in social work, and grievant did not meet those qualifications.

<sup>5</sup> Failure to fulfill the education and experience qualifications for a position would bar reclassification of a grievant's position.

based on the maxim that equity aids the vigilant and not those who slumber on their rights. Especially in those instances challenging the legality of a matter involving a public interest, such as the manner of expending public funds, a party must exercise due diligence. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246 (W.Va. 1987). Since grievant had a process to challenge a misclassification when she was alleging it occurred, the equitable doctrine of laches prohibits recovery now.

Grievant testified that she found out she was working out of classification when she talked to David Basham, Chief of Social Services for the Home, in June 1984 about applying for a Social Worker I position being vacated and was advised by him that she was unqualified for the position.<sup>6</sup> Respondent is correct that prior to April 1984 an employee could grieve, under the grievance procedures of the Civil Service Commission ("CSC"), being required to work out of classification.<sup>7</sup> However, by the time Grievant found out she was working out of classification the CSC was disallowing grievances such as hers, for from April 1984 until October 1984, when CSC issued its Classification Review Policy, the CSC did not consider such allegations of misclassification to be grievable. AFSCME v. CSC, Docket No. 17929 (W.Va. May 20, 1988) ("AFSCME III").

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<sup>6</sup>Mr. Basham formally notified Grievant in a letter of June 18, 1984, that she was not qualified for the position (Gr. Ex. 1).

<sup>7</sup>The CSC did not allow back pay in such cases. See AFSCME II.

Furthermore, Grievant was not provided any remedy by the Classification Review Policy, for it did not allow back pay, see AFSCME III, and Grievant had been already been advised by Mr. Basham that she could not be promoted to a social worker position. In fact, not until July 20, 1988, when CSC promulgated its Back Wage Computation Policy, did CSC allow any back wages in misclassification cases and that policy allowed back wages only to those employees who had received promotions, i.e., whose positions had been reclassified. An individual such as Grievant in this case was not assured of receiving any compensation for working out of classification until, on March 28, 1989, the Supreme Court of Appeals of West Virginia issued its decision in AFSCME v. CSC, 380 S.E.2d 43 (W.Va. 1989) ("AFSCME IV"), wherein it declared CSC's Back Wage Computation Policy null and void, and reiterated the holding it had made in the prior AFSCME decisions that an employee who is working out of classification is entitled to back pay for the time he or she so worked.

It cannot be said that Grievant contravened Maynard's requirement, on which Respondent relies, that diligence be exercised in asserting a claim involving a public interest.<sup>8</sup>

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<sup>8</sup>In VanDyke v. McDowell Co. Bd. of Educ., Docket No. 33-88-098 (Oct. 18, 1988), it was stated,

The West Virginia Education and State Employees Grievance Board, following the holding in Maynard v.  
(Footnote Continued)

Grievant correctly relies on Harris v. Civil Service Comm'n., 154 W.Va. 705, 178 S.E.2d 842 (1971), where the Court held that it would not apply laches to delays in filing an appeal before the CSC where there was confusion as to coverage and the time for filing and the Court allowed such appeals to be filed within a reasonable time of the court decision that settled the question. From the time that Grievant became aware that she was working out of classification up to the time she filed her claim there was no assured procedure under which she would receive back pay upon establishing that she worked out of classification. In fact, there was confusion as to whether and how a civil servant could get back pay for working out of classification until AFSCME IV was decided.

Furthermore, there has been no showing by Respondent of the "controlling element" recognized in Maynard for application of the equitable doctrine of laches, i.e., prejudice. "Delay alone does not constitute laches; it is delay which

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(Footnote Continued)

Board of Education of the County of Wayne, 357 S.E.2d 246 (W.Va. 1987), has previously held that when an employee is aware of a possible violation of his rights and does not timely pursue a resolution of the matter or show valid reason for a delay in excess of the timelines for filing a grievance, such matter is untimely and barred by the doctrine of laches.

Insofar as VanDyke indicates that the claim in Maynard, besides being barred by laches, was also barred because of untimely filing, i.e., failure of the plaintiffs to file a claim within the timeframes of the applicable statute of limitations, and insofar as VanDyke confused the separate issues of timeliness and laches, it was in error.

places another at a disadvantage." 357 S.E.2d at 253, quoting Syl. pt. 3, Carter v. Carter, 107 W.Va. 394, 148 S.E. 378 (1929). See also Hooper v. West Virginia Sch. of Osteopathic Medicine, Docket No. BOR-88-027-4 (June 29, 1989). Respondent has not asserted or shown it is prejudiced in any way, e.g., financially or in its ability to present a proper defense against the claim. In contrast, the defendant in Maynard proved that it was unable to compensate the plaintiffs for the 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.

Finally, while Maynard also recognized that laches would apply to a terminated employee's request for full back pay for the time he was unemployed where he delayed in bringing a claim for reinstatement, no such equitable consideration would apply where the employee was doing the work of a higher classification and the employer benefitted from that labor, as claimed here. Supportive of a determination that laches should not apply in this matter is West Virginia Inst. of Tech. v. West Virginia Human Rights Comm'n., #18608 (W.Va. June 28, 1989), where a professor proved that he had been paid less than other professors because of his national origin and full back pay was approved by the Court. The Court noted that laches were not established "in the sense discussed in Maynard," "involving delay and substantial prejudice to the public's fiscal



integrity resulting from a large retroactive monetary award." Slip op. n. 15.

For the above reasons, it is determined that Respondent failed to establish that the equitable doctrine of laches should apply in this case. The merits of whether Grievant worked out of classification will therefore be addressed.

The job description for a Clerk I describes the "Nature of Work" as follows:

An employee in this class performs a variety of clerical tasks in the processing of forms and records requiring the application and interpretation of office procedures and departmental rules and regulations. The employee makes independent decisions and uses personal judgment in applying procedures in accordance with departmental policies within the limits of established work methods. Recurring work assignments are not given detailed review, but are spot checked to determine that the employee is adhering to established regulations and departmental policies. Special work assignments are reviewed by a supervisor for accuracy and compliance with instructions.

The job description for a Social Worker I describes the "Nature of Work" as follows:

An employee in this field performs general social case work or field work and, under close supervision, provides limited counseling services, monetary grants, medical or other services in the alleviation or prevention of social problems. Work assignments are reviewed by a superior through reports and conferences with the employee.

Grievant's proposed findings of fact do not include any discussion of Grievant's duties from August 1983, when she was hired at the Barboursville Veterans Home ("the Home"),

until February 1985.<sup>9</sup> However, Grievant testified that she was assigned to the Nursing Department, where she worked under the nurses and health service workers. She coordinated driving runs, made appointments, such as medical and dental, for the residents and kept their charts. She stated that the residents came to her first with problems they had,<sup>10</sup> which she would take care of herself if she could and

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<sup>9</sup>Grievant's proposals merely provide the following inadequate and conclusory statements, which fail even to recognize that Grievant had amended her complaint to allege that she was doing the work of a Social Worker I (not a Social Service Worker I):

1. While classified as a Clerk I she assumed the duties and responsibilities contained in the W.Va. Civil Service Social Service Worker I job description....
3. Nursing care notes in Client's clinical records contain entries, including evaluations and recommendations, made by Sandra Cart....
7. Sandra Cart continued to perform the duties of a Social Service Worker I until February 1985.

It is also difficult to discern from the record the exact times at which Grievant carried out various duties since oftentimes dates were not provided and sometimes, particularly in Grievant's own testimony, incorrect dates were mistakenly given.

<sup>10</sup>Respondent's contention that residents came to Grievant with a problem "occasionally" is unsupported by the record. Moreover, Respondent's assertion that "there was no evidence that this was part of grievant's job description, but only something she did on her own to assist the residents at the Barboursville Veterans Home" is utterly inapposite to the inquiry in this matter because, if the evidence established that the work was outside Grievant's job description, it would tend to support Grievant's claim that she was working out of her classification as a Clerk I. Further, there is no support for Respondent's statement that

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would refer to others, such as service organizations and the Veterans Administration. She referred indigent residents to the Lions Club for free eyeglasses provided thereby. She stated she also checked on billings and "sent forward"<sup>11</sup> blood work. She stated she also did typing and clerical work.

Grievant's description of her duties was essentially corroborated by Patricia Ramey, a licensed practical nurse at the Home. She stated that Grievant answered the phone, ordered supplies, kept charts up-to-date and made sure the residents had transportation. In corroborating Grievant's testimony about referring the residents for dental work and glasses, she stated that the form for requesting dental work was two pages long and, in order to fill it out, Grievant had to take information from the resident's chart and also get idiosyncratic information from the resident himself for notation. Grievant also had to get information on the residents' insurance and keep track of their coverage. She stated that Grievant issued passes and made travel arrangements for the residents and talked to their families. She stated Grievant also made referrals to outside agencies and

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(Footnote Continued)

Grievant resolved the residents' problems "on her own" and, even if that were true, since Respondent accepted her so doing, that function would be considered part of her duties.

<sup>11</sup>Grievant did not explain what was meant by this phrase.

got information on laboratory work for Medicaid. Further, she stated that making such referrals and getting the Medicaid information is now done by the Home's Social Service workers, as is the arranging of the residents' transportation. She concluded by stating that while Grievant was in the Nursing Department she did a lot of work that is now done by the administration and social service departments of the Home. She did state that Grievant did a lot of typing also, such as the minutes for the Residents' Council and the Chapel bulletin, both of which are no longer done.

Respondent largely relies on the testimony of David Basham, who testified generally that Grievant was "not to my knowledge" doing duties of a social worker. He described such duties as in-depth interviewing of new admittees, writing a social history on the residents and assessing their needs. While Grievant's testimony did not support such extensive work, the job description of the Social Worker I also does not require such an interview process, instead providing for "limited counseling services."<sup>12</sup> Mr. Basham also stated that social workers made recommendations to other agencies, such as Social Security and the Veterans

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<sup>12</sup>Mr. Basham stated that the Home uses Social Workers I and Social Workers II. Accordingly, in describing the duties of the social workers at the Home, he included duties that are rightfully part of a Social Worker II's job description and are more extensive than those of a Social Worker I.

Administration, ordered medical records, and got information from other individuals.

There can be no serious argument that Grievant was not working out of her classification of Clerk I, the job description of which is totally limited to strictly clerical functions.<sup>13</sup> Further, in that Grievant's testimony of the nature of her work is consistent with the job description of a Social Worker I and is corroborated by Patricia Ramey's testimony, which is found very credible, and even partially by David Basham's description of the functions of a social worker,<sup>14</sup> it is found that a preponderance of the evidence establishes that Grievant was performing the duties of a Social Worker I from August 1983 to February 1985. Finally, the clerical work Grievant did during this time is not so

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<sup>13</sup>The Clerk I job description lists as "Examples of Work Performed" the following:

Maintains filing system of correspondence, records, and reports. Types memos, correspondence and record cards. Answers telephone giving information and screening calls. Operates copier or memograph [sic] machine to reproduce materials. Opens, sorts and routes mail to proper persons. Proofreads written and typed material for accuracy and completeness. Posts information to log or ledger for record keeping purposes. May assist in organizing information for preparation of reports. Performs related work as required.

<sup>14</sup>Certain testimony of David Basham that is inconsistent with that of Grievant and Patricia Ramey is so general, so unspecific to the duties of a Social Worker I, that it is not considered probative on whether Grievant's duties fulfilled the job description of a Social Worker I.

extensive or inconsistent with her social worker duties as to require a different conclusion.

Accordingly, Grievant is entitled to back pay for the time period alleged consisting of the difference in pay between a Social Worker I and a Clerk I at the pertinent time.

The final issue in this matter is whether Grievant is entitled to the interest she requests. W.Va. Code §29-6A-6 provides that in these proceedings hearing examiners are authorized, inter alia, to "provide such relief as is deemed fair and equitable in accordance with the provisions of this article...Provided, That in all cases the hearing examiner shall have the authority to provide appropriate remedies including, but not limited to, making the employee whole." The Supreme Court of Appeals of West Virginia recognized in Weimer-Godwin v. Bd. of Education of Upshur Cty., 369 S.E.2d 726, 732 (W.Va. 1988), that "unless prejudgment interest is received, full reimbursement is not accomplished" for a grievant requesting back pay from the grievant's employer. Similarly, since without interest on her back pay Grievant would not be made whole, payment thereof may be ordered if deemed appropriate.

Weimer-Godwin also supports that it is appropriate to award prejudgment interest in this case. In that case, where a county board of education violated a statute regarding compensation, the Court awarded prejudgment interest. The Court distinguished the facts of the case before it from

a prior case, Orndorff v. West Virginia Department of Health, 165 W.Va. 1, 9, 267 S.E.2d 430, 434 (1980), where, in the Court's words in Weimer-Godwin, it was

held that interest on back pay was not recoverable where back pay is awarded in a reinstatement of a state civil service employee who had been discharged or suspended. The Court reasoned that the employee may not have been entirely without fault in a discharge or suspension case. The Court also distinguished cases under the Federal Fair Labor Standards Act, 29 U.S.C. §§201-209, as amended, permitting interest on back pay in certain circumstances, as those cases involved "a rather basic issue" of whether the employer violated the statute, and the employee's fault was not at issue in those cases.

369 S.E.2d at 731. The Court found the case before it more like the federal fair labor cases than cases such as Orndorff since it involved "a rather basic issue" of whether the Board violated a provision and there was no issue of the employee's fault. This case is more like Weimer-Godwin than Orndorff because it involves the "basic issue" of whether Grievant was working out of classification, and, unlike a disciplinary action, there is no issue of Grievant's fault in such an action. Accordingly, Grievant is entitled to prejudgment interest.

**Docket No. 89-VA-071**

In February 1985 the parties agree Grievant was removed from the Nursing Department and transferred to the Dietary Department. Grievant's proposed findings of fact address this grievance merely by alleging, "While assigned to the Dietary Unit Sandra Cart also performed the duties of a Clerk III and Clerk II for the Pharmacy Department, the

Purchasing Department and the Dietary Department."<sup>15</sup> Respondent's proposals argue that the grievance was untimely filed and, alternatively, that Grievant was not working out of the Clerk I classification.

Respondent argues that Grievant was required to file her grievance within ten days of becoming aware in 1984 that she was working out of classification or, at the latest, within fifteen days of August 1, 1988, when she was transferred out of the Dietary Department, should misclassification be considered a continuing practice.<sup>16</sup> Respondent's arguments might have merit had not the Court in AFSCME IV ruled that, regarding misclassification claims arising prior to July 1, 1988, civil service employees were permitted to file grievances under the procedures of W.Va. Code §§29-6A-1 et seq. for ninety days after the issuance of that decision on March 28, 1989, and it was further held by this Board that the grievances which were already pending on that date were timely filed. Epling v. W.Va. Dept. of Health, Docket No. 89-H-109 (Apr. 13, 1989). Since this

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<sup>15</sup>Grievant's proposals do not state on what facts she relies in making that conclusory statement.

<sup>16</sup>Relying on the ruling in Dennison v. Braxton Co. Bd. of Educ., Docket No. 04-88-251 (Mar. 17, 1989), that the term "practice" implies affirmative activity, Respondent contends that there is no "continuing practice" where an employee works out of classification. It was noted in Herrald v. W.Va. Dept. of Highways, Docket No. EOH-88-062 (June 13, 1989), that a requirement of such affirmative activity would be fulfilled in misclassification cases.



grievance was pending at Level IV on March 28, 1989, it was timely filed.

Throughout these proceedings Grievant has alleged that from February 1985 until September 1988 she was fulfilling the duties of a Clerk III. Since only in her proposed findings of fact and conclusions of law has Grievant contended that she was doing the work of a Clerk II and since even there she provides no support for her contention, the only issue that will be decided is whether she was doing the work of a Clerk I or a Clerk III.

Respondent's proposals fairly represent the duties of Grievant from 1985 to 1988:

As a result of a consolidation in the nursing division, the grievant was moved out of that division and was moved to dietary. Although assigned to the dietary division, grievant actually performed duties for three divisions--dietary, administration and pharmacy. In March, 1986, grievant was assigned specifically to pharmacy, and Cordell Edwards was her supervisor. Although grievant continued to perform duties for other divisions, all requests had to come through Ms. Edwards.

Grievant's duties from February, 1985, to September, 1988, were typing memos, schedules, timesheets, recipes, food contracts and monthly reports, answering the phone, taking phone messages, and filing. During this time, grievant worked under direct supervision. Contracts and monthly reports were always reviewed, and grievant was not required to catch mistakes. Grievant's responsibility was only to type the reports or contracts, and not to determine their accuracy or to catch mistakes. On occasion, grievant was told by her supervisor that she needed a letter, what was to be included, and grievant would prepare a draft for her supervisor's review.

From August 1, 1988, until her leave of absence in September, 1988, grievant was the switchboard operator, typed menus, schedules and monthly reports for food service, and performed some typing for administration. Grievant is currently classified as a Typist I based

upon a review of her duties by the Civil Service Commission.

The Clerk III job description provides in pertinent part the following description of the "Nature of Work":

An employer in this class performs complex assignments often of a technical nature requiring the interpretation of application of office policies and practices to a number of specific work situations. Assignments requiring the establishment of new or revised procedures on policies are discussed with an administrative or technical superior. Before a final decision is made work problems relating to the application of these policies on standards will be resolved by the employee....

At the hearing Grievant stated her belief that she was doing too much typing to be considered a Clerk I. However, there is nothing in the position descriptions of a Clerk I and a Clerk III that the amount of typing controls which of the two classifications apply. In fact, neither job description centers on typing at all, and only in the "Examples of Work Performed" of a Clerk I is typing mentioned. Further, Kermit R. Barnett, the administrator of the Home until his retirement in 1987, opined that Grievant's duties did not fulfill the Clerk III job description, noting that she was not required to make any interpretation of office policies, that she worked under the direction of the pharmacist or purchasing agent, and that she basically did typing.

The preponderance of the evidence does not establish that Grievant was misclassified from 1985 to 1988; the evidence does not support that she was fulfilling the duties of a Clerk III at that time.

Docket No. 89-VA-180

Grievant alleges,

On Feb. 6, 1989 I was denied a schedule adjustment for school. This is discriminatory and retaliatory. Relief sought: That my schedule adjustment be granted and that the harrassment [sic] cease and to be made whole in any other way.

As receptionist for the Home, Grievant's regular workhours are 8:00 a.m. to 4:00 p.m. Grievant requested that she be allowed to work 7:30 a.m. to 3:30 p.m. on Tuesdays and Thursdays so that she would not be late for a 4 p.m. calculus class she was attending during the Spring Semester at Marshall University. The request was denied. She testified that with denial of the adjustment she continued to attend the class but arrived a half-hour late each day.

Grievant has not shown any monetary loss that she has suffered due to the denial of her request. Furthermore, since the Spring Semester is over, no other relief can be granted her for any illegal denial of her request, and therefore any issue thereon is moot. Finally, no prospective relief can be granted at this time. This Grievance Board will not speculate as to whether Grievant in the future may need a schedule adjustment for educational purposes and whether any such schedule adjustment would be reasonable. Since no remedy accordingly can be provided Grievant, the merits of her grievance will not be addressed.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate:

#### Findings of Fact

1. While employed as a Clerk I from August 1983 to February 1985 in the Nursing Department of the Barboursville Veterans Home Grievant was carrying out duties that comported with the position description of a Social Worker I.

2. In June 1984 Grievant found out she was working out of classification and was notified that she was educationally unqualified to apply for a vacant social worker position.

3. From February 1985 to September 1988 Grievant did clerical work, especially typing.

4. On February 6, 1989, Grievant requested that her schedule be adjusted on Tuesdays and Thursday from the regular schedule of 8:00 a.m. to 4:00 p.m. to 7:30 a.m. to 3:30 p.m. so she could attend during the Spring Semester a calculus class which began at 4:00 p.m. With denial of her request she arrived approximately one-half hour late to her class.

#### Conclusions of Law

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 28, 1988).

2. Laches will not bar Grievant's claim that she was working out of classification from August 1983 to February 1985 because it cannot be said that she failed to exercise diligence in filing her claim for backpay and Respondent did not establish prejudice. See Maynard v. Bd. of Educ. of Wayne County, 357 S.E. 2d 247 (W.Va. 1987); Harris v. Civil Service Comm'n., 154 W.Va. 705, 178 S.E.2d 842 (1971); Hooper v. W.Va. Sch. of Osteopathic Medicine, Docket No. BOR-88-027-4 (June 29, 1989).

3. Grievant established that she was entitled to back pay for carrying out the functions of a Social Worker I while classified as a Clerk I from August 1983 to February 1985.

4. Grievant is entitled to prejudgment interest on said back pay, as provided in Weimer-Godwin v. Bd. of Education of Upshur Cty., 369 S.E.2d 726, 731-732 (W.Va. 1988).

5. Grievant's claim that she was working out of classification from February 1985 to September 1988, filed October 31, 1988, was timely since it was pending when the decision in AFSCME v. CSC, 380 S.E.2d 43 (W.Va. 1989), was issued. Epling v. W. Va. Dept. of Health, Docket No. 89-H-109 (Apr. 13, 1989).

6. Grievant failed to establish by a preponderance of the evidence that she was working out of classification from February 1985 to September 1988.

7. Since Grievant has shown no monetary loss due to the denial of her request for a schedule adjustment during

the Spring Semester 1989 and said semester has ended, any issue as to whether the denial of her request was improper is moot. See Ledbetter v. Braxton Co. Bd. of Educ., Docket No. 04-86-092 (April 15, 1986); Harrison v. Cabell County Board of Education, 351 S.E.2d 604 (W.Va. 1985).

Accordingly, the grievances of Docket Nos. 89-VA-071 and 89-VA-180 are **DENIED**. The grievance of Docket No. 89-VA-070 is **GRANTED** and Respondent West Virginia Department of Veterans Affairs is **ORDERED** to provide Grievant back pay less set-off plus interest, as provided herein.

Any party may appeal this decision to the Circuit Court of Cabell 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.

  
SUNYA ANDERSON  
HEARING EXAMINER

Dated: August 3, 1989