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GLORIA KELLY

v.

Docket No. 89-VA-236

**WEST VIRGINIA DEPARTMENT OF VETERANS AFFAIRS and
WEST VIRGINIA DIVISION OF PERSONNEL**

DECISION

Gloria Kelly, an employee of Respondent West Virginia Department of Veterans Affairs at the Barboursville Veterans Home, grieves,

I'm currently classified as a Clerk III performing the duties of a Stenographic/Secretary I, I have performed these duties since 11/10/82 to the present. RELIEF SOUGHT: To be reclassified as a Stenographic/Secretary I with back pay for the period of time that I worked out of classification and to be made whole in every way.

Her claim was waived at Levels I and II¹ and denied at Level

¹ It is unclear whether Levels I and II were correctly combined in this case. However, there was some reference to another post held by Grievant's immediate supervisor besides Registrar, and it will be assumed he was the acting chief of the Barboursville Veterans Home at the time this case was filed. Waiver was appropriate, at least on its face, since it was in writing and since there was no authority there to grant the relief sought. See Bumgardner v. Ritchie Co. Bd. of Educ., Docket Nos. 43-89-222, etc. (June 12, 1989)

(Footnote Continued)

III² prior to its advancement to Level IV on June 1, 1989, where it was the subject of a July 25 hearing. The parties, including additional party-respondent West Virginia Division of Personnel (Personnel),³ agreed to submit fact-law proposals, if at all, by September 8. That date having passed, the matter is mature for disposition.⁴

(Footnote Continued)

(interpreting parallel education employees grievance procedure, W.Va. Code §§18-29-1 et seq.).

² The Level III hearing transcript and decision are part of the record at Level IV. Witnesses were not placed under an oath or affirmation of veracity at Level III and this procedural deficit is an item of concern. See Martin v. GOCID, Docket No. CID-88-073 (Aug. 15, 1989), n. 2.

Grievant has not argued entitlement to another classification level besides Stenographic Secretary I and it is accepted that she has waived any such contention regarding the period November 10, 1982, through the present.

³ The Division of Personnel, formerly the West Virginia Civil Service System, was formally joined to this case by order entered July 27; however, it had been fully apprised of this case and of the July 25 hearing, and chose not to appear or otherwise participate even though it has all along enjoyed those rights. See, generally, W.Va. Code §§29-6A-1 et seq.

⁴ The parties were advised that the decision whether to offer post-hearing material was purely theirs. Grievant chose to make submissions, while Respondent did not although its counsel indicated desire to do so at the Level IV hearing. Personnel, on July 31, requested "additional time. . .to acquire representation. . .and to prepare presentations for the case." By letter of August 2, the undersigned advised Personnel of the September 8 deadline and invited it to request a longer period if such was needed. Personnel did not reply and it is therefore assumed, even though no "presentations" on its behalf were filed, that it deemed September 8 a reasonable date from its perspective for closure of the record.

Grievant's Exhibit 1 is the official Personnel classification description for Stenographic Secretary I. In pertinent part, it reads as follows:

Nature of Work: An employee in this class performs secretarial, stenographic, typing, clerical and general office duties in relieving an administrative superior of clerical, minor administrative tasks and office management functions. The work involves limited participation in organization and program matters utilizing knowledge of the supervisor's jurisdiction, policies and views.

Examples of Work Performed:

Types letters, reports, numerical data, charts, forms and memoranda from verbal or written instructions, voice-recorded dictation or shorthand notes.
Takes and transcribes dictation from the supervisor or others.
Receives and screens telephone calls; provides information or refers callers to proper staff member; answers inquiries requiring a knowledge of program matter and supervisor's view.
Reads incoming mail and distributes as appropriate; composes routine letters for supervisor's signature; proofreads correspondence for correct grammar, spelling and punctuation.
Transmits information and instructions between supervisor and staff members.
Sets up and maintains files of correspondence and records.
Schedules meetings, makes travel arrangements and assembles information for meetings; may attend meetings and take notes in supervisor's absence.
Inventories office supplies and prepares requisition for ordering as necessary.
Operates standard office equipment as required.
Performs related work as required.

Post-hearing, Grievant, at the request of the undersigned, submitted Personnel descriptions for the Clerk II

and Clerk III classifications. The "Nature of Work" sections of each of those is reproduced below:

Clerk II:

An employee in this class performs clerical tasks calling for interpretation and adaptation of office procedures, rules and regulations. Appropriate procedures must be selected from among several suggested by the supervisor or established by precedent. Positions in this class are further distinguished by the requirement for making initial decisions in compliance with regulations, standards and instructions. Results are reviewed critically only when unusual problems are involved. The work requires frequent contacts with immediate supervisors on problems of unit organizations, work methods and standards.

Clerk III:

An employee in this class performs complex assignments often of a technical nature requiring the interpretation of [sic] application of office policies and practices to a number of specific work situations. Assignments requiring the establishment of new or revised procedures on [sic] 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 [sic] standards will be resolved by the employee. Work may also include the incidental supervision of a small office staff and relaying instructions where such supervisory responsibility is not the primary part of the job.

Each of the three classification descriptions also contains requirements as to "Knowledge, Skills and Abilities" and "Minimum Training and Experience." It is uncontroverted

that Grievant meets the standards in these two areas for each of Clerk II, Clerk III and Stenographic Secretary I.⁵

Grievant's employment at the Veterans Home has always been in its Registrar's Office, and she has been the only staff person in that office besides the Registrar. Mr. Kermit Barnett occupied the Registrar's post from the Home's opening in 1981 until 1986, when he was elevated to Commandant; since 1986, Mr. David Andrews has been Registrar. It is noted that when Mr. Barnett vacated the Registrar position, his recommendation to his superiors was that Grievant be selected to fill the slot.

Mr. Barnett appeared at Level IV and testified that the Registrar's Office had many responsibilities, adding these had been particularly taxing during the first few years of the Home's existence in the early 1980's. Specifically, Mr. Barnett as Registrar was responsible not only for processing entry and exit applications, conducting tours, and providing information to potential applicants and their families, but

⁵ There being no evidence to the contrary, it is presumed that these three descriptions have been in effect as presented at all times pertinent hereto.

There is a caveat to Grievant's meeting the Stenographic Secretary I standard, however. According to the classification description she must evidence "[s]kill in taking dictation at the required rate." It is acknowledged that Grievant may have to pass some sort of proficiency test before she is technically qualified to become a Stenographic Secretary I. Any such requirement would only affect her reclassification rights, and not her entitlement to damages for misclassification. See AFSCME v. CSC, ("AFSCME II"), 341 S.E.2d 693, 697 n. 6 (W.Va. 1985).

also for the inspection of living quarters on the premises and the creation of a liaison between the Home's administration and its Residents' Advisory Council, a problem-solving and policy-making forum. Mr. Barnett explained that his duties required him to be out of the office much of the time, and thus, Grievant was needed to cover many tasks that normally would be his. For example, families often dropped by without appointment for information on the Home, and certainly could not wait hours for Mr. Barnett to return from an inspection or other venture. Calls coming in from the Veterans Affairs offices around West Virginia often had to be handled by Grievant for the same reason. Mr. Barnett concluded that most of these matters could not have waited because public relations with the area offices, the potential Home population, and the public in general was of primary importance. He opined that the State had invested millions of dollars in this project, and wanted it to be utilized as fully as possible.

He stated Ms. Kelly performed all the "Examples" of Stenographic Secretary I work, Gr. Ex. 1, except that she did not make travel arrangements⁶ and did not compose letters for him, although he knew that she had done so for Mr. Andrews. Ms. Kelly testified that she had composed

⁶ Grievant stated neither she nor the Registrar often travelled on-the-job such that "arrangements" were necessary.

letters for both Messrs. Barnett and Andrews, but agreed she had never arranged for travel. Mr. Barnett stated he had attempted on many occasions, both as Registrar and Commandant, to obtain a classification upgrade for Grievant. He added that in 1983 he was told by then-Commandant Woody Williams if Grievant was working out of her classification, it was his fault, and her duties were to be limited. Mr. Barnett admitted her job was not changed much after this warning, but added that, since his responsibilities were likewise not curtailed by Mr. Williams, he was still required to be out of the office much of the time. He further explained that the administrative offices of the Home were directly across the hall from his, and that persons in the administrative offices were well aware of what went on on a day-to-day basis with the Registrar and his staff. Ms. Kelly testified that her responsibilities, those of the Registrar's office, and other particulars of her work situation have not appreciably changed since the advent of Mr. Andrews to Registrar.

Much of the dispute over Ms. Kelly's classification revolves around whether her normal job duties have required shorthand.⁷ The evidence is uncontroverted that, starting

⁷ It is noted that Respondent did not raise expressly any procedural or substantive defenses to Grievant's claim, during the Level IV proceedings. Apparently, Respondent stands on an assumption that Grievant failed to meet her burden of proving misclassification, and entitlement to
(Footnote Continued)

at least in 1984, she began taking and transcribing minutes of Residents' Council meetings, utilizing shorthand, at Mr. Barnett's behest. Apparently, Respondent had theretofore purchased an electronic recording device for this purpose, but such had proved unsatisfactory in that Council members, mostly elderly men, were wont to interrupt one another and otherwise conduct themselves so that transcription of their meetings from tape was most difficult. As noted supra, one of Mr. Barnett's duties was to be administrative liaison with the Council, which presumably included the responsibility of ensuring proper record was made of its meetings. Nevertheless, Mr. Barnett and Ms. Kelly both acknowledged that her participation in the Council meetings was an "extra" assignment and not within the scope of her daily duties within the Registrar's office. And, on Personnel "Position Description" forms completed by Grievant in 1984, 1987 and 1988, See Gr. Ex. 3, she checked the "no" box following the question, "Does this [your] position require shorthand?" On a 1987 form, however, Grievant followed the "no" with a representation that she used shorthand 5% of her

(Footnote Continued)

reclassification, by a preponderance of the evidence.

At Level III, Respondent's representative, apparently asserting prejudice, rather vaguely argued that certain documentation relevant to this grievance had been destroyed over the years. This matter was not addressed at Level IV and any defense of this nature must be presumed abandoned.

worktime in taking dictation from her supervisor⁸ and "minutes at all Advisory Council meetings." Gr. Ex. 3.

While the "Examples of Work Performed" section of Personnel classification descriptions is instructive, the more significant portion is "Nature of Work." Dollison v. W.Va. Dept. of Emp. Sec., Docket No. 89-ES-101 (Nov. 3, 1989). The Stenographic Secretary I "Nature of Work" does state "an employee in this class shall perform. . .stenographic. . .duties." The term "stenography" is defined as "shorthand writing; specif., the skill or work of writing down dictation, testimony, etc. in shorthand and later transcribing it, as on a typewriter." Webster's New World Dictionary (2nd College Ed. 1984), Simon & Schuster, New York, p. 1395. There is no indication of the percentage of duties that should be associated with stenography; it could be argued on the one hand that stenography is just another undistinguished part of a several-item list, and on the other that the job can be defined at least somewhat by its own title. See this Decision at p. 3. Of nine "Examples of Work Performed," only two relate to shorthand, with only one absolutely mandating it. Id. A review of all factors, however, leads to the conclusion that the performance of

⁸ Besides rather vague reference such as this, the evidence of Grievant's shorthand usage was limited to the Council minutes.

stenographic duties is a hallmark of the Stenographic Secretary I classification.⁹

As at least partial explanation for the "no" box being checked by Grievant and signed by her supervisors on the aforementioned forms, Grievant stated that she and her superiors were attempting to get her reclassification approved, but to a level lower than Stenographic Secretary I not requiring shorthand skills. Grievant's evidence was to the effect that she, Mr. Barnett and Mr. Andrews¹⁰ had, separately and together, tried several times over the years to achieve upgrading of her position, and had come to recognize the process as a matter of strategy. She still held, at Level IV, that her post, as presently classified, or even if elevated to the status she sought at times including 1984, 1987 and 1988, would not positively require mastery of shorthand according to Personnel specifications and therefore her answer of "no" was correct.

Regardless of the information on the forms, the credible evidence is that, at least since September 11, 1984, Grievant has been recording Residents' Council meetings, which are conducted several times annually, in shorthand.

⁹ Administrative notice is taken of the Personnel classification descriptions in the "Secretary," as opposed to the "Stenographic Secretary," series. Those categorized as "Secretary" may not have shorthand as a duty requirement.

¹⁰ Surprisingly, Mr. Andrews, Grievant's supervisor since 1986, did not testify on behalf of any party.

Grievant's Exhibit 8 is a packet of those minutes, covering 1984 through 1989. Respondent's counsel cross-examined Grievant on how she could determine, from looking at the documents, whether she had transcribed them from shorthand or tape-recording. While her answer was not altogether lucid, her general recollections, and those of Mr. Barnett, of the practice employed, i.e., her use of shorthand, at most Council meetings after the recording device became impractical, were not controverted and are accepted.¹¹ Further, Grievant's testimony and that of Mr. Barnett and Grievant's Exhibits, especially number two and five through eleven,¹² support her assertion that she has at times engaged in all Stenographic Secretary I "Examples of Work Performed" save one, making travel arrangements.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

¹¹ Specifically, Grievant stated she could identify minutes as having been transcribed from shorthand if portions thereof were enclosed in quotation marks. Not all entries in Grievant's Exhibit 8 contain quotation marks; however, again, the memory of Grievant and Mr. Barnett as to the general procedures employed will be credited.

Grievant has submitted the shorthand notes she took at recent Council meetings. Gr. Ex. 8. She explained she had only recently started saving these notes after their transcription.

¹² Grievant's Exhibit 2 is an April 16, 1984, memorandum authored by Mr. Barnett, regarding "Merit Increase for Gloria Kelly." Grievant's Exhibits 5 through 11 are packets containing examples of Ms. Kelly's work products.

FINDINGS OF FACT

1. Grievant has been employed by Respondent at Barboursville Veterans Home in its Registrar's Office, a two-person operation, since October 1982. She was classified as Clerk II from then until March 16, 1987, when she was upgraded to Clerk III. During almost her entire tenure, she has had considerable administrative responsibility, due in large part to the many duties of the Registrar which require his frequent absence from the office.

2. Her duties have more closely matched those of the West Virginia Division of Personnel classification description for Stenographic Secretary I since at least September 11, 1984, than those of either Clerk II or Clerk III. Specifically, she has relieved "an administrative superior of clerical, minor administrative tasks and office management functions" and engaged in at least "limited participation in organization and program matters utilizing knowledge of the supervisor's jurisdiction, policies and views." Further, she has reasonably needed to use her shorthand skills on a regular basis to assist her supervisor in his role as Home liaison to its Residents' Council.

3. Grievant, at all times pertinent hereto, has met the "Knowledge, Skills and Abilities" and "Minimum Training and Experience" qualifications for Stenographic Secretary I, as provided by the Personnel classification description,

save perhaps any reasonable skills test requirement. See n. 5, supra.

CONCLUSIONS OF LAW

1. In order to prevail, a grievant must prove the allegations of her complaint by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. "Misclassification" is a past or present inequity, the remedy for which is backpay and the value of other back-benefits as damages. See AFSCME v. CSC ("AFSCME II"), 341 S.E.2d 693, 697 n. 6 (W.Va. 1985). "Reclassification" is a remedy in and of itself, that of a position's future classification at a stated level.

3. For a grievant to meet her burden of proof in a classification-related claim, she must show that her duties, at relevant times, more closely matched a West Virginia Division of Personnel classification description other than the one under which she was or is categorized. Hayes v. DNR & CSC, Docket No. NR-88-038 (Mar. 28, 1989). The "Nature of Work" sections of the classification descriptions are particularly significant. Dollison v. W.Va. Dept. of Emp. Sec., Docket No. 89-ES-101 (Nov. 3, 1989).

4. Grievant has established that she was and is misclassified, starting September 11, 1984. Accordingly, she is entitled to back pay and benefits as if she had been

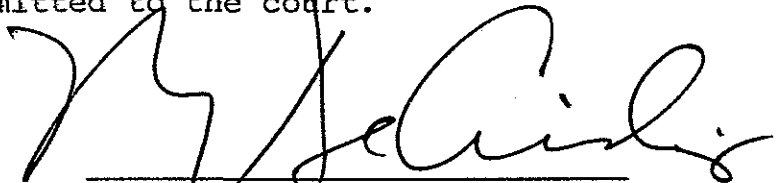
classified as Stenographic Secretary I commencing then, less any appropriate setoff.

5. Grievant has additionally established that she meets minimum qualifying standards for a Stenographic Secretary I position, with the possible exception of a reasonable skills test, see Finding of Fact 3. Therefore, since she is currently misclassified, she is entitled to her position's reclassification to Stenographic Secretary I forthwith if there is no such test necessary, or, if there is, immediately upon her successful completion thereof.

This grievance is **GRANTED** to the extent and Respondent and Personnel are ordered to supply the relief as recounted in Conclusions of Law 4 and 5, supra. If Personnel requires Grievant to submit to a reasonable skills test to determine basic qualifications for the Stenographic Secretary I classification, such test shall be administered and scored within two weeks of this Decision unless Grievant agrees to a longer period. This grievance is **DENIED** to the extent that Grievant seeks relief for any period prior to September 11, 1984.

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. This office should be advised of any intent to appeal so that the record can be prepared and transmitted to the court.

A handwritten signature in dark ink, appearing to read 'M. Drew Crislip', written over a horizontal line.

M. DREW CRISLIP
HEARING EXAMINER

Date: November 6, 1989