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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

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Governor

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**PAULINE DOLLISON**

**v.**

**Docket No. 89-ES-101**

**WEST VIRGINIA DEPARTMENT OF EMPLOYMENT SECURITY**

**D E C I S I O N**

Pauline Dollison was on staff with Respondent West Virginia Department of Employment Security in its ESV Unit<sup>1</sup> until her retirement December 30, 1988. On or about February 22, 1989, she initiated the following grievance at Level I:

1) Grievance is based on belief a) that I performed Management Analyst II duties while classified as ES Technician I between Oct. 1, 1980 and Sept., 1988; b) I was denied due process by Emp. Security and. . .[W.Va.] Civil Service. . . .

. . . .

2) My original request for back pay was denied by ES because I received a promotion to Management Analyst II before my claim was processed. I was not informed that it was possible to apply for reclassification and back pay following the guidelines of the Court decision until after the promotion was underway. In addition, I was "discouraged" from proceeding with a comment by Personnel staff that further pursual [sic] could

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<sup>1</sup> Employment Security Validation Unit.

result in a lower classification than that held. I do not think it was the intent of the Court to deny back pay based on a technicality.

3) The worked duties I performed as Management Analyst II from Sept., 1988 to my retirement Dec. 31, 1988, were essentially the same duties performed while classified ES Technician I. This belief is substantiated by my supervisor. . . .

4) My request is for consideration of back pay based on working out of classification from Oct. 1, 1980 to Sept. 1988.

By letter dated February 28, Mr. Anthony J. Selario, Assistant Director of Respondent's Management Analysis Section, the parent of ESV and other units,<sup>2</sup> "advised that no action will be taken in this matter since an employer/employee relationship no longer exists." This advice operated as a denial at Levels I and II and Grievant bypassed Level III and filed her claim at Level IV on March 16.<sup>3</sup> The undersigned determined that Grievant was indeed an "employee" within the meaning of W.Va. Code §29-6A-2(e)<sup>4</sup> and, by order of March 28, remanded the case to Level I for further

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<sup>2</sup> Quality Assurance and Internal Security were the other units covered by the Management Analysis Section umbrella.

<sup>3</sup> Mr. Selario, as Grievant's immediate supervisor at the time of her retirement and her Section's administrator, was the appropriate Level I and Level II evaluator. There was, however, no basis for Grievant's bypass of Level III, see W.Va. Code §29-6A-4(c), but under the circumstances of this case, the error is deemed harmless.

<sup>4</sup> See Hamlin v. W.Va. Dept. of Health, Docket No. H-88-036 (May 15, 1989).

consideration.<sup>5</sup> Thereafter, Mr. Selario issued a refusal of the relief sought<sup>6</sup> and the case was advanced to Level III where, after hearing, it was again denied.<sup>7</sup> Grievant thereafter reinstated her claim at Level IV, where it was heard June 13.<sup>8</sup> The parties were asked to file post-hearing briefs responsively, with the matter to be mature July 28, the date fact-law proposals were due. Thereafter, the final deadline for submissions was extended through August 25.<sup>9</sup> That date having passed, this case is ready for resolution.

Grievant's case centers around the contention that, for the length of her service as an Employment Security

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<sup>5</sup> Respondent at no time raised a timeliness defense per Code §§18-29-4(a), 18-29-3(c). In addition, AFSCME v. CSC ("AFSCME IV"), 380 S.E.2d 43 (W.Va. 1989), which coincidentally was handed down on the same date as the remand order in the instant case, opened a jurisdictional window which salvaged Grievant's claim as it relates to the pre-July 1, 1988 period. See Epling v. W.Va. Dept. of Health, Docket No. 89-H-109 (Apr. 13, 1989); see also Code §29-6A-11.

<sup>6</sup> This decision is not of record at Level IV and it is assumed to be on the merits.

<sup>7</sup> The Level III hearing transcript is not part of the record presented at Level IV.

<sup>8</sup> An earlier-scheduled hearing was continued upon Grievant's motion and for good cause shown.

<sup>9</sup> Grievant's material was timely filed under the original schedule. Respondent did not submit the requested briefs at all, and did not timely present its proposed findings of fact and conclusions of law; as to the latter, there may have been some procedural confusion and the undersigned has reviewed and considered the proposals in arriving at the outcome herein.

Technician I (ES Tech I), she performed the same duties as did her immediate supervisor, Mr. Jack Matheny, a Management Analyst II (MA II). She further argues that Mr. Matheny was correctly categorized as an MA II.

Grievant's Exhibit I is the West Virginia Division of Personnel<sup>10</sup> (Personnel) classification description for MA II. In pertinent part, it provides:

Nature of Work: An employee in this class works at the full-performance level in the gathering and analyzing of information from complex management studies to be applied in the recommending, designing, revising and utilizing of techniques and procedures related to fiscal or operations management. Incumbent works under general direction and functions as a lead worker or in a specialist capacity requiring in-depth skills and abilities.

Examples of Work Performed:

- [1] Tests recommended systems for improvement of management and operations and evaluates reports on the feasibility and effects of the systems.
- [2] Develops systems for performance evaluation and cost determination of program budgets.

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<sup>10</sup> At certain times pertinent to this grievance, the Division of Personnel was known instead as the West Virginia Civil Service System. It is noted that Personnel has not formally been joined here as a party, even though it might be argued that, pursuant to W.Va. Code §§29-6A-1 et seq., Personnel is a statutory party-respondent to all state employee grievances. Regardless, Personnel is not an indispensable party herein since reclassification, a purely prospective relief, is not a requested remedy and since an award of backpay for misclassification, a past and/or current injustice, is in the nature of damages rather than "retroactive reclassification." See AFSCME v. CSC ("AFSCME II"), 341 S.E.2d 693 (W.Va. 1985), at 697, n. 6 ("[r]elief will not be denied where work of a higher classification is performed, though the individual performing the work lacks the formal qualifications for appointment or promotion to the higher level position").

- [3] Schedules production, determines quality control methods and conducts operational audits and time studies.
- [4] Monitors and measures expansion activity, capital investment, job creation and potential and project status.
- [5] Directs the design and maintenance of all procedures within a systems group.
- [6] May assign, supervise and review the work of other procedures analysts in the development, writing and implementing of written procedures.
- [7] Prepares progress reports to inform management of procedures development and deviations from scheduled goals.
- [8] May recommend and review hiring, promotions or reassignment of subordinate analysts.
- [9] May conduct training courses on procedures implementation.
- [10] Performs related work as required.

Grievant's Exhibit 2 is the Personnel description for ES Tech I and reads, in pertinent part:

Nature of Work: An employee in this class performs the less difficult technical or professional duties in one or more of the following general functions of the agency; research studies, program review and appraisal, special or statewide programs, specialized functions such as systems and procedures analysis or development, technical staff functions--this list is not intended to be all inclusive. Employee assists or is assigned work and guided by his supervisor or a more experienced specialist. Employee performs, without constant direction and with some latitude for independent activity.

No "Examples of Work Performed" appear on Gr. Ex. 2.

The evidence is uncontroverted that Grievant's duties were in essence the same as Mr. Matheny's except that she did not have his supervisory authority or ultimate responsibility for the ESV Unit. Mr. Matheny testified that there were many areas of Unit responsibility over which Grievant had mastery and he had little knowledge. He stated, however, that he thought Grievant and he were both properly

classified and that his efforts to improve her employment situation were directed at seeking augmented pay on the ES Tech I scale.<sup>11</sup> He added that he did not believe the ESV Unit could or should have had more than one MA II. Respondent agreed, emphasizing the structure of the ESV Unit and its lack of needing more than one supervisor.

Respondent's counsel questioned both Mr. Matheny and Grievant about each of the "Examples of Work Performed" displayed on Gr. Ex. 1. Matheny stated that he believed three of those examples were descriptive of his and Grievant's duties, while Grievant opined that six, i.e., numbers one, three, five, seven, nine and ten were fully or partially applicable.<sup>12</sup> The "Nature of Work" section is the more crucial portion of Personnel classification descriptions, see Hayes v. DNR & CSS, Docket No. NR-88-038 (Mar. 28, 1989); this truth is pronounced herein, since Gr. Ex. 2 does not even include "Examples of Work Performed." This is not to say the "Examples" are irrelevant, but even if a

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<sup>11</sup> At one point, Mr. Matheny declared that he and Grievant performed the same duties and "had work to do, whether it was ES Tech I or MA II."

<sup>12</sup> It is unclear from the record which specific examples Mr. Matheny considered pertinent. Intriguingly, Respondent, although at least strongly hinting that Mr. Matheny perhaps would have more correctly been classed as an ES Tech I, proposed as its conclusion of law 3, "It is irrelevant and immaterial to this proceeding that Jack Matheny, who was classified as a Management Analyst II, performed similar duties to those performed by Pauline Dollison." Clearly, it is neither.

staff member performs only a few of the listed "Examples," he nevertheless might well be correctly classified if his position reasonably closely matches the "Nature of Work" information. See id.

It is noteworthy that nothing in the MA II "Nature of Work" indicates that personnel so classified must exercise supervisory responsibility over others; instead, an MA II is characterized as a "lead worker" or "specialist." And even the "Examples of Work Performed" lists "May. . .supervise," emphasis supplied, as a possible part of the MA II function. Grievant asserted, without contradiction, that during at least some of the time pertinent to this grievance, the Internal Security Unit, see n. 2, had two employees classed as MA II, one of whom acted as supervisor. She additionally argued that Respondent's structure, which allowed only one MA II within the ESV Unit, did not justify denying her backpay if she was performing work at that level.

Indeed, the evidence overwhelmingly supports Grievant's analysis of her duties in light of the "Examples of Work Performed" from Gr. Ex. 1. Grievant's position, in essence, consisted of both central-office and on-site auditing of practices at regional Employment Security offices around West Virginia. In this regard, she was involved with the review of systems for the improvement of operations; the adoption of quality control methodologies; the establishment and phasing-in of procedures; the instruction of personnel in implementation of newly-adopted procedures and the

development of courses toward this end; the conduct of operational audits and time studies; the preparation of progress reports; and the completion of related work. Grievant's uncontradicted testimony was that her responsibilities did not appreciably change once she was promoted to MA II effective September 1, 1989, save that she reviewed leave requests and engaged in other minor administrative tasks. It is noted that Grievant additionally had the ultimate responsibility for the ESV Unit from September 1, 1988, through her December 30, 1988, retirement.

Grievant conceded that Mr. Matheny had several years more experience in Respondent's employ and with the ESV Unit than did she. She countered, however, that her pre-Respondent career history, including time spent in a local Job Service office, afforded her a background in particular work covered by the ESV Unit of which Mr. Matheny had little grasp. She admitted she required a time period approaching six months before she did "most" ESV Unit work independently.

It appears that Grievant has proven, by a preponderance of the evidence, that she should have been classified as an MA II for the greater portion of the October 1, 1980-September 1, 1988 period, i.e., except perhaps the first six "training period" months. Respondent, however, has strenuously asserted the applicability of the doctrine of laches, charging that Grievant failed to "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, 255 (W.Va. 1987), to the detriment of another. Id. at 253.

AFSCME v. CSC ("AFSCME II"), 341 S.E.2d 693 (W.Va. 1985),<sup>13</sup> held, at 699, the petitioners therein "entitled to the salary differential between the classification to which they were appointed and the higher classification in which they were actually working, and they are entitled to be paid such differential for the entire period during which they worked out of classification." However, AFSCME v. CSC ("AFSCME IV"), 380 S.E.2d 43 (W.Va. 1989) adds the caveat, at n. 10, that not all misclassified personnel are so entitled:

. . .As to those employees who have filed no grievance, we note that the doctrine of laches may, in appropriate cases, raise a bar to relief. It is well-settled that, in the absence of a statute of limitations, laches will be applied in administrative cases. [Citations omitted].

Cart v. W.Va. Dept. of Veterans Affairs, Docket Nos. VA-88-070/071, 89-VA-180 (Aug. 3, 1989), analyzed laches and found it to apply "where the grievant has not exercised

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<sup>13</sup> The so-called "AFSCME quadrilogy" of cases includes those commonly known as AFSCME I, 324 S.E.2d 363 (W.Va. 1984), AFSCME II, AFSCME III (W.Va. 5/20/88) (per curiam order), and AFSCME IV, cited at n. 5. These pronouncements are related to a continuing controversy between the American Federation of State, County and Municipal Employees and the West Virginia Civil Service System, see n. 10, regarding classification of state employees in West Virginia.

diligence in bringing his or her claim and where the respondent agency has been prejudiced by the delay." Rollins & Bannister v. W.Va. Dept. of Human Services, Docket Nos. 89-DHS-251/252 (Nov. 3, 1989), p. 2. Further, "what constitutes laches depends upon the facts and the circumstances of each case." Maynard at 254.

Respondent's basis for alleging laches is the undisputed fact that a classification review policy was in effect on October 1, 1984, and that Grievant had clear constructive, if not actual, knowledge thereof. Grievant's only defense is that she was not aware of the policy, and, to somewhat adapt her statement of grievance, that in her view "it was not the intent. . .to deny backpay based on a technicality."

While the particulars are a bit sketchy, it is clear that Respondent issued an addendum to its employee handbook regarding Personnel's classification review policy, Administrative Directive 6500.50, see Gr. Ex. 13.<sup>14</sup> Diana Perdue, at pertinent times secretary to the Management Analysis Section and in charge of the Section's handbook, testified that the directive was definitely received, although she could not say when, and promptly thereafter

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<sup>14</sup> Grievant's Exhibit 13 is page one of that policy. Even though the entire policy is not of record, that page contains information sufficient to identify it as one advising employees of their procedural rights to review of their classification complaints.

placed by her in the book. She added that not infrequently such documents were received for filing several months after their effective dates. However, she explained that she regularly received reports which listed the number and title of newly-promulgated policies, which she checked to ensure that the book was fully updated, and that these reports were circulated among employees for their review and initials.<sup>15</sup>

Respondent's Personnel Officer of twelve years, Willard Legg, appeared at Level IV and explained that "News and Views," the agency's newsletter, which is distributed to all staff members, "always" published general information about policy changes as well.<sup>16</sup> Mr. Legg added that Grievant first approached him on October 3, 1988, regarding backpay, and he responded by indicating that such could only be awarded upon a finding of current misclassification; since

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<sup>15</sup> It is noted that no such document with Grievant's initials thereon was offered into evidence.

<sup>16</sup> As its finding of fact 3, Respondent proposes, "[t]he classification review policy was published in the December, 1984, edition of the departmental newspaper." There is no copy of "News and Views" in the record, or other evidence of this specific assertion.

Testimony was also offered by Lynn Kendrick, Personnel Assistant III, and Betty Conner, Respondent's EEO Officer, although neither provided information of direct relevance. Ms. Conner stated she was in charge of maintaining the personnel manual for the EEO Unit and that she did not receive any supplements after "number 47, dated October 1, 1984." Gr. Ex. 13 reveals the classification review policy was "number 50." It is somewhat incredible that Ms. Conner, still EEO Officer and presumably still in charge of that unit's manual, has not, to date, received any updates since October 1984.

Grievant did not contend that her position was then improperly categorized, he felt she did not have a claim. Mr. Legg was obviously wrong in this assumption, but his error is harmless in light of Grievant's utilization of the grievance procedure for relief.

Rollins & Bannister involved two Department of Human Services (DHS) workers who believed themselves to have been misclassified from 1979 to 1984. In that case, "both grievants testified that they had been issued copies of the employee handbook but did not read them. . .[and] [t]he handbook. . .included a section properly advising the employees of their right to file grievances through the. . .[Civil Service System] and notifying them that copies of the grievance procedures could be obtained through. . .[DHS'] personnel office." At 4. It was further noted 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.'" Id., quoting from Bank of Mill Creek v. Elk Horn Coal Corp., 133 W.Va. 639, 655, 57 S.E.2d 736, 747 (1950). See also Baker v. Schofield, 243 U.S. 114 (1917). Ms. Rollins and Ms. Bannister were held to have known "that employees classified [higher than they]. . .were doing the same work they were doing throughout 1979 to 1984 but did not investigate their rights, taking no action until. . .1986." Rollins & Bannister, Finding of Fact 2.

Grievant stated that she began questioning the correctness of her classification at least informally with her immediate supervisor, Mr. Matheny, and other colleagues as early as approximately six months after she started work.<sup>17</sup> Therefore, she was clearly knowledgeable of "fact or facts putting. . .[her] on inquiry" beginning sometime in 1981. Although no evidence of the same was presented in this case, administrative notice is taken of the fact that another Personnel classification review procedure was in place prior to April 1984. See Rollins & Bannister; see also Hamlin v. W.Va. Dept. of Health, Docket No. H-88-036 (May 15, 1989). Presumably, Grievant could have taken advantage of this earlier plan as well as the later, October 1984 policy; this further weakens Grievant's position.<sup>18</sup> More to the point, however, Grievant at any time could have queried Respondent's personnel office about her classification concerns.

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<sup>17</sup> Mr. Matheny rather vaguely opined that she first broached the subject with him "toward the end" of her tenure under his supervision, which ended June 30, 1988, but Grievant's testimony in this regard was more detailed and thus deemed worthy of greater credibility.

<sup>18</sup> Unlike the grievant in Cart, Ms. Dollison was qualified, per Personnel specifications, for promotion to the position she claims to have been performing the duties of, for the entire period of alleged misclassification. See Cart, Finding of Fact 2 (grievant without educational requirements for advancement to Social Worker classification).

This truth is more salient than even the existence of either of the job review procedures.<sup>19</sup>

Maynard clarifies that the party asserting laches must establish significant prejudice attendant to the delay. "'This disadvantage may come from. . .intervention of equities, or other causes. . .[w]hen a court of equity sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.'" At 253, quoting Carter v. Price, 85 W.Va. 744, 102 S.E. 685 (1920), syl. 3. The Supreme Court of Appeals of West Virginia has referenced Maynard as involving 'substantial prejudice to the public's fiscal integrity resulting from a large retroactive monetary award.'" W.Va. Inst. of Technol. v. WVHRC & Zavareei, 383 S.E.2d 490, 500 (1989), n. 15. It also compared Maynard to Zavareei, a case brought under the West Virginia Human Rights Act involving disparate-treatment discrimination in

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<sup>19</sup> In her brief, Grievant cites Harris v. CSC, 178 S.E.2d 842 (W.Va. 1971) and argues,

Laches should not attach to this case because there has been confusion with regard to filing. AFSCME has been pursuing this issue since 1983 on behalf of its members, therefore, June 26, 1989, the last day of the 90-day period allowed by the W.Va. Supreme Court of Appeals [in AFSCME IV] for employees to file should be considered the date that laches attach[es].

While this argument need not be addressed, it may be characterized as not overly persuasive. See Rollins & Bannister. Indeed, it would seem in direct conflict with AFSCME IV, n. 10.

pay based on national origin. The Court awarded the plaintiff in Zavareei back pay apparently to 1974, noting the liberality of the Human Rights Act and "[t]he record here does not establish laches in the sense discussed" in Maynard. Id. Simply put, there were many plaintiffs in Maynard, i.e., all service employees of the Wayne County Board of Education, present and past and their heirs, personal representatives and similarly-situated successors. Further, the period in question in Maynard was "several years." At. 248.

There is but one Grievant in this case. Administrative notice is taken that Respondent is not in the process of defending a massive number of classification disputes,<sup>20</sup> which was significant to the sustenance of DHS' laches defense in Rollins & Bannister. Id. at 8. And, while the period in question here is almost eight years, and Grievant has established misclassification for roughly seven-and-one-half of those years, this fact alone cannot support the requisite finding of prejudice. Since laches is an affirmative defense Respondent has the burden of demonstrating its applicability by a preponderance of the evidence. See Cart. The undersigned has been offered no evidence whatsoever as to the amount of backpay due Grievant herein; any finding in this regard would be pure conjecture. Furthermore,

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<sup>20</sup> Or if so, the undersigned has been offered no information thereon.

Respondent has not shown any other prejudice or indeed alleged any, except perhaps vaguely.<sup>21</sup>

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

#### FINDINGS OF FACT

1. Grievant was employed by Respondent as an ES Tech I from October 1, 1980, through September 1, 1988, when she was promoted to MA II.

2. Grievant performed the duties of an MA II, per Personnel classification description, from April 1, 1981, through her promotion date referenced supra.

3. Classification review procedures were available to Grievant throughout the period of her misclassification, save April-October 1984. Respondent took steps to advise all employees, including Grievant, of at least the later policy, which was effective October 1, 1984.

4. Grievant was aware that she was at least possibly misclassified approximately April 1, 1981. She discussed the matter with her supervisor around that time, but took no other steps, such as consulting Respondent's personnel office, until after September 1, 1988.

5. Respondent has asserted the affirmative defense of laches herein.

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<sup>21</sup> Respondent did not even mention prejudice in its proposed findings of fact and conclusions of law.



### CONCLUSIONS OF LAW

1. Classification-related disputes relating to times prior to July 1, 1988, are outside the jurisdiction of the West Virginia Education and State Employees Grievance Board. W.Va. Code §29-6A-11. The Supreme Court of Appeals of West Virginia created a limited exception to this rule in AFSCME v. CSC ("AFSCME IV"), 380 S.E.2d 43 (1989) by opening a jurisdictional window, see Epling v. W.Va. Dept. of Health, Docket No. H-88-013 (Apr. 13, 1989), through June 26, 1989. The within case in essence utilized that window and is properly in this forum for consideration.

2. Grievant failed to "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 the Co. of Wayne, 357 S.E.2d 246, 255 (W.Va. 1987), since she had "facts putting. . .[her] on inquiry," Bank of Mill Creek v. Elk Horn Coal Corp., 133 W.Va. 639, 655, 57 S.E.2d 736, 747 (1950), but did nothing until late 1988. Some of this delay might be attributed to the confusion revealed by the AFSCME quadrilogy, see n. 13; however, this alone would have been inadequate to bar laches, had all its elements been present. However, Respondent did not establish significant prejudice, a prerequisite for the applicability of the doctrine, by a preponderance of the evidence.

3. Since Grievant has, by a preponderance of the evidence, proven herself to have been misclassified from

April 1, 1981, through September 1, 1988, and since laches does not bar her recovery, she is entitled to back pay for the entire period. See AFSCME II; see also AFSCME IV.

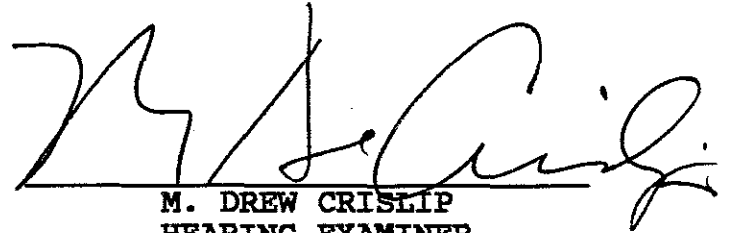
Accordingly, this grievance is **GRANTED**, and Respondent is ordered to forthwith render unto Grievant full back-pay and -benefits, less any appropriate offset, covering the period April 1, 1981-September 1, 1988, for her services as a Management Analyst II.<sup>22</sup>

Any party or the W.Va. Division of Personnel may appeal this decision to the Circuit Court of Kanawha 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

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<sup>22</sup> The other contentions raised by Grievant in her statement of case, e.g., denial of due process, being "discouraged" from grieving, etc., were not the subject of evidence herein and so have not been addressed.

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.



M. DREW CRISLIP  
HEARING EXAMINER

Dated: November 3, 1989