



Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

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

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

WILMA HARRIS

v.

Docket No. 89-CID-592

**GOVERNOR'S OFFICE OF
COMMUNITY AND INDUSTRIAL DEVELOPMENT**

and

**WEST VIRGINIA
DIVISION OF PERSONNEL**

D E C I S I O N

Grievant Wilma Harris, employed by Respondent Governor's Office of Community and Industrial Development (CID), filed a claim on June 26, 1989, alleging she has worked out of classification since July 1, 1986, and requesting backpay with interest and reclassification. The grievance, denied at Levels I through III, was advanced to Level IV on October 6, 1989. While a hearing was initially requested and scheduled, subsequently Grievant and CID agreed that this decision could be based on the record compiled below. That record was received and those parties submitted their proposed findings of fact and conclusions of law in December. However, upon review of the record, the undersigned discovered that the West Virginia Division of Personnel (Pesonnel) had not been made a party and therefore joined it

it as an indispensable party on January 10, 1990. The parties were also provided further opportunities to have a hearing or to otherwise supplement the evidentiary record and to submit additional briefs. Since no further submissions were requested or made and the deadline of February 1 therefor has passed, this matter may be decided.

At issue is whether since July 1, 1986, Grievant has been doing the work of an Equal Employment Opportunity Representative (EEO Rep), which classification she presently holds, or the higher classification, Equal Employment Opportunity Specialist (EEO Specialist).¹

A grievant alleging misclassification must establish by a preponderance of the evidence that he/she has/had the duties and responsibilities of a classification higher than the one assigned, as described by the specifications for that classification written by Personnel. Boggs v. W.Va. Tax Dept., Docket No. 89-T-174 (Sept. 22, 1989); see also Hayes v. DNR, Docket No. NR-88-038 (March 28, 1989). The "Nature of Work" section of the specification is the most crucial portion. Dollison v. W.Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989); Hayes.

¹The grievance alleged, "I was classified as a Field Rep. II and performed the duties of EO Rep & Eligibility Specialist," and asked for reclassification to the EEO Specialist position. The record establishes that in July 1989 Grievant was reclassified to the EEO Rep position. Since the pay for a Field Rep II and an EEO Rep is equal, no consideration of whether her work was that of a Field Rep II is needed here.

The nature-of-work section of the specification for the EEO Rep classification is

Under general supervision, an employee in this class provides on-site services to the local employment offices and businesses in an assigned area with respect to employment practices required by equal employment opportunity laws and regulations.

The correlative section for the EEO Specialist position provides,

Under limited supervision, an employee in this class performs personnel work in equal opportunity, such as, compliance reviews; recruiting; investigating EEO complaints; and counseling employees and supervisors, to ensure compliance with equal employment opportunity laws.

It is clear from these descriptions that the two classifications are not part of a series.² Compare Rumbaugh v. W. Va. Dept. of Highways, Docket No. 89-DOH-389 (Dec. 18, 1989); Bannister v. W. Va. Dept. of Human Services, Docket Nos 89-DHS-251 (Nov. 3, 1989). Moreover, their

²Lowell D. Basford, Assistant Director, Classification and Compensation Section, Personnel, by memorandum of September 15, 1989, states, "It should be noted that the Governor's Office of Community and Industrial Development has been authorized by the Civil Service Commission to use the Equal Employment Opportunity Representative class but does not have authorization to use the Equal Employment Opportunity Specialist class. The latter classification is reserved for the Department of Highways." Since Respondent makes no argument based on this statement, any issue of whether a classification could validly be reserved for one agency, although employees in other agencies fulfill its duties while working in a lower-paid classification, need not be addressed. Nevertheless, it is noted that it is possible that such a practice would be contrary to the "equal pay for equal work" principle of W.Va. Code §29-6-10(2). See discussion thereof in Largent v. W.Va. Dept. of Health, Docket No. H-88-012 (Sept. 12, 1989).

specifications are not readily compared because the description of the nature of work of a EEO Specialist lists very specific duties, while the nature-of-work description of an EEO Rep is very general. Accordingly, reference to the "Examples of Work Performed" by an EEO Specialist is helpful but not critical in analyzing this matter since for the most part the examples duplicate the specific duties given in the nature-of-work section. In contrast, reference to the "Examples of Work Performed" by an EEO Rep is critical since without such reference what is meant by "on-site services" would remain a mystery. Those examples are as follows:³

1. Identifies problem areas in employment services, employer compliance and recommends action to strengthen service to minority groups in general and individual applicants.
2. Investigates causes of discriminatory employment practices, files reports, and recommends action to the Equal Employment Opportunity Officer.
3. Consults with business and industry, local civil rights organizations, governmental and other civic organizations working in the field of job placement and Equal Employment Opportunity through addressing assembled groups to promote a better understanding of the Employment Service functions required by Civil Rights legislation.
4. Informs employers of the principles of equal opportunity and merit based systems and provides guidance and assistance to aid them in meeting requirements of Titles VI and VII of the 1964 Civil Rights Act and other equal employment legislation.
5. Recruits applicants, in cooperation with local employment offices and agencies, in response to court orders and consent decrees by visiting

³All numbering of examples of work performed is given for reference purposes and is not in the specifications.

- employers to develop jobs for various protected group applicants.
6. Informs Equal Employment Opportunity Officer on status of programs.
 7. Informs employees of complaint procedures and rights to appeal discriminatory practices.
 8. Performs related work as required.

In response to a request of her representative that she describe her job duties and responsibilities, Grievant stated,

I do several things and for instances I do compliance reviews, I do all types of technical assistance, monitor local employment security offices, update handbooks, visit work sites for our program reviews, provide equal opportunity compliance for the federal rules and regulations and their policies, we monitor subsponsors to ensure compliance for Dept. of Labor's rules and regulations, we inform employers, subsponsors, enrollees, participants of complaint procedures and the process involved in filing complaints, we write the reports and make recommendations for corrective actions, I conduct contract negotiations for equal opportunity compliance, what I do is look up the agencies' affirmative action plans and their personnel policies and procedures, everything that pertains to equal opportunity to make sure they are in compliance and if the[y're] not we give them suggestions for corrective action and make note of it and give them the opportunity to complete it and then submit it with their contract before the[y're] funded to start their program. And then I do additional monitoring with JTPA monitor at the SDA level. I inform subsponsors of equal opportunity princip[les] and provide assistance in meeting their requirement of other acts and legislations. I set up office files for each new contract year such as files for the reports, handicap 504 evaluation forms, ingoing and outgoing correspondence, equal opportunity updates. I compile statistical data on minority groups and individual applicants based on the demographic areas, I fill in for the program[m]atic section when, since they are short staffed and unable to travel with the monitoring team so I more or less do equal opportunity program[m]atic and eligibility and we make travel accom[mod]ations for the group and comp[i]le monitoring reports, write reports, make recommendations to my boss who is the Equal Opportunity Officer, I provide individual on-site training to agencies upon request, and I perform related work as required like if Mr. Price [her supervisor] isn't in, someone calls, we handle it and

just several other areas wherever it's required so that I think pretty much in whole.

A 3.⁴ From this passage the problems encountered in attempting to sort out whether Grievant's duties are more that of an EEO Rep or a Specialist should be clear, for it is representative of the record as a whole. Grievant's testimony never clarifies what are the distinctions between the two specifications, what Grievant's office as a whole does, and what are her individual responsibilities.⁵ Moreover, with two specifications that apparently describe similar functions in different ways, Grievant made little attempt to show on the record what is meant by terms of art for employment opportunity programs. Rather than a clear description of what she does and how her duties conform to the EEO Specialist specification rather than the EEO Rep one, Grievant's testimony tended to over-assume that the reader is expert in how employment opportunity programs are run. Moreover, while Grievant submitted a mass of documents purporting to help establish she does the work of a EEO Specialist, without explanation they generally fail to do

⁴The Level III hearing was held on two days, July 27 and August 23, 1989. Cites to the transcript of the first day of hearing are designated "A"; "B" refers to the transcript of the second day.

⁵Grievant stopped her own testimony at one point to note, "I don't know why I keep saying we." A 11. While apparently some testimony should have referred to her individually rather than her office as a whole, it cannot be assumed that each time she said "we," she meant "I."

so. It must be emphasized that it is a grievant's burden to prove that he or she has been working out of classification; where the evidence is so unclear that the facts cannot be ascertained, a grievant may fail in that burden of establishing his or her claim by a preponderance of the evidence.

Thereafter Grievant's testimony was organized with the aim of establishing that she did all of the "examples of work performed" of an EEO Specialist.⁶ Those examples are hereinafter provided as topic headings.

1. Coordinates equal employment opportunity programs, projects, and seminars. Grievant testified that she had conducted workshops, sometimes in the place of Mr. Price, and seminars. A 4-5.

2. Monitors activities of divisions and districts of a state agency or subcontractors to assure that affirmative action program requirements are met such as dissemination of agenc[y's] or subcontractor's employment opportunity policy, recruitment, training and promotions, records and reports.

Referring to a one-page document titled "Compliance Checklist, Negotiation Review Form," Gr. Ex. 3, Grievant testified,

[T]his is here is when I do the negotiation process where we review the subsponsors, contract package when they come in for funding. This is what I look at for the equal opportunity that says affirmative action plan[s] were required, make sure that they have all

⁶In her proposals Grievant argues that she carries out the duties of the examples and therefore has been working out of classification.

their EO procedures ...and it ties into the different areas here and that's a check off list that I have to look for. ...[W]e have to make sure their complaint procedures for their staff and their participants are in order, [] we look at their monitoring procedures for equal opportunity compliance and we base that on the equal opportunity laws, rules and Department of Labor's laws, rules and regulations and their policies, we need to know that they understand their protective group information and all that, and that the person that is assigned the equal opportunity responsibilities that they are knowledgeable telling the participant how to file a complaint and the procedures and everything.

A 6-7. She also stated she did a "preaward" review in Mr. Price's stead and monitored activities of subcontractors to ensure affirmative action program requirements are met. A 7. Grievant also submitted a document titled "Compliance Audit Section - Staff Assignment," which lists "Wilma Harris - Participant eligibility verification; Equal Opportunity Compliance." Finally, she referred to Gr. Ex. 6 as evidence of "where I participated in a compliance review." A 8. That memo, written by Grievant, states, "Re State Level JTPA Compliance Review," Grievant would be completing the "Title IIA and 3% program review." The documents provide that Mr. Price and another individual would otherwise participate in the compliance review. Grievant also submitted Gr. Ex. 7, identified as a compliance monitoring report. She testified,

I do the staff information and do all the demographics for that area stats and everything up here on all the information down here the information that ties into the compliance review up here too. Here is another piece of information that I do. I write a narrative on my report and I do the demographics up here and then I write down the findings and put suggestive actions and corrections on it then I submit it for review. Then here's another part of the report where I give them technical assistance that goes on the back of the report. I put the agency, the date the technical assistance was provided and then I write the

description and all this is tied into equal opportunity. ...And I do labor market information on that report, also.

A 9. She also said that she does "programmatic reviews."

See Gr. Ex. 9.

During the second day of hearing she testified that a compliance review consists of

report writing, monitoring different activities in different agencies, assisting agencies, informing employers, participants, supervisors of equal opportunity updates, laws, regulations, more or less of the JTPA work program. Visiting work sites.

B 7.

3. Investigates complaints concerning alleged discrimination. Grievant referred to Gr. Ex. 4, and stated that it was "the copy of a complaint that was in the Berkeley County area. I did the statistics and everything." The document consists of a seven-page list of individuals, classified by sex, age, race, date of hire, and "result," and a cover page finding "Employment Security has referred 17% of the total minor population and .05% of their handicapped referred to [illegible]" and that those percentages were not "in compliance with the equal opportunity requirements under the Job Training Partnership Act[.]"

4. Informs employees of complaint procedures and their right to complain about unfair and/or inequitable employment practices. Grievant testified that she handles phone inquiries concerning equal opportunity "if someone has a complaint or if someone needs technical assistance or has a question" on equal opportunity requirements. A 11. She also

testified that, yes, she does the listed job function and, in fact, does a "comprehensive review of the program." B 8.

5. Assists in recruiting employees for state agencies or subcontractors. Grievant only stated she had to make sure the program participants were doing their recruitment. A 6.

6. Writes reports and makes recommendations to the Equal Employment Opportunity Officer. Grievant refers to Gr. Ex. 6, discussed supra, and several other documents.

7. Performs related work as required. Grievant relied on Gr. Ex. 22, simply identified as "information that I went over the negotiation process," B 9; Gr. Ex. 23, titled "JTPA Needs Survey"; Gr. Ex. 24, which Grievant called a "tracking chart" of "one of the protective group," B 10; and Gr. Ex. 25, titled "Compliance Indicators."

While Grievant called Pam Heinig, a Personnel Analyst for Personnel, as her witness and Ms. Heinig testified she had reviewed Grievant's description of her job duties, her only given conclusion was that Grievant "does conduct comprehensive compliance reviews." B 5.

Grievant also called Clyde Price, Compliance Manager heading the office Grievant works in, who described her duties as follows:

To provide technical assistance to sub[]contractors, to review the equal opportunity program that each sub[] contract has established, and to determine the records of employment security concerning eligibility. Make sure that the individual is referred. Do in fact meet the eligibility criteria as established by the Department of Labor. ...She participates in the activity of the other monitors that make up the monitoring team.

They do a desk review. She is involved in that activity. Making arrangements with the sub[]sponsors to to the on site visit. To review the participant files and see if they contain the required information[.]

B 14. He stated that investigation of complaints were his "particular function." B 14. Asked to compare the specifications for the EEO Rep and EEO Specialist positions, he did not "see much difference in the two positions," B 15, and agreed that the Specialist specification "generally fits some of the duties that she performs." However, he concluded that her duties better matched those of the EEO Rep position than the EEO Specialist. B 18.⁷

Post-hearing an audit of Grievant's job was conducted by Lowell D. Basford, Assistant Director, Classification and Compensation Section, Personnel, and his memo giving his conclusions drawn therefrom was made part of the evidentiary record.⁸ Mr. Basford stated that Grievant's position

⁷Paul Skaf, Administrative Manager for Programs and Acting Director, when asked for his opinion on what classification best fit Grievant's duties, simply stated, "I would like to say an Equal Opportunity Representative." B 21. That evidence is given no weight because it is unclear and perhaps equivocal and because Mr. Skaf represented Respondent throughout the Level III hearing.

⁸Regarding the memo, on January 10, 1990, the undersigned wrote the parties that "it is pure hearsay, for it is provided to prove the truth of the statements made. While I do consider hearsay evidence, I ordinarily tend to give it very little probative weight because the opposing party has been denied its right of cross-examination. In this case, however, if Grievant has no wish to cross-examine Mr. Basford, as indicated by her request that the decision be based on the record below, and therefore waives such right, I will be giving Mr. Basford's report full weight.
(Footnote Continued)

has two primary responsibilities: (1) to monitor subsponsors of the Jobs Training Partnership Act for compliance with equal opportunity requirements as established by federal and state laws; and (2) monitor Employment Security Offices for eligibility verifications of enrollees. The job also includes participation in pre-visit meetings and assisting in the preparation of monitor reports. In relation to the Equal Employment Opportunity Specialist classification the duties assigned to this position are of a less difficult and less complex nature and are restricted to the compliance monitoring of JTPA subsponsors and the eligibility verification of applicants referred to the subsponsors by the local Employment Security Offices. The audit revealed that the work performed is highly regimented and structured through the use of reporting questionnaires and report forms required by the U.S. Department of Labor. The information used in the monitoring reviews and the eligibility reviews is readily available and discernible. The additional duties of preparing monitoring reports is rather straightforward and of limited complexity. The technical assistance provided to subsponsors is similarly straightforward and of limited complexity. ...

The work [of a EEO Specialist] is more diverse and complex in scope than that found in the Equal Employment Opportunity Representative class. In addition to compliance reviews and monitoring the work it also involves the recruitment and counseling of employees as supervisors and the investigation of EEO complaints.

Mr. Basford's conclusion was that Grievant is properly classified.

Mr. Basford's memo is the only evidence that draws coherent distinctions between the two classifications; indeed, he alone even attempted to look at what are the

(Footnote Continued)

Accordingly, I hereby also give Grievant a final opportunity to request a Level IV hearing." Since no such hearing was requested, Mr. Basford's conclusions are given appropriate weight consistent with the letter.

essences of the classifications and what are the essential differences between them.

The evidence is also consistent with his views. As Mr. Basford recognized, the evidence is clear that Grievant does do compliance reviews and has monitoring duties, two responsibilities that at first blush appear to be only in the EEO Specialist specification. However, while those words are not used in the EEO Rep specification, they appear to be described in the first four examples of work thereof. Moreover, Mr. Basford's observation that the monitoring duties are rather regimented and require simple forms is supported, for the documents provided tend to be of such a nature. Finally, a preponderance of the evidence does not establish that Grievant performs the work described in the "examples of work performed" of an EEO Specialist.

Regarding the first example, involving "coordination of programs, projects, and seminars," that Grievant conducted workshops and seminars is insufficient to establish that this duty was performed, for there is no indication that simply conducting a workshop is the type of coordination the example refers to. Moreover, since the EEO Rep specification gives as an example of work "addressing assembled groups....," it may be that Grievant's efforts on workshops fit that example. Finally, it is noted that, regarding the only workshop she discussed with any particularity, conducted in 1989, she went in the stead of Mr. Price. It is

unclear whether otherwise she has any extensive duties of conducting workshops.

The evidence on the other examples for the EEO Specialist position can be readily examined. While Grievant stated she investigates complaints of discrimination, the record indicates that the duty referred to in the specification involves a very specific type of investigation which Mr. Price's testimony supports was his duty rather than Grievant's.⁹ While the evidence does establish she does some informing employees of their equal employment rights, that is also given as an example of work performed of an EEO Rep. See Number 7 of the examples thereof. There was no evidence of recruitment whatsoever and no real report of any length or analysis was provided by Grievant to show she "writes reports and recommendations..."

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

⁹Grievant's representative apparently agreed, stating that "Mr. Price does the actual investigation of EEO complaints" and only noting that "some of the work done by Ms. Harris could be viewed as indirectly related to that area." B 18.

Conclusions of Law

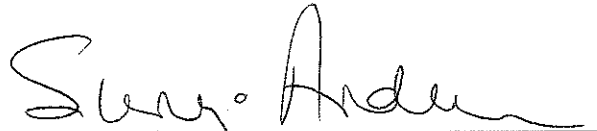
1. A grievant must prove, by a preponderance of the evidence, the allegations of his or her complaint. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). "In a classification-related complaint a grievant must show that she was performing the duties of one professional categorization, as revealed by the official CSS [Personnel] 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).

2. Grievant failed to establish by a preponderance of the evidence that she has been performing the duties of an Equal Employment Opportunity Specialist and therefore failed to show that she has been working out of her classification of Equal Employment Opportunity Representative.

Accordingly, the grievance is **DENIED**.

Either party or the West Virginia 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 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

Date: March 8, 1990