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

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REBECCA WHETZEL

v.

Docket No. 89-RS-376

W.VA. DIVISION OF REHABILITATION SERVICES

DECISION

On May 24, 1989, Grievant, an employee of Respondent West Virginia Division of Rehabilitation Services at the Romney branch office, filed a grievance claiming entitlement to back wages from May 29, 1985 to May 16, 1989. Grievant alleges that during this time she was classified as a Secretary I while performing the job duties of a Secretary II. The grievance was denied at Level I on May 24, 1989 and at Level II on June 7, 1989. Following a hearing at Level III,¹ the grievance evaluator issued a decision in favor of Grievant but apparently conditioned that favorable decision upon Grievant's acceptance of \$1,000 as the total amount of back wages to be awarded. Grievant rejected this

¹ The decisions at Levels I and II, as well as the Level III hearing transcript, decision and exhibits are a part of the record herein.

arrangement and filed her appeal at Level IV.² After being advised by both parties that this matter could be decided upon the existing record, a date of December 22, 1989 was set for the submission of proposed findings of fact and conclusions of law. That date having passed and no such proposals having been received, the matter is now mature for decision.

Grievant began her employment with Respondent in October, 1978 as a Stenographer I. She was subsequently promoted to Stenographer II in April, 1981 and to Secretary I in October, 1983. On May 29, 1985, Grievant completed a Job Analysis Questionnaire which was mandated by the Legislature as part of a pay equity study conducted by the Pay Equity Task Force. This questionnaire consisted of ten pages and required a detailed description of Grievant's job duties. It was then verified and signed by Randy Henderson, Grievant's immediate supervisor.

After being informed by a member of the Clerical Advisory Board that the only way to gain promotion was via reclassification, Grievant filed a Position Description Form with the Respondent on November 7, 1988. This request for reclassification was approved by Respondent but denied by

² The Level IV appeal was originally filed at the Elkins, W.Va. office of this Board and subsequently transferred to the undersigned on October 30, 1989.

the Civil Service Commission.³ However, on appeal, Grievant was found to be working as a Secretary II. As a result, Grievant was reclassified as a Secretary II by the Civil Service Commission effective May 16, 1989. Grievant was then informed that, as a result of a change in procedure,⁴ she would be required to file a grievance for any back pay to which she may be entitled. These proceedings followed.

Initially, the issue of the timeliness of this grievance must be discussed. While never directly raising the affirmative defense of timeliness, counsel for Respondent presented certain evidence that procedures were in place as early as 1985 for review by Respondent of any perceived misclassifications. (T.20). Additionally, Grievant acknowledged that she may have seen a memorandum as early as August 1985 dealing with the resolution of back pay issues; however she also testified that she had no reason to pay attention to it then as it had no application to her at that time. (T.31).

In AFSCME v. CSC, 380 S.E.2d 43 (W.Va. 1989) ("AFSCME IV"), the West Virginia Supreme Court of Appeals created a

³ As of February 1989, the Civil Service Commission became known as the Division of Personnel.

⁴ Presumably, Grievant refers to the West Virginia Supreme Court of Appeals decision in AFSCME v. CSC, 380 S.E.2d 43 (1989) ("AFSCME IV") directing state employees with misclassification claims arising prior to July 1, 1988 to file a grievance pursuant to W.Va. Code §29-6A-1 within ninety days of March 28, 1989.

jurisdictional window for state employees with misclassification disputes that arose before July 1, 1988, allowing them to file grievances thereon under the procedures of W.Va. Code §§29-6A-1 et seq. for ninety days after its decision, issued March 28, 1989. Epling v. W.Va. Dept. of Health, Docket No. 89-H-109 (April 13, 1989). Since this claim was filed within the time frame created by the Court, it is timely.

This evidence was also considered as an attempt to assert the affirmative defense 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. Laches has been held to apply "where the grievant has not exercised diligence in bringing his or her claim and where the respondent agency has been prejudiced by the delay." Rollins and Bannister v. W.Va. Dept. of Human Services, Docket Nos. 89-DHS-251/252 (Nov 3, 1989), p.2.

Respondent's basis for alleging laches is its contention that a classification review policy was in effect as early as August, 1985, and that Grievant should have known of its existence. Grievant's only defense is that the policy did not apply to her situation at that time.

Grievant testified that she began questioning the correctness of her classification when advised by the

Clerical Advisory Board that reclassification may be her only means of gaining promotion. Prior to that time, she stated that she was aware that she could file for reclassification but did not know whether or not she had "a case." (T.10). While Grievant concedes that the reclassification policy was set out in a letter from Respondent's Director in 1985, she stated "I didn't pay any attention, whatever, I wasn't up for promotion at that time." (T.31).

It is clear from the evidence presented 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 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. However, Respondent did not establish, nor allege, any significant prejudice, a prerequisite for applicability of the doctrine, by a preponderance of the evidence. There is but one grievant in this case. And, while the period in question here is approximately four years, that fact alone cannot support the requisite finding of prejudice. Therefore, the merits of whether Grievant worked out of classification from May 29, 1985 to May 16, 1989 will be addressed.

The job description for a Secretary II describes the "Nature of Work" as follows:

An employee in this class performs secretarial, typing, clerical and general office duties in

relieving an administrative superior of clerical, minor administrative and office management functions. The work involves varying degrees of participation in organization and program matters reflecting considerable knowledge of the program involved, mission of the agency and the supervisor's jurisdiction, policies and views. The incumbent exercises considerable initiative in carrying out assignments.

Pursuant to the position description form filed by Grievant in November, 1988, Larry Freeman, Personnel Officer for Respondent, performed a Job Classification Review and summarized his findings in a memorandum dated November 30, 1988. Mr. Freeman reviewed Grievant's current job duties and compared them with those of a Secretary II. It was his conclusion that Grievant should be classified as a Secretary II as of November, 1988. Moreover, he further reviewed the Job Analysis Questionnaire completed by Grievant in May, 1985. Based upon this review, Mr. Freeman found that Grievant had been working as a Secretary II since May, 1985 and was entitled to back wages to May 1, 1985. Mr. Freeman recommended reclassification and back pay to James P. Quarles, Chief, Personnel Administration, who in turn made the same recommendation to the Civil Service Commission.

In February, 1989, Civil Service reviewed these recommendations but determined that Grievant was correctly classified as a Secretary I. Grievant appealed this decision and a hearing was held on April 3, 1989. Again, a detailed comparison was made between the job duties actually performed by Grievant and those required of a Secretary II. By decision dated April 19, 1989, the Personnel Analyst

concluded that Grievant should be reclassified as a Secretary II and she was so classified as of May 16, 1989.

During the Level III hearing in this matter, Grievant presented detailed information on the tasks which she performed from 1985 to May, 1989. This testimony was supplemented by the Job Analysis Questionnaire completed by Grievant and verified by her immediate supervisor in 1985. For example, Grievant testified that she scheduled appointments for her immediate supervisor, made arrangements with vendors and janitorial services, answered questions regarding agency policy in her supervisor's absence, handled walk-in traffic, talked with the Chief of Services for the Deaf in Charleston and made arrangements for conferences in his absence. Grievant handled the clerical work for 2½ territories⁵ in addition to being secretary to the branch office manager. She also prepared memoranda, composed letters to organize conference programs, helped write speeches and handled all administrative billing invoices. This testimony was corroborated by Randy Henderson, Grievant's immediate supervisor since 1984, who testified that Grievant had performed the same job duties of a Secretary II since at least 1985.

⁵ Grievant worked, and continues to work, for the counselors for the deaf territory, deaf/blind territory and one-half of the independent living territory.

In the face of this overwhelming testimony, it was Respondent's position that Grievant should not be found to have worked as a Secretary II from 1985 to 1989 because there was no independent source to show that she was performing said duties during that time. However, this ignores the testimony of Mr. Henderson who is Branch Office Manager at Romney. Moreover, Respondent in no way attacked Grievant's credibility and presented no witnesses or other evidence to contradict her testimony. Finally, Respondent's former Director of Personnel testified that he had "no reason to question" either Grievant's testimony or the information contained in the Job Analysis Questionnaire. (T.23).

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

FINDINGS OF FACT

1. Grievant was employed by Respondent as a Stenographer I in October, 1978. Following promotion to Stenographer II in April, 1981, she became a Secretary I in October, 1983.

2. As the result of filing a position description form in November, 1988, it was determined by a Personnel Analyst for the Civil Service System on April 19, 1989 that Grievant

should be reclassified as a Secretary II; Grievant was so reclassified effective May 16, 1989.

3. Grievant was advised by Respondent that she would have to file a grievance pursuant to W.Va. Code §29-6A-1 et seq. to establish back pay for any period she was determined to be working out of classification. Grievant filed the present grievance on May 24, 1989, alleging she had worked as a Secretary II since at least May 29, 1985 and claiming entitlement to back wages.

4. Following a Level III hearing, the grievance evaluator found that Grievant was entitled to "the relief she has requested." However, that ruling was apparently conditioned upon Grievant's acceptance of \$1,000 as the total amount of back pay to which she was entitled. Grievant rejected this arrangement.

5. While employed as a Secretary I between May 29, 1985 and May 16, 1989, at Respondent's Romney branch office, Grievant was performing duties that comported with the position description of a Secretary II.

CONCLUSIONS OF LAW

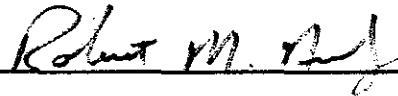
1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant's claim that she was working out of classification from May 29, 1985 to May 16, 1989, filed May 24, 1989, was timely since it was filed within ninety days of the March 28, 1989 decision of the West Virginia Supreme Court of Appeals in AFSCME v. CSC, 380 S.E.2d 43 (W.Va. 1989). Epling v. W.Va. Dept. of Health, Docket No. 89-H-109 (Apr. 13, 1989).

3. Grievant has established that she is entitled to back pay for performing the functions of a Secretary II while classified as a Secretary I from May 29, 1985 to May 16, 1989.

Accordingly, this grievance is **GRANTED** and Respondent West Virginia Division of Rehabilitation Services is ordered to provide Grievant back pay less any set-off, as provided herein.

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, appearing to read "Robert M. Nunley", is written over a horizontal line.

ROBERT M. NUNLEY
HEARING EXAMINER

Dated: January 29, 1990