

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KATHIE L. SIZEMORE,**  
**Grievant,**

**v.**

**Docket No. 2019-1341-MAPS**

**DIVISION OF CORRECTIONS AND  
REHABILITATION,**  
**Respondent.**

## **DECISION**

Grievant, Kathie Sizemore, is employed by Respondent, Division of Corrections and Rehabilitation, in the classification of Secretary 2. Ms. Sizemore filed a level one grievance form dated March 28, 2019, alleging that she had successfully applied for a promotion with her new duties to start in mid-February 2019, and a 9.5% salary increase. The paperwork to effectual this transfer was submitted a month in advance. Grievant did not receive her 9.5% pay increase for some time after beginning her duties. As relief, Grievant seeks: "immediate restitution, to include interest, and for the effective date of [her] promotion to be corrected to reflect 16 February 2019. A level one decision was issued on April 11, 2019, granting Grievant lost pay from February 16, 2019 through March 16, 2019 finding that she had improperly been worked out of her classification during that period. The grievance was denied related to the effective date of Grievant's promotion. Grievant filed an appeal to level three dated June 11, 2019, which was transferred to level two by order dated June 25, 2019.

Respondent issued an amended level one decision on September 3, 2019, stating that it had no authority to grant the pay relief and denying the grievance in all respects. A

mediation was conducted at level two resulting in an order dated December 30, 2019. Grievant filed a level three appeal form dated January 8, 2020.

The parties jointly requested on September 21, 2020, to submit the case for decision based upon stipulated facts and arguments of law. This request was granted on September 23, 2020. Grievant, Kathie Sizemore, appears *pro se* and Respondent is represented by Briana J. Marino, Assistant Attorney General. The parties submitted joint stipulations of fact on September 29, 2020. The parties were given additional time to submit Proposed Findings of Fact and Conclusions of Law, but chose not to make a submission. Consequently, this matter became mature for decision on October 29, 2020, upon the passing of the new submission deadline.

### **Synopsis**

Grievant applied for a promotion from a Secretary 1 position to a Secretary 2 position with a 9.5% salary increase. Grievant began working in the Secretary 2 classification but her salary was not increased until a month after she assumed the position and performed the duties required in the higher classification. Respondent admits that a mistake was made causing Grievant to work in the higher classification for a month without the commensurate salary increase. Respondent admits that Grievant is owed the additional compensation she would have received if she had been paid at the proper rate when she began working as a Secretary 2.

The following facts are stipulated by the parties to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.<sup>1</sup>

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<sup>1</sup> The factual record upon these stipulations was developed at a level one hearing. Only the stipulated facts which are relevant and necessary for this decision were included.

### **Findings of Fact**

1. Grievant Sizemore was employed by the Respondent in the classified position of Secretary 1, pay grade 8 with an hourly salary of \$15.9039 per hour.

2. Grievant Sizemore applied for and was awarded a classified service position as a Secretary 2, pay grade 9, with Respondent effective February 16, 2019. This promotion awarded Grievant Sizemore a 9.5% pay raise.

3. Grievant signed an acceptance letter for the position dated January 15, 2019. The paperwork related to her promotion was submitted to the Respondent's Department of Administration on January 18, 2019.

4. Grievant began working in the Secretary 2 position on February 16, 2019, and assumed the responsibilities associated with the that position.

5. Due to clerical error, omission, or mistake, the personnel transaction to effectuate Grievant Sizemore's promotion and pay raise was delayed. As a result, Grievant Sizemore worked out-of-class and without the awarded pay raise until March 16, 2019.

6. As a result of the delay in processing of the personnel transaction and Grievant Sizemore working out of class, Grievant Sizemore was deprived of earnings in the amount of \$243.12 for work performed between February 16, 2019, and March 16, 2019.

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herein. Finding of Fact 3 was not part of the stipulated but is based upon the evidence recorded in the level one transcript

7. Respondent admits Grievant Sizemore was working out-of-class for the period of February 16, 2019, to March 16, 2019.

8. Grievant Sizemore is owed back pay for the period of February 16, 2019, to March 16, 2019, due to the late processing of the personnel transaction. Per the Division of Administrative Services this amount of back pay is \$243.12.<sup>2</sup>

### **Discussion**

This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

There is no dispute that Grievant was promoted from a Secretary 1 position in paygrade 8 to a position in the Secretary 2, classification with a paygrade 9. The promotion was to become effective of February 16, 2019, and pursuant to her promotion, began working duties within the higher classification on that day. The parties also agree that “[d]ue to clerical error, omission, or mistake, the personnel transaction to effectuate Grievant Sizemore’s promotion and pay raise was delayed. As a result, Grievant Sizemore worked out-of-class and without the awarded pay raise until March 16, 2019.”

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<sup>2</sup> This amount is the difference between Grievant’s salary as a Secretary 1 and the salary she was to receive in the Secretary 2 classification.

Because of this delay Grievant worked as a Secretary 2 for that month but was only paid her salary as a Secretary 1.

West Virginia Code of State Regulations § 143-1-5.5 and §143-1-5.5.a states:

Pay on Promotion. -- When an employee is promoted, the employee's pay shall be adjusted as follows:

5.5.a. Minimum Increase. -- Any employee promoted will be compensated to at least the minimum of the compensation range of the job class to which he or she is promoted. An employee whose salary is within the range shall receive an increase of one (1) increment or a maximum established by the Board, except where an employee accepts a lesser increase within the compensation range to obtain the position. In no case shall any employee receive an increase which causes the employee's pay to exceed the maximum of the range except as provided in subdivision 5.5.b of this rule.

Grievant Sizemore accepted a promotion pursuant to W.Va. CSR § 143-1-5.5 and the parties agree that transaction resulted in a pay increase of 9.5%. Grievant was not paid at the higher rate for the period of February 16, 2019 through March 16, 2019.

The Grievance Board has previously held, "If an employer assigns 'out of class' duties to an employee on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification." *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996); *Shremshock v. W. Va. Dept. of Trans.*, Docket No. 94-DOH-095 (Aug. 31, 1994). *Reed v. WV Div. of Corrections*, Docket No. 97-CORR-127 (May 22, 1998). *Hall v. Div. of Natural Res. and Div. of Personnel*, Docket No. 00-DNR-053 (Apr. 28, 2000). *Baker v. Dep't of Health & Human Res.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016). In this case the duties in the

higher classification of Secretary 2 were permanent the fulltime duties of Grievant's new position. They were not temporary or occasional.

Grievant is entitled to be paid the difference between the two classifications during the time in question which the parties agree was \$243.12. Accordingly, the grievance is **GRANTED.**

### **Conclusions of Law**

1. This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. West Virginia Code of State Regulations § 143-1-5.5 and §143-1-5.5.a states:

Pay on Promotion. -- When an employee is promoted, the employee's pay shall be adjusted as follows:

5.5.a. Minimum Increase. -- Any employee promoted will be compensated to at least the minimum of the compensation range of the job class to which he or she is promoted. An employee whose salary is within the range shall receive an increase of one (1) increment or a maximum established by the Board, except where an employee accepts a lesser increase within the compensation range to obtain the position. In no case shall any employee receive an increase which causes the employee's pay to exceed the maximum of the range except as provided in subdivision 5.5.b of this rule.

3. “If an employer assigns ‘out of class’ duties to an employee on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification.” *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996); *Shremshock v. W. Va. Dept. of Trans.*, Docket No. 94-DOH-095 (Aug. 31, 1994). *Reed v. WV Div. of Corrections*, Docket No. 97-CORR-127 (May 22, 1998). *Hall v. Div. of Natural Res. and Div. of Personnel*, Docket No. 00-DNR-053 (Apr. 28, 2000).” *Baker v. Dep’t of Health & Human Res.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016).

4. Grievant proved by a preponderance of the evidence that for the period of February 16, 2019 through March 16, 2019, she worked with the knowledge and direction of Respondent in a position classified as a Secretary 2, but was only compensated as a Secretary 1. Grievant is entitled to be paid the difference between the two classifications during the time in question which the parties agree was \$243.12.

Accordingly, the grievance is **GRANTED**.

Respondent is **ORDERED** to pay Grievant the sum of \$243.12 plus statutory interest from March 16, 2019, through the date the principle amount is paid.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named.

However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2018).

**DATE: DECEMBER 4, 2020.**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**