**MARCIA BOURGEOIS**

**v.** **Docket No. 93-BOT-268B**

**BOARD OF TRUSTEES/MARSHALL UNIVERSITY**

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

Marcia Bourgeois, Grievant, has been employed at Marshall University in progressively responsible positions in student housing since 1980. (See footnote 1) On May 28, 1993, when she filed this grievance, she was employed with the classified title of Assistant Manager of Housing and had held that position since May, 1989. Her working title was Assistant Director of Residence Services for Administration. The Grievant alleges that "despite repeated reuqests (sic) by the grievant for reclassification due to added job responsibilities, the facility failed and/or refused to give her an accurate classification." The Grievant requests she be "reclassified from the time the additional duties were assumed and for back pay commisserate (sic) with her reclassification." (See footnote 2) This grievance was denied at all lower levels.

The time period for which the Grievant requested reclassification and back pay has varied throughout the grievance process. At the Level III hearing the Grievant stated she should have been reclassified as Associate Director on or about June, 1992, and that she officially requested job reclassification in August, 1992. At the Level IV hearing the Grievant argued she has been misclassified, in essence, twice since 1990. (Trans. Vol. III at 209). She clarified this contention by saying she is currently in Pay Grade 13 and should have been in Pay Grade 14 in 1990 or 1991 and then increased to Pay Grade 15 or 16 from mid-1992 to July, 1993. In her brief the Grievant argued she has been misclassified since April, 1991. At that time she should have been in Pay Grade 14, and as of April, 1992 she should have been "at least a 16." Grievant also alleges she was discouraged from filing a grievance by being told it would do no good.

The Respondent states a portion of the Grievant's misclassification claim is untimely filed, and she was not discouraged from filing a grievance, but chose not to do so. The Respondent stipulates the Grievant was given significant, additional, temporary duties on or before May 11, 1992 whichprobably raised her to a Pay Grade 14, and as a consequence of this change was given an interim, eight

percent pay increase in compensation. This increase began on December 17, 1992. (See footnote 3)

Although there was extensive testimony at Level IV, the essential facts are as follows. Since the history and testimony in this grievance was long and somewhat confusing the majority of the findings of facts are given in a narrative style.

In May, 1989 the Grievant returned to Marshall University after a two-year absence. She was hired as the Assistant Manager of Housing at a Pay Grade 12. At this time Housing and Residence Life were separate entities. Grievant's immediate supervisor, Manager of Housing, oversaw both the physical facilities, i.e., maintenance and housekeeping of these facilities, as well as the administrative aspects of housing assignments, i.e., billing, room assignments, meal tickets, etc. There were two positions directly below this manager, Grievant's and the Assistant Manager of Housing - Physical Environment. In her position the Grievant supervised some central office staff, oversaw billing and collection of student accounts, made room assignments and coordinated these activities with a variety of other campus agencies such as the Bursar's office and the Athletic Department. During 1989 and 1990 the Housing Department increased the use of computers for record keeping including computerizing the meal system. Since theresponsibilities of both Assistant Managers had increased, their positions were reclassified to Pay Grade 13 and they received a pay raise in August, 1990.

Dave Sites, Assistant Manager for the Physical Environment, was dissatisfied with this one level raise, grieved his claim through a campus committee, and in April 1991 his pay grade was increased to 14. After Mr. Sites received this increase the Grievant states she went to her boss, Ms. Mary Beth Poma, and asked to be reclassified at Pay Grade 14 as well. She states Ms. Poma told her that a grievance would do no good because there was a "freeze." (See footnote 4) The Grievant did not grieve her pay grade. The Grievant contends she should have been classified as Pay Grade 14 in April 1991, the same as Mr. Sites, since their positions were similar in responsibility.

Ms. Queen Foreman, Director of Human Resources, and Mr. Avalon DeLong, Assistant Director of Human Resources, testified that according to the Grievant's Position Information Questionnaire ("PIQ") she was properly classified in 1991 and 1992 at Pay Grade13. The Human Resources Department is in charge of position classification at Marshall University. Ms. Foreman also stated her belief that Mr. Sites should not have been promoted to Pay Grade 14 and had testified to this in front of the campus committee at the time of his grievance. Thus, the parties are diametrically opposed on the issue of misclassification from 1990 and 1991. Further, the Respondent's position is that this

portion of the grievance is untimely, since the Grievant was aware of her alleged misclassification as early as 1990, but did not file this grievance until May, 1993.

Next, the Grievant argued that she should have been classified at a Pay Grade 15 or 16 for approximately 13 weeks in the Winter and Spring of 1992 because Ms. Poma, her supervisor, was off with a high risk pregnancy and subsequent birth of her child. Grievant states she assumed Ms. Poma's duties and acted in her capacity while she was gone. She also testified she performed some of the duties of the Assistant Manager of Facilities since Mr. Sites had left and his position was unfilled.

Mr. Ray Welty, Associate Vice-President for Administration and the Grievant's second-level supervisor, disagreed with Grievant's representations. He testified: 1) he and other staff members assumed some of Ms. Poma's duties; 2) Ms. Poma was able to continue some of her duties; and 3) yes, Grievant did "jump in" and assume some of Ms. Poma's duties that were in her assigned area. Grievant, in essence, supported these statements. She testified that she was in frequent contact with Ms. Poma, referred high leveldecisions to Ms. Poma, and also sought and received help and guidance from Ms. Arnold the former Director of Housing. On this issue the parties are again in disagreement and the Respondent again states Grievant's claim is time-barred.

Next, the Grievant states she was misclassified from May, 1992 until July, 1993. Ms. Poma returned in the middle of 1992, but the Grievant alleges she was then misclassified because in the Spring of 1992, Dr. Gilley, President of Marshall University, directed that Housing and Residence Life merge into one unit. Ms. Poma became the Director of Residence Services around May, 1992, and Ms. Poma and the Grievant assumed responsibility for much of Residence Life, as well as retaining their prior responsibilities. Some housing duties were removed from the Grievant, and an administrative aide was assigned to relieve her. Ms. Hall, the Administrative Assistant, testified she took over most of the Grievant's housing duties. (Trans., Vol. II at 61.) Additionally, two new positions of Area Coordinators were created. These positions were directly supervised by the Grievant, and they directly supervised the student advisors. The Respondent stipulates the Grievant assumed many duties at this time and should have been reclassified to a Pay Grade 14.

The former Director and Assistant Director of Residence Life were placed under Ms. Poma for supervision, but apparently were assigned few duties. These individuals were informed their positions would be eliminated. They grieved this decision successfully, and at the time of this grievance were

still workingin Residence Services. These individuals were at Pay Grades 14 and 13, respectively.

The Grievant's new working title was Assistant Director of Residence Services. The Grievant testified she repeatedly asked to be reclassified and was repeatedly told this was impossible due to the constraints placed on the University by the Mercer Study. (See footnote 5) No position was audited without written permission of the President. (Trans., Vol III at 195.) Ms. Foreman testified she informed the Grievant of these constraints, told her she must get permission from President Gilley to have her position audited, and informed her she could file a grievance. (Trans., Vol. III at 206-09.) The Grievant acknowledged this testimony, but the record was unclear as to when Ms. Foreman, Ms. Poma, and Grievant had these discussions. These requirements are reflected in letters from Chancellor Manning and General Counsel Layton Cottrill dated August 15, 1991, October 2, 1992, and July 8, 1992, respectively. (G. Exhs. 25-27.) This information was published in the University newsletter. These memos also reflect that before duties and responsibilities were added to a position, a justification letter had to be sent by the supervisor to the President. These new duties and responsibilities must change the position by twenty-five percent before a classification review would be allowed.

In August, 1992, Grievant officially, verbally asked to be reclassified. In November, 1992, Grievant wrote Mr. Welty adetailed letter describing the inequities in the department and again requesting a change in title, salary, and pay grade. In December, 1992, in recognition of the Grievant's workload and the constraints of the Mercer Study, the Grievant received an eight percent pay raise but no change in title or pay grade. (See footnote 6) A one-step increase in pay grade is equal to a five percent increase in pay.

Thus, the parties agree the Grievant's duties changed and increased in May, 1992. The difference between the parties positions for this time period is that, Grievant states she should have been increased to a Pay Grade 15 in May 1992, because she should have already been increased to Pay Grade 14 in 1990 or 1991. Respondent argues Grievant was properly classified prior to May, 1992, but should have been increased to Pay Grade 14 in May, 1992 due to the greater duties she received in the merger.

In December, 1992 the position of Assistant Director of Facilities was filled by Mr. Larry Crowder. In January, 1993 Ms. Poma resigned. Thereafter, the testimony of the parties varies drastically. The Grievant states she assumed "85%" of Ms. Poma's duties and was in essence Acting Director of

Residence Life, thus she should "at least have been" classified as a Pay Grade 16, Ms. Poma's pay grade when she left.

Multiple witnesses, including Grievant, testified Mr. Welty, Grievant's next level supervisor after Ms. Poma, stated he would be Acting Director until a new Director was found. A search wasstarted immediately. Grievant's contention is that although he stated he would be Acting Director, he did not fulfill these duties and she did.

At the Level IV hearing the Grievant submitted a list of her duties as she saw them, including the time after Ms. Poma left. (G. Exh. 10). She reported that other people treated her as the Acting Director, and she functioned at a higher level than she had before Ms. Poma's departure.

Many witnesses, especially those Grievant had supervised before Ms. Poma left, stated they saw Grievant as Acting Director from January 1993 to July 1993, and they frequently went to her with questions. Other witnesses, especially ones on an equal level with the Grievant, stated they went to Mr. Welty with their questions as they would have gone to Ms. Poma in the past. Mr. Welty examined Grievant's Exhibit 10 and gave either specific examples of how he or someone other than the Grievant also performed these duties during this time, or expressed that these were duties he would expect her, in her current classification and position, to perform. (Trans., Vol. II at 242-70). This testimony was confirmed by other witnesses.

Further, it is apparent that many administrative discussions were conducted and some decisions were made by Mr. Welty and others without Grievant's input or prior knowledge. The three other Assistant Directors consulted directly with Mr. Welty when they had questions or concerns, not Grievant. Testimony also reveals that certain specific work, i.e., release requests and certainevaluations were performed or approved by Mr. Welty. The Grievant agreed that certain of Ms. Poma's functions were assumed by Mr. Welty or others, and that she did not supervise the three other Assistant Directors, although she was occasionally consulted by them. These three Assistant Directors made decisions in their own areas. Additionally, other clerical and administrative staff stated they referred mail, requests, and questions to Mr. Welty.

The Grievant elicited much testimony on whether, and how often, Mr. Welty was in the Residence Life offices. This testimony varied widely. Mr. Welty stated he did not get over to those offices as frequently as he had originally hoped, but that he did come by, was available by phone, and often individuals came to his office to see him. This testimony was confirmed by other witnesses, including

Grievant.

The Grievant further testified she told Mr. Welty, "I really want to be Director at sometime, and I feel like that this is an opportunity to get on the horse and ride it, so to speak." (Trans. Vol. I at 79). She stated he did not discourage her, nor tell her she was overstepping her boundaries. Id. at 78-79. She further testified she discussed situations and decisions as frequently as four or five times a day with Mr. Welty, usually by phone. She described many of the situations as reporting a fait accompli to Mr. Welty, as opposed to asking his opinion or seeking his permission to act. Thus, while it is clear Grievant was working very hard and performing more duties than she had the previous year, it is also clear Grievant willingly assumed many of these duties as she saw it as an opportunity to learn.

## Discussion

The Grievant, depending on the portion of the record referred to, argues she has been misclassified since 1990 or 1991 in a variety of ways. The Respondent agrees to a certain extent, and stipulates the Grievant was misclassified from May 11, 1992 to July 1, 1993 and that her proper classification should have been at Pay Grade 14. In awareness of her increased duties and in recognition of the constraints of the Mercer Study and University's guidelines, the Respondent chose to acknowledge her status by giving her an eight percent pay increase but did not audit her position. The Respondent also argues that any grievance prior to May 11, 1992 is untimely and should be barred because the Grievant did not file this grievance until May 28, 1993.

From the testimony above, it is apparent the Grievant was misclassified for at least a portion of the time she grieves. The issues then become, when was she misclassified, what is her proper classification, and should any portion of the Grievant's claim be time barred?

The Grievant responds to the timeliness argument by saying that in 1991 she was discouraged from filing a grievance, or told that it would not help, thus this portion of her grievance should not be time barred. She also agreed she was informed the only way to have her position audited to assess her classification was to receive approval from President Gilley for this audit. Grievantalso stated she knew she could file a grievance and chose not to do so. She stated at Level III that although she had the grievance information, she wanted to apply for the vacant Director's position and was afraid a grievance would harm her chances of securing the job. Grievant also testified she was told no reclassifications were being done and was unaware of the twenty-five percent increase in duties

reflected in memos by Chancellor Manning and Mr. Cottrill. (G. Exhs. 25-27.)

Ms. Foreman and Mr. DeLong testified they were told not to do individual audits of positions unless told to do so directly by President Gilley. Guidelines stated a position should be reclassified if there was a change of duties by twenty-five percent. Ms. Foreman testified she had some question whether Grievant's overall duties had changed by twenty-five percent, because, although Grievant had taken on many new duties, some duties had been removed and additional clerical staff had been provided to perform some of the her former duties.

Mr. DeLong, the individual who frequently does the audits, stated he believed Grievant's job duties changed by twenty-five percent as of May 11, 1992, and with the increased supervision of Residence Life staff, she should have been reclassified at Pay Grade 14. He did not agree that the Grievant had been misclassified prior to that time even though the position of Assistant Manager of Physical Environment had been changed to Pay Grade 14 through a grievance procedure. Both Ms. Foreman and Mr. DeLong repeatedly testified that the Grievant's position should be no higher than a 14 from May, 1992 to July, 1993.

The above narrative discussion summarizes the facts deduced at hearing and from the lower level records and all exhibits. The undersigned believes a recounting of the salient facts would be helpful.

## Findings of Fact

1. The Grievant was rehired by Marshall University in 1989 as Assistant Manager of Housing at Pay Grade 12.

2. Although the Grievant alleges she has been misclassified in various ways since approximately April, 1991, she did not file this grievance until May 25, 1993.

3. On October 17, 1990, due to increased responsibility the Grievant received an increase in Pay Grade to 13.

4. A co-employee of the Grievant who had received the same increase in pay grade grieved this decision, and in April, 1991 was increased to a Pay Grade 14 by a Campus Grievance Committee.

5. Grievant then went to her supervisor and asked to be increased to Pay Grade 14. Grievant testified she was discouraged from filing a grievance because there was a freeze on and "it probably wouldn't work." The Respondent argues the Grievant was informed of her rights to grieve, and

Grievant agrees that she was aware of the grievance process.

6. Grievant did not grieve her misclassification until May 28, 1993.

7. In approximately July, 1991, all universities within the State system were required to review all classified positions. Thus, the prior routine reviews were suspended, while a state-wide review was done of all positions. Some individual or area reviews could be done under specified guidelines. At Marshall, a position audit required the prior approval of the University President.

8. During a thirteen week period in the Winter and Spring of 1992 the Grievant's direct supervisor, Ms. Poma, was on sick and maternity leave. The Grievant assumed some of her duties. Other duties of Ms. Poma were assumed by other administrators, and Ms. Poma was able to perform some of her duties from home.

9. On or around May 11, 1992 the areas of Residence Life and Housing were merged, and Ms. Poma, Director of Housing and Grievant's supervisor, became the Director of Residence Services. The Grievant's position was retitled to Assistant Director of Residence Life - Administration, and her duties increased by approximately twenty-five percent.

10. Respondent gave the Grievant an eight percent pay raise on December 17, 1992 in recognition of her increased job responsibilities and in recognition that job audits were not to be conducted during the Mercer Study without prior approval of the President. As of the hearing the Grievant had continued to receive this increase.

11. Grievant's duties did increase after the departure of her supervisor in January, 1993 but not by twenty-five percent. One reason for this increase was the Grievant's desire to perform theseduties as a learning experience. The Grievant did not direct the work of the other assistant managers.

12. A one-step increase in pay grade results in a five percent increase in pay.

## Conclusions of Law

1. "Each institution shall review annually each job description in relationship to the assigned duties and responsibilities, current job title and pay grade of each classified employee of that institution. Based upon the data collected through such reviews, each institution shall determine which, if any, of its classified employees should be recommended for a change in job title in order to conform to the personnel classification system of its governing board: Provided, That any classified employee filling a position or carrying out the duties and responsibilities of a position normally

assigned a higher pay grade in accordance with the personnel classification system established by the appropriate governing board shall be recommended for a change in job title or shall be returned immediately to the duties and responsibilities outlined in the appropriate job description." W. Va. Code §18B-9-6.

2. "[A] classified employee may appeal the initial assignment, any change in the assigned classification or job title, or any change in the system of classification, whether such change is the result of action taken by the appropriate governing board upon its own authority or upon the recommendation of the institutions." W. Va. Code §18B-9-7.

3. W. Va. Code §18-29-4 states a grievance is to be filed "within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance . . . ."

4. "As a general rule, where a State employee is aware of the facts constituting a grievable matter and delays filing, relief is limited to the ten-day period preceding the filing of the grievance." Hatfield v. W. Va. Alcohol Beverage Control Commission, Docket No. 91-ABCC-052, 169 (Sept. 27, 1991). Here, since the Respondent has stipulated the Grievant was misclassified from May 11, 1992 to July 1, 1993 and does not contest this time period, the Grievant's misclassification grievance is considered timely for those dates. Id. at 5.

5. "Ignorance of the existence of and/or misunderstandings about the grievance procedure for state employees ... will neither toll nor excuse the failure to file a timely grievance." Cutright v. Alcohol Beverage Control Admin., Docket No. 90-ABCC-354 (Oct. 11, 1990).

6. As far as prior to May 11, 1992, Ms. Poma's statements back in 1991 do not appear to have been intended to "mislead or lull the Grievant into believing that filing a grievance or exercising whatever right she had at the time would not be necessary." Gaskins v. W. Va. Department of Health/W. Va. Division of Personnel, Docket No. 90-H-032 (Apr. 12, 1990). Thesestatements were more in the nature of statements of the current fiscal and classification situation, and were not of the type which would cause an employee to delay filing a grievance. Id. at 9. These statements do not toll or excuse Grievant's failure to file a timely grievance for her alleged misclassification from April, 1991 to May, 1992, and the Grievant's misclassification grievance for this time period is untimely. Id. at Conclusion of Law 3.

7. Further, as to the dates prior to May 11, 1992, the general rule is that interpretation of their own rules and regulations by bodies charged with their administration are entitled to deference unless shown to be wrong. cf. W. Va. Dept. of Health and Human Resources/Welch Emergency Hosp./W. Va. Division of Personnel v. Blankenship, Syl. Pt. 2, 431 S.E.2d 681 (W. Va. 1993). Thus, unless Human Resources' opinion that the Grievant was not misclassified from April, 1991 to May, 1992 is shown to be wrong, the Grievant was properly classified during that time period.

8. The Grievant has not met her burden of proof in demonstrating she was misclassified prior to May 11, 1992.

9. The Grievant has proved by a preponderance of evidence that she was misclassified at Pay Grade 13 from May 11, 1992 to July 1, 1993. The proper classification during this time period was Pay Grade 14.

10. Since the Respondent has already identified that the proper pay increase for Grievant's increase in duties was eight percent, Grievant is entitled to that same pay increase fromMay 11, 1992 until the time she began to receive the additional pay in December, 1993.

11. In proving a misclassification case, the predominant duties of the position in question are controlling. Broaddus v. W. Va. Division of Human Services, Docket No. 89-DHS-606/607/609 (Aug. 31, 1990).

12. Although the Grievant performed some of the functions and duties of her supervisor after she left in January, 1993, these did not comprise the majority of her duties nor did these duties include supervision of those individuals on a lateral administrative level to herself. Thus, she did not function as Acting Director from January, 1993 to July, 1993.

Accordingly, this grievance is **GRANTED** in part and **DENIED** in part. The Respondent is **ORDERED** to reclassify the Grievant to a Pay Grade 14 and pay her back wages in form of the difference between the salary she would have received had she been properly classified and paid from May 11, 1992 to the time at which she first received the eight percent pay increase in December, 1992.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal, and

should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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**JANIS I. REYNOLDS**

**Administrative Law Judge**

**Dated: March 30, 1994**

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Footnote: 1*From July, 1987 to May, 1989 the Grievant was employed as the Manager of Ronald McDonald House.*

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Footnote: 2*The Grievant originally filed a two-part grievance, and to accommodate the parties the evidence for both issues was heard at hearings conducted September 15, 16, 17, 1993 at Marshall University. Because the two issues are distinctly separate and complex, separate decisions are issued. For discussion of the nonselection issue, see Docket No. 93-BOT-268A.*

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Footnote: 3*The Respondent was still paying this additional compensation as the date of the hearing even though the Grievant's duties were decreased and changed as of July, 1993 when the new Director began and reorganized the department.*

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Footnote: 4*The Grievant repeatedly quoted Ms. Poma, her direct supervisor. Respondent objected on the grounds of hearsay. Grievant countered saying Ms. Poma's testimony was scheduled for a telephone deposition and would clarify and support Grievant's statements. After the hearing the Grievant decided not to take Ms. Poma's deposition. No reason for this change was given to the undersigned. Further, it must be noted that pursuant to W. Va. Code §29-6A-6 relevant hearsay is admissible in administrative hearings. The question with regard to hearsay is the weight it should be given. Since the Grievant's statements are self-serving, uncorroborated, and contradicted by other witnesses, the weight that can be attributed to them is limited. Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb.4, 1994).*

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Footnote: 5*The purpose of the Mercer Study was to review all positions in higher education and to provide a statewide classification system for these employees.*

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Footnote: 6*It is noted that all parties were working under the assumption that the Mercer Study would be completed in 1992 and all positions would be reevaluated then.*