

DONNA J. WAUGH,

Grievant,

v. Docket No. 95-MCHD-368

**MONONGALIA COUNTY HEALTH
DEPARTMENT AND DEPARTMENT
OF ADMINISTRATION/ DIVISION
OF PERSONNEL,**

Respondents.

DECISION

Donna J. Waugh (Grievant), currently employed with the Monongalia County Health Department (MCHD or Respondent) and classified as a Supervisor I, was employed and classified as a "Secretary I" from July 1, 1992. Grievant filed a Level One grievance on or about June 9, 1995, in which she challenged her past classification and paygrade as a Secretary I. The grievance was not resolved at Levels One, Two or Three. An appeal was made to Level Four on August 22, 1995. The matter became mature for decision at the conclusion of an evidentiary hearing on November 17, 1995.

Grievant's complaint stated that she had been performing the duties of an Office Supervisor I since July 1, 1992 and that she filed this grievance due to discriminatory practices. She is seeking the following relief: reclassification to Office Supervisor I from the time period of July 1, 1992 through July, 1995, and to make up the difference between the paygrade as a Secretary I and the paygrade for an Office Supervisor. She also seeks "due consideration for missed promotional opportunities".

PRELIMINARY ISSUES

As a preliminary matter, an issue was raised as to whether the Grievance Board has the jurisdiction to hear Grievant's case. West Virginia Department of Administration v. West Virginia

Dept. of Health and Human Resources/Division of Health, 451 S.E.2d 768 (W.Va. 1994)(also known as Chafin), clarifies this issue. In Chafin the Court held that

Under W.Va. Code, §§29-6A-1, et seq., it is clear that the Legislature intended to place in the Education and State Employees Grievance Board jurisdiction over matters arising from a 'misapplication or misinterpretation regarding...hours, terms and conditions of employment.' This terminology is sufficiently broad to cover a grievance for work performed out of classification. Furthermore W.Va. Code, §29-6A-11, provides that '[t]his article supersedes and replaces the civil service grievance and appeal procedure currently authorized under the rules and regulations of the civil service commission.' Syl. Pt. 2, in part, AFSCME v. Civil Service Comm'n, 181 W.Va. 8, 380 S.E.2d 43 (W.Va. 1989). Syl. Pt. 1, Chafin.

The Court also held in Chafin that

An employee of a county health department who is a member of the state merit system is subject to the grievance procedures for state employees and may accordingly file grievances pursuant to West Virginia's Code §§ 29-6A-1 to -11 (1992) before the West Virginia Education and State Employees Grievance Board. Syl. Pt. 2, Chafin.

Therefore, Grievant is entitled, by law, to pursue her grievance before the West Virginia State Education and Employee Grievance Board.

A second preliminary matter raised by Respondent Division of Personnel involved the issue of the timeliness of this grievance. Respondent argued that Grievant's claim was not filed in a timely manner. Grievant filed this grievance on or about June 9, 1995, and her position at MCHD as a supervisor was not effective until July 1, 1995. It is well established that misclassification grievances constitute continuing practices which can be grieved at any time during the period of alleged misclassification. AFSCME v. Civil Serv. Comm., 341 S.E.2d 693, 698 (W.Va. 1993). Therefore, since the subject matter of this grievance involves a continuing practice of misclassification, the Undersigned finds that this grievance is timely filed. Moreover, it is not necessary or appropriate to address now what time period Grievant might be entitled to relief. See Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399 (W.Va. 1995); Hatfield v. W.Va. Alcohol Beverage Control Comm., Docket No. 91-ABCC-052, 169 (Sept. 27, 1991).

A third preliminary matter involves the Division of Personnel's contention that there is a procedural

problem in that the Division of Personnel should have been notified of the Level Three hearing. W. Va. Code §29-6A-4(c) states that a copy of the appeal and the Level Two decision are to be served upon the personnel director of the Division of Personnel by Grievant. The Division of Personnel is indicating that such a copy was not forwarded to them. However, the Division of Personnel was present at the Level Four hearing, and is now a party to this grievance and had the opportunity to present evidence. The error of the Division of Personnel not receiving a copy of the Level Two or Three decisions and/or a copy of the appeal is a harmless one.

The Division of Personnel also questions whether this grievance is premature. The position of the Division of Personnel is that according to W. Va. Code §29-6-10(1), MCHD does not have the authority to classify positions nor has MCHD secured proper classification of their employees from the Division of Personnel. Grievant is a state employee in that she receives compensation in the form of a wage or salary, funded either in part or in whole by the state. W. Va. Code §29-6-10(1) states that

...Except for persons employed by governing boards of higher education, all persons receiving compensation in the form of a wage or salary, funded either in part or in whole by the state, shall be included in either the position classification plan for classified service or classified-exempt service...

Apparently because of a dispute over the ability of the MCHD to opt out of the state's merit system, Personnel did not classify Grievant's position or any of the other positions at MCHD in 1992, when it implemented a reclassification project for the Department of Human Resources and local health departments. Whatever the cause, there is no dispute that Personnel did not classify Grievant's position during the time period relevant to this grievance. See W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993). It is Personnel's function to classify positions, and it has not yet done so.

Therefore, the Division of Personnel is hereby **ORDERED**, within sixty (60) calendar days from and after the date of this Decision, to determine whether Grievant was misclassified at any time during the period beginning on or about July 1, 1992 to the present and to notify the parties of its determinations. If the Division of Personnel determines that Grievant was misclassified during any portion of that period, it should ascertain what additional compensation, if any, she should have been paid, plus interest as provided for by law. If the Division of Personnel determines Grievant was not misclassified, Grievant may refile her grievance at Level Four within ten (10) working days of receipt

of the Division of Personnel's findings. If Grievant is determined to have been misclassified during any portion of the relevant time period, but a dispute nonetheless remains about her classification or about backpay, she may refile the grievance at Level Four within ten (10) working days of receipt of the Division of Personnel's findings.

DATE : March 6, 1996 _____

MARY BETH ANGOTTI-HARE

Administrative

Law Judge