JOAN EASTERLY,

Grievant,

v. DOCKET NO. 96-HHR-053

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
and WEST VIRGINIA DIVISION OF PERSONNEL,

Respondent.

DECISION

Ms. Joan Easterly, Grievant, was employed by the West Virginia Department of Health and Human Resources, Respondent, from 1975, until her retirement on February 23, 1995. On August 10, 1994, when Grievant filed this grievance, she was a Social Service Worker II.

Grievant alleged she began working out of classification as an Adult Protective Service Worker on January 16, 1987. Grievant sought to be relieved of her adult protective service duties, and awarded backpay for the difference between the Protective Service Worker rate and the lower Social Service Worker II rate.

Grievant was denied relief at Levels I and II. At Level III, a hearing was held on October 17, 1994. The Level III hearing examiner partially granted the grievance. Grievant was "awarded backpay with interest from July 27, 1994 (ten working days prior to the filing of her grievance) to February 24, 1995." The Level III hearing examiner limited relief based on Conclusions of Law numbers five and six of her decision, which are reproduced below:

> 5. Grievant freely admitted that although she was aware of the fact that she was working out of classification in 1988, she chose not to file a grievance until August 10, 1994. Therefore, Grievant is not entitled to backpay for the entire misclassification period under the portion of W.Va. Code, 29-6A-4(a), permitting an employee to file a written grievance within ten days of becoming aware of the grievable event.

6. By not timely filing a grievance within the time allotted by statute, Grievant forfeited any claim to the 1989 AFSCME Settlement Agreement which involved settlement for back wages due to misclassification.

This undated Level III decision was apparently lost. The February 7, 1996, Certificate of Service accompanying the decision was signed by a different hearing examiner. (See footnote 1)

Grievant appealed, to Level IV, only the portion of the decision which limited her relief to ten days prior to the filing of the grievance. On March 21, 1996, a Level IV evidentiary hearing was held at the Grievance Board's office in Elkins, WestVirginia. On May 6, 1996, this case became mature upon receipt of Grievant's post-hearing submission.

The following findings of fact are derived from the record.

FINDINGS OF FACT

1. From January, 1988, until her retirement, Grievant performed a range of social service duties and adult protective service duties. From January 16, 1987, until January, 1991, adult protective services made up approximately 30-40 percent of her duties.

2. From January, 1991, until 1992, adult protective services comprised more than 60 percent of Grievant's duties.

3. From 1992, until her retirement in 1995, adult protective services comprised 80-90 percent of Grievant's duties.

4. In 1994, Grievant's supervisor, Mr. Donald Dick, recommended that she be promoted to Protective Service Worker. On June 30, 1994, this request was denied by Mr. Frank Cosner, Mr. Dick's supervisor and Adult Program Coordinator, because Grievant was not qualified for the Protective Service Worker position. Grievant did not possess a four year college degree.

5. Mr. Cosner and Grievant discussed her working out of classification on several occasions over the years prior to her filing a grievance.

6. Grievant and Mr. Dick discussed the possibility of filing a grievance concerning her working out of classification. He suggested that she wait until the Toney v. W. Va. Dept. of Healthand Human Resources, Docket No. 93-HHR-460 (June 17, 1994), grievance was settled. (See footnote 2)

7. Grievant admitted she was familiar with the grievance process, but that she "didn't like to file" grievances.

DISCUSSION

The Level III hearing examiner properly concluded in Conclusion of Law #3 that Grievant proved "by a preponderance of the evidence that she was working out of classification from January 1, 1988 to February 24, 1995." At Level III, Grievant also proved that the "best fit" for her position during that period was Protective Service Worker. These issues were not appealed to Level IV. At Level IV, the sole issue was whether the Level III Grievance Evaluator correctly limited the relief to ten days prior to the filing of the grievance.

This issue was addressed in Hatfield v. W. Va. Alcohol Beverage Control Comm'n., Docket No. 91-ABCC-052/169 (Sept. 27, 1991). The Administrative Law Judge stated:

> Grievant, however, is not entitled to back pay for the entire period of misclassification. 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. Relief is not available for the earlier timeperiod, if the employer asserts a timeliness defense, because the claim for the earlier period is time-barred by W.Va. Code, 29-6A-4. (See footnote 3) See Hall v. West Virginia Dept. of Tax and Revenue, Docket No. 90-T-239 (Aug. 10, 1990); Allman v. Harrison County Bd. of Educ., Docket No. 89-17- 215 (June 29, 1990).

Id. at 5.

The Supreme Court of Appeals of West Virginia has ruled that limiting relief in this manner is appropriate in Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399 (W.Va. 1995). In Martin allegations included misclassification and sex discrimination in the form of compensation disparity. In addressing the misclassification claim, the Court stated:

> The plaintiff contends she has been erroneously classified as service personnel rather than professional personnel. As the ALJ did with the disparate salary claim, she concluded this contention was time barred because the decision to reclassify was made in 1990 and the grievance was not filed until 1992, well past the fifteen-day time period stated in W.Va. Code, 18-29- 4(a)(1). We conclude, however, the W.Va. Code, 18-29-2, allows employees to contest a misclassification at any time (although only once). As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days (See footnote 4) preceding the filing of the grievancee.

Id. at 413. Furthermore, Grievant has not alleged any harassment or coercion by any of Respondent's agents. At Level III, the following colloquy occurred:

> O'Brien: Okay. I just wanted to clarify that nobody . . .
>
> Easterly: . . . I've never . . .

> O'Brien: . . . tried to talk you out of grievances or anything like that during that period to time.
>
> Easterly: No. I've always, I've always been told that there is either no position or nothing available or it will be posted next year or something like that and it never happened. But I never really thought about grievances. I honestly didn't.

Therefore, absent inappropriate or unlawful action by Respondent, Grievant's relief is limited to ten days prior to the filing of the grievance.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. In nondisciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Unrue v. W.Va. Div. of Highways, Docket No. 95-DOH- 287 (Jan. 22, 1996).

2. Any relief is limited to prospective relief and to back relief from and after ten days preceding the filing of the grievancee. Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399 (W.Va. 1995); Hatfield v. W. Va. Alcohol Beverage Control Comm'n., Docket No. 91-ABCC-052/169 (Sept. 27, 1991). 3. Grievant proved by a preponderance of the evidence that she is entitled to relief from and after ten days preceding the filing of the grievancee.

Accordingly, the grievance, as appealed to Level IV, is **DENIED**. The Level III Grievance Evaluator was correct in limiting relief to ten days prior to the filing of the grievance.

Any party 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.

Dated: July 25, 1996 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 Grievant's Representative acknowledged, since the Level III decision was issued nearly one year after Grievant's retirement, the request to discontinue Protective Service Worker duties was moot.

Footnote: 2 Grievant estimated that conversation took place approximately six months prior to the Toney decision being issued. Mr. Dick thought that the conversation took place approximately two months before the Toney decision. However, neither had a clear recollection of the date of their discussion.

Toney is disapproved by the Grievance Board. See Hager v. Dept. of Health and Human Resources, Docket No. 95-HHR-241 (Sept. 30, 1995).

Footnote: 3 Cases filed during the ninety-day window created by the West Virginia Supreme Court of Appeals in AFSCME v. Civil Serv. Comm'n of W.Va., 380 S.E.2d 43 (1989) (AFSCME IV), are exceptions to the general rule. The Court in that case stated that misclassified employees were entitled to back pay for the entire period of misclassification. There, and in early decisions, the Court, of course, was not presented with any question concerning the limitation period contained in W.Va. Code, 29-6A-4.

Footnote: 4 Pursuant to W.Va. Code §18-29-4(a)(1), education employees have fifteen days to file a grievance, while W.Va. Code §29-6A-4 allows state employees only ten days.