JUDITH S. BYRD,

Grievant,

v. DOCKET NO. 96-06-324

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Judith S. Byrd (Grievant) complains that Respondent Cabell County Board of Education (CCBE) improperly reduced her 261-day contract to 220 days and transferred her to another position contrary to W. Va. Code §§ 18A-4-8b, 18A-2-6, and 18A-4-8g. This grievance was initiated under W. Va. Code §§ 18-29-1, et seq., on April 9, 1996. The grievance was waived to Level II, as Grievant's immediate supervisor did not have authority to grant the relief requested. A Level II hearing was conducted on May 29, 1996. Following an adverse Level II decision issued by CCBE's Superintendent, Richard Jefferson, on July 15, 1996, Grievant waived Level III as permitted by W. Va. Code § 18- 29-4(c), appealing to Level IV on July 22, 1996. A Level IV evidentiary hearing was held at CCBE's Vocational-Technical Center in Huntington, West Virginia, on September 24,1996. (See footnote 1) The parties subsequently took the deposition of an additional witness, and this matter became mature for decision upon receipt of the transcript of that deposition on December 2, 1996.

Having heard the testimony of the witnesses at Level IV, and having reviewed the transcribed testimony from Level II, as well as the transcript of Grievant's transfer hearing before CCBE, the following Findings of Fact are made in this matter.

FINDINGS OF FACT

1. Grievant is employed by the Cabell County Board of Education (CCBE) as a regular Secretary III, a school service personnel position.

2. Grievant was first employed by CCBE as a half-time Clerk II in October 1983, assigned to

the employee absentee "hotline." HT at 9-10, 19. **(See footnote 2)**

3. The hotline position was expanded to full-time in February 1984, and Grievant successfully bid into that job, remaining a Clerk II. HT at 20.

4. In May 1987, Grievant was selected as the Financial Aid Secretary in CCBE's Vocational-Technical Center. HT at 21-24; J Ex A at L IV.

5. Prior to August 1987, two "hotline" positions were posted and filled by Jerri Black and Tammy Glover. These positions were multi-classified as Secretary I/Clerk II. R Ex 1at L II; G Ex B at L IV. See Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990).

6. Grievant trained Ms. Glover regarding her duties on the employee absentee hotline.

7. At the time Grievant worked on the absentee hotline, her job description did not include any reference to typing, filing or updating experience records in personnel files. All these duties are included in the job description for the Secretary I/Clerk II positions subsequently held by Ms. Glover and Ms. Black. Cf. G Exs A & B.

8. Despite the duties listed in the Secretary I/Clerk II job description for the hotline position at the time it was held by Ms. Glover and Ms. Black, these employees were not required to perform any typing assignments. Such typing as they performed for convenience or legibility did not constitute a significant portion of their duties.

9. In late 1989 or early 1990, Grievant was called to testify as a witness in a Level IV hearing regarding a grievance filed by Ms. Black. Grievant testified that although she could not type 55 words per minute, unlike Ms. Black, she had not been required, while holding her position on the hotline, to sign an agreement to pass a typing test before moving to another position in the Secretary classification. Black, supra.

10. Grievant was aware in 1987 and earlier that she was not being awarded seniority as a Secretary for the time she worked on the absentee hotline in the service personnel classification of Clerk II.

11. This grievance was initiated on April 9, 1996. 12. Respondent asserted that the grievance was untimely filed at Level II. HT at 7-8.

DISCUSSION

CCBE contends that this grievance was not initiated within the time limits set forth in W. Va. Code § 18-29-4(a)(1):

> Before a grievance is filed and 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, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Grievant contends that this grievance was initiated within fifteen days of the date it was "discovered" in accordance with Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990).

A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE- 130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). As required by W. Va. Code § 18-29-3(a), Respondent asserted at the Level II hearing that this grievance was untimely. HT at 7-8. See generally Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

In order to determine if this grievance was timely filed, it is necessary to discuss certain events which preceded the filing of this grievance in some detail. Grievant was first employed by CCBE as a half-time Clerk II in October 1983. HT at 9-10, 19. In thatcapacity, she worked with the "hotline" for employees calling in absent. The hotline duties were expanded to a full-time position in February 1984, and Grievant successfully bid into that posted position, remaining a Clerk II. HT at 20. In May 1987, she bid into a Secretarial position as the Financial Aid Secretary for the Vocational-Technical Center. HT at 21-24; J Ex A at L IV.

After Grievant left the hotline, CCBE hired Jerri Black and Tammy Glover to perform similar duties. At the time Ms. Black and Ms. Glover were selected, each of the hotline positions was multi-classified as a Clerk II/Secretary I. See Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990). R Ex 1 at L II. The positions were duly posted in accordance with W. Va. Code § 18A-4-8b as multi-classified Clerk II/Secretary I in January 1987. See G Ex B. Thus, Ms. Glover and Ms. Black attained seniority as Secretaries from August 1987. See J Ex A at L IV.

Grievant claimed that she was not aware that Ms. Black and Ms. Glover had received seniority as secretaries until she looked at the secretarial seniority list in 1996, shortly after

being notified that she was subject to a reduction in force (RIF) action. HT at 10. On February 28, 1996, Grievant submitted a request for seniority as a Secretary for the time she served on the hotline between 1983 and 1987. G Ex 2 at L II. In that request, Grievant stated: "I feel that I was misclassified as a Clerk II, and I am now requesting that my seniority be adjusted to my employment date of February 1982." (See footnote 3) As indicated by the foregoing statement, this grievance does not involve a simple denial of seniority. Grievant received seniority credit for the position she held in 1983 as a Clerk II. Grievant is alleging that she discovered nine years later that she was misclassified during the time she worked as a Clerk II, and that she should have been classified as a Secretary I/Clerk II, the multi-classifications subsequently held by Ms. Black and Ms. Glover.

In late 1989 or early 1990, Grievant appeared as a witness for Ms. Black at a Level IV grievance hearing. Ms. Black claimed in that matter that she should have been promoted to a posted secretarial position without being required to take a typing test, in the same manner Grievant had been promoted to her secretarial position. See Black, supra. Grievant's statement that she testified in a grievance about moving from the hotline to a secretarial position without becoming aware that Ms. Black was then classified as a Secretary is simply not credible. It is even less credible considering Ms. Glover's testimony that Grievant trained her on the duties of her new position on the hotline in 1987.

W. Va. Code § 18-29-4(a) permits a school employee to file a grievance "within fifteen days of the date on which the event became known to the grievant." In Spahr, this "discovery" provision was applied to find that the grievants there did not learn of the "event" giving rise to the grievance, in that case disparate treatment of similarly situated teachers in regard to a pay supplement, until they met with their union representative. Accordingly, the grievance was timely since it was filed within fifteen days of that "discovery." Spahr, supra. In the instant matter, the "event" giving rise to this grievance was CCBE's alleged misclassification of Grievant. Misclassification is considered to be a "continuing violation" which may be grieved at any time. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). However, once the employee is promoted or transferred to another proper classification, that violation ceases to exist, and the employee must file his or her grievance within the established time limit. See Wylie v. W. Va. Dept. of Natural Resources, Docket No. 94-T&P-628

(Mar. 7, 1995); Spencer v. Dept. of Health & Human Resources, Docket No. 93-HHR-523 (Oct. 28, 1994); Gaskins v. W. Va. Dept. of Health, Docket No. 90-H-032 (Apr. 12, 1990); Taylor v. Mason County Bd. of Educ., Docket No. 26-86-030 (Oct. 7, 1986).

Grievant knew that her position was classified as a Clerk, not as a Secretary, during the time she performed the duties of the hotline position from 1983 through 1987. Thus, Grievant knew of the "event" giving rise to this grievance at least nine years before it was filed. Further, a preponderance of the evidence indicates that Grievant knew or would have inevitably discovered that the employees who succeeded her were classified differently. See Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). See also Brown v. Public Employment Relations Bd., 345 N.W.2d 88 (Iowa 1984). What Grievant "discovered" in 1996 was that if she were to receive seniority as a Secretary for the time she spent on the absentee hotline, she would not be one of the two least senior 261-day secretaries at CCBE's Vocational-Technical Center. Such a discovery is not an "event" within the meaning of Spahr. See Adkins v. W. Va. Dept. of Educ., Docket No. 95- DOE-507 (Apr. 26, 1996). See also Floren v. Kanawha County Bd. of Educ., Docket No.93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991). Accordingly, the undersigned finds that Grievant waited more than 15 working days from the date of the event at issue to file her grievance and, therefore, this grievance was not timely filed.

Even if this grievance had been timely filed, Grievant failed to prove that she should have been classified as a Secretary during the time period in question. In order to prevail on a claim that her position was misclassified, an employee must establish, by a preponderance of the evidence, that her duties more closely match those of another W. Va. Code § 18A-4-8 classification than that under which her position was previously categorized. Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994); Pope v. Mingo County Bd. of Educ., Docket No. 91-28-068 (July 31, 1992).

W. Va. Code § 18A-4-8 defines Secretary I as "personnel employed to transcribe from notes or mechanical equipment, receive callers, perform clerical tasks, prepare reports and operate office machines." Likewise, a Clerk II is "employed to perform general clerical tasks, prepare reports and tabulations and operate office machines." W. Va. Code § 18A-4-8. Obviously, these two classifications include overlapping duties. This Grievance Board has

previously recognized that because two or more job definitions may encompass the same duties, proof that an employee performs such crossover duties does not necessarily mandate that her position be reclassified. Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994).

A preponderance of the evidence indicates that Grievant, in fact, performed substantially the same duties as Ms. Glover and Ms. Black. Indeed, Ms. Glover testifiedthat Grievant trained her to perform the duties of her position. However, both Ms. Glover and Ms. Black testified that, notwithstanding the language in their job descriptions, they were not required to perform any significant typing. According to them, the only thing they typed was a list of substitutes each semester, and that was typed for "convenience" or "legibility," not because typing was required. Thus, a preponderance of the evidence indicates Grievant and her successors on the hotline position transcribed from notes or mechanical equipment so infrequently that this was not a significant aspect of their duties. Cf. Johnston v. Lincoln County Bd. of Educ., Docket No. 92-22-482 (Jan. 27, 1993) (Switchboard Operator/Receptionist found to be performing secretarial duties on "a regular basis"). The remainder of the duties performed by Grievant, including those listed in her job description, are included in the Clerk II classification. See G Ex A.

Nonetheless, Grievant's theory regarding her entitlement to seniority as a Secretary goes one step further by arguing that she was subjected to discrimination prohibited by W. Va. Code § 18-29-2(m). That statute defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or other employees, and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once Grievant establishes a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

In this matter, Grievant failed to establish a prima facie case of discrimination because she is not similarly situated to Ms. Glover or Ms. Black. Grievant applied for and received a posted Clerk II position. After Grievant was promoted to a Secretary III position, the employer revised the position description for her former position and posted that position as a Clerk II/Secretary I. Cf. G Exs A & B. Thus, CCBE's treatment of Grievant and the employees against whom she seeks to be compared occurred at separate times, and were not demonstrated to be part of a continuing pattern or practice. Therefore, Grievant did not demonstrate that she was "similarly situated" to Ms. Black and Ms. Glover as required under § 18-29-2(m).

Further, even if Grievant did establish a prima facie case of discrimination in regard to her alleged misclassification between 1983 and 1987, a preponderance of the evidence indicates that, notwithstanding the statements in their position description regarding typingassignments, Ms. Black and Ms. Glover were apparently misclassified during their tenure on the hotline as well. It is well-settled that an employee who performs the same work as another misclassified employee is not entitled to the misclassified employee's classification. Akers v. Dept. of Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995); Gilliam v. Dept. of Transp., Docket No. 96-DOH-511 (Apr. 24, 1997); Roberts v. W. Va. Dept. of Transp., Docket No. 96-DOH-017 (May 2, 1996), aff'd, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (Mar. 25, 1997). Thus, even if this matter had not been filed well after the permitted statutory time limit, Grievant failed to establish any entitlement to relief on the merits of her grievance.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. A timeliness defense is an affirmative defense, which must be established by a preponderance of the evidence. Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). 3. Under the "discovery provision" of W. Va. Code § 18-29-4(a)(1), "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739, 742 (W. Va. 1990). See Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27- 481/482 (Aug. 19, 1992).

4. CCBE established by a preponderance of the evidence that Grievant was aware of all the basic facts necessary to file her grievance more than fifteen days before the instant grievance was filed. Accordingly, this grievance is time-barred by the provisions of W. Va. Code § 18-29-4(a)(1). See Adkins v. W. Va. Dept. of Educ., Docket No. 95- DOE-507 (Apr. 26, 1996); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991). See also Brown v. Public Employment Relations Bd., 345 N.W.2d 88 (Iowa 1984).

5. In order to prevail in a misclassification grievance, an employee must establish, by a preponderance of the evidence, that her duties more closely match those of another W. Va. Code § 18A-4-8 classification than that under which her position was previously classified. Farley v. Logan County Bd. of Educ., Docket No. 96-23-159 (Sept. 26, 1996); Pierantozzi v. Brooke County Bd. of Educ., Docket No. 96-05-061 (May 31, 1996); Hatfield v. Mingo County Bd. of Educ., Docket No. 91-29-077 (Apr. 15, 1991).

6. "Because of similarities in the nature of certain jobs listed in Code § 18A-4-9, two or more job definitions may encompass the same duties. Proof that an employee performssuch 'crossover' duties does not necessarily mandate that his position be reclassified." Graham v.

Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994).

7. "Secretary I" means personnel employed to transcribe from notes or mechanical equipment, receive callers, perform clerical tasks, prepare reports and operate office machines. "Clerk II" means personnel employed to perform general clerical tasks, prepare reports and tabulations, and operate office machines. W. Va. Code § 18A-4-8.

8. Grievant failed to prove by a preponderance of the evidence that her duties on the personnel absentee "hotline" position between 1983 and 1987 more closely match the Secretary I classification than the Clerk II classification under which she was previously classified.

9. "Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

10. Grievant failed to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m) in regard to her classification while working on the employee absentee hotline in

comparison with two other employees who performed similar duties on the hotline at a later point in time. See Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994); Steele, supra.

11. Even if Grievant had established a prima facie case of discrimination in regard to her alleged misclassification, she would not be able to prevail in the circumstances presented as an employee who performs the same work as another misclassified employee is not entitled to the misclassified employee's classification. Akers v. Dept. of Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995); Gilliam v. Dept. of Transp., Docket No. 96-DOH-511 (Apr. 24, 1997); Roberts v. W. Va. Dept. of Transp., Docket No. 96-DOH-017 (May 2, 1996), aff'd, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (Mar. 25, 1997).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Cabell County or 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 § 18-29-7. 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 22, 1997

Footnote: 1

At that hearing, the parties agreed to consolidate the related case of Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316, for purposes of developing the record at Level IV, but requested that separate decisions be rendered in each matter.

Footnote: 2

The transcript from the Level II hearing in this matter will be cited as "HT at ." Grievant's exhibits will be cited as "G Ex ," while CCBE's exhibits will be cited as "R Ex ."

Footnote: 3

At the Level II hearing, Grievant acknowledged that she began working as a substitute in February 1982, and she only intended to seek seniority from October 1983, when she began regular employment. HT at 9-10.