CAROLYN DEEL,

Grievant,

v.

DOCKET NO. 96-BEP-361

WEST VIRGINIA BUREAU OF EMPLOYMENT

PROGRAMS/DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Carolyn Deel, filed her grievance on January 5, 1996, alleging:

> The level of responsibilities and authority required to complete duties and attain agency goals have and continue to exceed my current classification and compensation.
>
> The administration has acted in a manner detrimental to program objectives and employee development.

As her requested relief she asked:

> To be classified appropriate to the responsibilities, duties and level of authority required for the effective coordination of statewide federal entitlement programs.
>
> To be made whole in every way, to include but not limited to; salary adjustment, back pay and reimbursement of legal fees.

Grievant, an Employment Programs Specialist, sought to be reclassified as an Employment Programs Specialist, Senior. As a result of the level three hearing, the Commissioner of the Bureau of Employment Programs (BEP) determined that the duties Grievant was performing more closely matched the personnel classification of EmploymentPrograms Specialist, Senior. It was also found that she had been performing those duties since July 1, 1994. Back pay was awarded from May 9,

1995, the date she completed her position description. Grievant appealed to level four on August 23, 1996, to contest the amount of back pay she was awarded. She asserts she should be awarded back pay to July 1, 1994, the date she assumed her current duties.

The salient facts are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievant is employed in the Division of Job Training Programs, BEP, as the Coordinator of the Trade Adjustment Assistance Program, a federal entitlement program that is administered and operated statewide by the BEP.

2. Mr. John Cottrell previously held the position of Trade Act Coordinator, but left that employment effective June 30, 1994. Mr. Cottrell's position was classified as an Employment Program Specialist, Senior.

3. The position held by Mr. Cottrell was never posted by BEP. The duties performed by Mr. Cottrell were disbursed among the remaining employees in that Division.

4. On July 1, 1994, Grievant assumed all of the duties of the Trade Act Coordinator, with the understanding from her supervisor and Assistant Director that a promotion would be pursued after she had performed in the position for a few months. Grievant's classification was Employment Program Specialist.

5. On October 14, 1994, Nancy Daugherty, Grievant's immediate supervisor, submitted a Request for Personnel Action form proposing that Grievant be promoted to Employment Program Specialist, Senior. LIII, G. Ex. O. 6. On or about October 21, 1994, that form was returned to Ms. Daugherty by the Director, Anthony Solario, with this notation: “Must request reallocation of position via position description. Called Nancy D. 10/21/94 and instructed her to have Carolyn complete position description.” LIII, G. Ex. O.

7. BEP underwent a reorganization in October 1994, which resulted in the appointment of a new Director to Grievant's division in November 1994. Grievant decided to wait to approach the new Director about her personnel situation because she “knew she would have her hands full.”

8. On December 23, 1994, Grievant met with Director Quetta Muzzle, to discuss her situation. Ms. Muzzle asked Grievant to give her until January to pursue the matter further, and Grievant agreed.

9. Grievant did not hear anything from Ms. Muzzle, and in March 1995, asked her program manager, Sherron Higginbotham, to follow up with Ms. Muzzle. Ms. Higginbotham told Grievant she needed to complete the position description form.

10. Grievant completed the position description on May 9, 1995, and forwarded it to Ms. Muzzle.

11. The complete documentation was forwarded to the Division of Personnel on or about November 3, 1995. The Division of Personnel denied the request for reclassification on November 28, 1995.

12. BEP appealed Division of Personnel's decision on behalf of Grievant on December 15, 1995. That appeal was also denied.

13. Grievant initiated this grievance on January 5, 1996.

Discussion

Grievant contends that she took the position in question in July 1994, with the understanding from her supervisors that she would be promoted, and would consequently receive additional compensation, effective July 1, 1994. She seeks compensation back to July 1, 1994. BEP awarded Grievant back pay from the date she completed her position description, May 9, 1995. According to Mr. Thomas Rardin, BEP Personnel Administrator, BEP's practice has been to grant back pay in similar cases to the date the position description was completed. Based on Grievant's delay in completing the position description and in filing her grievance, BEP contends it has been more than fair in determining the appropriate amount of back pay.

Grievant's statement of grievance indicates that she was seeking to be reclassified to Employment Program Specialist, Senior, the same classification held by Mr. Cottrell. However, Grievant's later arguments and evidence indicate that she is arguing that she should have been “promoted” into Mr. Cottrell's position. The level three hearing examiner held that Grievant should be reallocated to the Employment Program Specialist, Senior position, and awarded back pay to May 9, 1995, the date she completed her position description. While the outcome is not affected by the label attached to the personnel action, the undersigned will attempt to clarify the differences between the various personnel actions.

West Virginia Administrative Rules, Division of Personnel, define the following personnel actions:

Allocation: The assignment of a position to a class by the Director of Personnel on the basis of the duties performed and responsibilities assumed.

Promotion: A change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities.

Reallocation: Reassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or difficulty of duties and responsibilities assigned to the position or to correct a position misclassification.

Grievant asserts she should have been promoted because she filled the vacancy created when Mr. Cottrell left the Division. BEP "reallocated" Grievant at level three due to the significant change in her duties and responsibilities, to the Employment Program Specialist, Senior. (See footnote 1) BEP argues that Grievant could not have been "promoted" because there was no vacant position as anticipated by the above definition. BEP did not post the position held by Mr. Cottrell, nor did it intend to fill that position. Rather, the duties of that position were disbursed among the various existing employees in that Division, in an effort to comply with the Governor's directive to downsize staffing where possible. The undersigned agrees with BEP that, because there was no vacancy, she could not have been promoted. The definition of "promotion" clearly speaks to a change of status of an employee from a position in one class to a "vacant position" in another class of higher rank. In order for Grievant to have been "promoted" into the position held by Mr. Cottrell, that position would have had to be posted, and filled accordingly. Had Grievant been the successful applicant for that position, her change in status would have been a "promotion." LIV Test., Rardin. The remaining issue is whether the back pay awarded Grievant at level three was proper. BEP relies on Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399 (W. Va. 1995), which holds that, where a grievant prevails in a misclassification grievance, but has delayed filing, and where the employer has raised a timeliness defense, the grievant is entitled to back pay to ten days prior to the filing of the grievance. Thus, BEP argues, under Martin, Grievant would have only been entitled to back pay to ten days prior to January 5, 1996, and since it awarded her back pay to May 9, 1995, it has been more than generous under these circumstances.

The record in this case demonstrates that not only did Grievant delay in filing her grievance but she delayed several months in completing her position description, which was required in order to

process her promotion request, or to determine if she was working out of classification. Ms. Nancy Daugherty, Grievant's immediate supervisor at all times relevant herein, testified that she told Grievant she needed to complete the position description. With regard to the “promise” made by Ms. Daugherty when Grievant was offered the opportunity to assume Mr. Cottrell's duties, she testified as follows:

> Q:
> Okay. When you spoke with Carolyn Deel about taking the position of Mr. Cottrell was there any -- Did Ms. Deel tell you that it was her understanding that she would take that position so long as she was compensated for it?
>
> A:
> It was her understanding that she would take the position and work in it for a period of time at which time we would try to promote her into that position.

LIII Transcript, p. 85.

Grievant's Assistant Director, Allen Wright, testified:

> Q:
> . . . Did you have any discussions with Carolyn Deel in 1994 when she took over the position that was formerly held by John Cottrell as to a promotion to Employment Programs Specialist Senior?
>
> A:
> To the best of my recollection I can't specifically recall any specific ones, but I think it was inferred by if not directly stated to her that we would certainly pursue the idea of placing information to the Employment Programs Specialist Senior classification.

LIII Transcript, p. 100.

The evidence presented demonstrates that Grievant voluntarily assumed the duties performed by Mr. Cottrell after his departure. There is no evidence that Grievant was required to perform those duties, or otherwise coerced against her will to undertake those job responsibilities. There also is no evidence that Grievant's supervisors “promised” her she would be promoted. The level three testimony of both individuals, set forth above, demonstrates that what they “promised” her was they would initiate the paperwork for a promotion for Grievant. They kept that “promise.”

This Grievance Board has held that, “(e)mployees who, with full understanding that they have no guarantee of higher compensation voluntarily fill in at a higher classification level cannot later claim that they should have been reclassified for that period.” Gregg, et al. v. Bd. of Trustees, W. Va. Network for Educational Telecomputing, Docket No. 94- MBOT-863 (Dec. 18, 1996); Spencer v. W. Va. Dept. of Health and Human Res., Docket No. 93-HHR-523 (Oct. 28, 1994); Freeman v. W. Va. Dept. of Health and Human Res., Docket No. 90-H-237 (Dec. 26, 1990). See also, Wilds v. Div. of Highways, Docket No. 94- DOH-290 (Dec. 30, 1994).

Finally, BEP's Policy and Procedure 6500.45, Non-Competitive Promotions, submitted by Grievant, outlines the procedure required to process a request for promotion. Specifically, Section II, Responsibility, notes that it is the supervisor's responsibility to initiate the request for promotion and to assure required documentation is made. But it isthe employee's responsibility to complete an up-dated position description form, which must be completed before any review of the request can be made. LIII, Hearing Ex. 2 (emphasis added). It is undisputed that Grievant did not complete the position description form until May 9, 1995. There is no evidence that she was misled by her superiors or that anyone suggested she not fill out the position description form. It was Grievant's responsibility to complete that document, and until she did so, the procedure to promote her could go no further.

Grievant requested as part of her relief an award of attorneys' fees and costs. This Grievance Board has previously determined that it does not have authority to award attorneys' fees at Level IV. Cremeans v. BOT/Marshall Univ., Docket No. 96-BOT-099 (Dec. 30, 1986); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986). See Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). Moreover, W. Va. Code § 29-6A-8 explicitly provides that, at Levels I through III of the grievance procedure for state employees, any expenses incurred shall be borne by the party incurring such expenses.

Under the grievance procedure for state employees, this Grievance Board has explicit authority to allocate costs in “extreme instances” of bad faith conduct by one of the parties. W. Va. Code § 29-6A-7. See Knight v. W. Va. Dept. of Tax & Revenue, Docket No. 91-ABCC-221 (June 16, 1992). Any determination of extreme bad faith must be made on a case-by-case basis. The Grievant has presented no evidence which would substantiate a claim that BEP acted in bad faith throughout this grievance process. Accordingly, no award of costs may be made.

Conclusions of Law

1. In a non-disciplinary grievance, the burden lies with the grievant to prove her allegations by a preponderance of the evidence.

2. Grievant has failed to prove BEP violated any rules, policy, or statute when it reallocated her to an Employment Program Specialist, Senior, with back pay to May 9,1995, the date she completed her position description form.

3. Grievant has failed to prove she was entitled to a promotion, as that term is used by the West Virginia Division of Personnel, to Employment Program Specialist, Senior.

4. This Grievance Board does not have authority to award attorneys' fees at Level IV. Cremeans v. BOT/Marshall Univ., Docket No. 96-BOT-099 (Dec. 30, 1986); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986). See Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996).

5. Any award of costs under W. Va. Code § 29-6A-7 must be made on a case- by-case determination. Grievant has failed to establish that BEP acted in extreme bad faith in this grievance process.

Accordingly, this grievance is **DENIED**.

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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MARY JO SWARTZ

Administrative Law Judge

Dated: March 11, 1997

Footnote: 1

Grievant has not challenged the dollar amount of the back pay she has been awarded, only the length of time of the award. Thus, it appears that Grievant feels that she received the correct salary adjustment for the personnel action taken.