

ROSEMARY GARRISON,

Grievant,

v.

Docket No. 99-HHR-521

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES,

and

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,

DIVISION OF PERSONNEL,

Respondents.

DECISION

On October 18, 1999, Rosemary Garrison (Grievant) initiated this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., with her employer, Respondent West Virginia Department of Health and Human Resources (DHHR), alleging that she was currently misclassified. The parties mutually agreed to waive Levels I and II of the grievance process, and proceeded to Level III. The West Virginia Division of Personnel (DOP) was joined as an indispensable party on October 26, 1999. On November 2, 1999, DOP approved Grievant's reclassification from Secretary I to Secretary II, effective December 1, 1999. A Level III evidentiary hearing was conducted on November 19, 1999. The Grievance Evaluator, Barbara Wheeler, determined that because Grievant's reclassification had been approved, the only issue remaining was whether her grievance was timely filed. On November 30, 1999, a Level III decision was issued by Lena Hill, DHHR's Commissioner for Child Support Enforcement, denying any relief because the grievance was untimely. Grievant appealed to Level IV on December 14, 1999, and a Level IV hearing was conducted in this Grievance Board's office in

Charleston, West Virginia, on February 18, 2000. [\(See footnote 1\)](#) At the conclusion of that hearing, the parties made oral closing arguments, waiving written briefs, and this matter became mature for decision at that time.

Based upon a preponderance of the credible evidence contained in the record established at Levels III and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is currently employed by Respondent West Virginia Department of Health and Human Resources (DHHR) as a Secretary II in the OSCAR (Online Support Collecting and Reporting) Unit in the Bureau for Child Support Enforcement. OSCAR is an automated computer system which provides support for the Bureau.
2. Grievant was classified as a Secretary I in 1995. Grievant's immediate supervisor at that time was James Richards, III. Mr. Richards was classified as a Program Manager I.
3. In January 1997, Mr. Richards submitted an updated job description for Grievant's position to the West Virginia Division of Personnel (DOP), requesting that Grievant's position be reclassified as a Secretary II.
4. DOP rejected Grievant's reclassification in a letter to Grievant from Director Robert L. Stephens, Jr., dated February 3, 1997, which stated the following:

This is in response to your letter of January 31, 1997, regarding the classification of your position with the Child Support Enforcement Division - OSCAR Unit.

The Secretary class series was developed based in part on the organizational structure and the reporting relationship of each position. This means that one of the criteria used in classifying the Secretary positions was the level of the supervisory position. In your case you report to a position classified as HHR Program Manager I. The secretary positions reporting to HHR Program Manager I positions were typically classified as Secretary I. We attempted to maintain this levelling concept throughout DHHR.

Therefore, based on the information submitted, I must affirm the previous decision assigning your position to Secretary I. If you disagree with this determination, then you may seek redress through the state employees grievance procedure.

5. Grievant understood the foregoing letter from DOP to state that a Secretary working under the direct supervision of a Program Manager I could not be classified as a Secretary II.

6. Grievant did not file a grievance challenging DOP's determination that she was not eligible for reclassification to Secretary II, although she did not agree that she was properly classified as a Secretary I.

7. On June 1, 1999, George P. Schrader, III, was competitively promoted to Chief Technical Officer for the OSCAR Unit, becoming Grievant's immediate supervisor.

8. The Chief Technical Officer position was posted as a Program Manager I, and reclassified as a Program Manager II by DOP after review of an updated jobdescription for the position. Thus, Mr. Schrader's classification was changed to Program Manager II, effective June 1, 1999.

9. On October 10, 1999, while preparing an updated organization chart for the OSCAR Unit, Grievant learned that Mr. Schrader was classified as a Program Manager II.

10. Grievant informed Mr. Schrader of the earlier effort in 1997 to "upgrade" her position to Secretary II.

11. Mr. Schrader prepared an updated position description for Grievant's position, and submitted it to DOP on October 18, 1999, recommending that Grievant's position be reclassified to Secretary II.

12. In response to the question in Section 29 of Grievant's updated position description, "Indicate how this position has changed since the last review," Mr. Schrader provided the following comments:

Position has changed in structure, number, and position of primary managers. The position is responsible for completing all assignments provided by the Bureau's Chief Technical Officer and Chief Compliance Officer, members of the Bureau's State Office Management Team, who report directly to the Commissioner, Bureau for Child Support Enforcement. With new supervisory positioning this has increased complexity and range of work assigned to the position in question.

R Ex 1 at L IV.

13. Mr. Schrader updated and revised several other portions of the position description. For example, in 1997 Mr. Richards indicated that Grievant spent 80% of her time typing. In 1999, Mr. Schrader stated that Grievant spent 30% of her time typing. He also listed different tasks performed by Grievant, and assigned a different priority to the tasks he listed as "most important." R Ex 1 at L IV.

14. Grievant filed this grievance challenging her classification as a Secretary I on October 18, 1999.

15. On October 20, 1999, Jeanne L. Roberts, DHHR's Director of Employee Information, forwarded Grievant's updated position description to DOP, noting that "[t]here are now additional job responsibilities in the new job description."

16. On November 2, 1999, Lowell D. Basford, DOP Assistant Director for Classification and Compensation, advised DHHR that he recommended that Grievant be reclassified as a Secretary II. Grievant's reclassification to Secretary II became effective on December 1, 1999.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

Initially, DHHR filed a Motion to Dismiss contending this grievance is untimely because the grievance was not appealed to Level IV within the five-day time limit contained in W. Va. Code § 29-6A-4(d)(1). Where the employer seeks to have a grievance dismissed on the basis that it was not timely pursued, the employer ordinarily has the burden of demonstrating such untimely appeal by a preponderance of the evidence. Should the employer demonstrate that a grievance has not been timely appealed to the next level, the employee may nonetheless demonstrate a proper basis to excuse her failure to appeal in a timely manner. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-O1 8 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C- 02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

Grievant responded to DHHR's Motion to Dismiss contending she did not receive the Level III decision until December 7, 1999. [\(See footnote 2\)](#) In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays.

Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). The day Grievant filed this Grievance by mailing her completed grievance form to this Grievance Board ([See footnote 3](#)), December 14, 1999, was the fifth working day following her receipt of the Level III decision. Accordingly, this grievance was timely appealed to Level IV. Grievant asserts she should receive back pay as a Secretary II to June 1, 1999, the date her immediate supervisor's classification was reallocated to Program Manager II. DHHR concedes Grievant is entitled to back pay from 10 days prior to October 18, 1999, when this grievance was initiated, to December 1, 1999, when Grievant was reclassified as a Secretary II. However, DHHR asserts the grievance was otherwise untimely, and the employer's liability for back pay may not be extended beyond 10 days prior to the date a grievance challenging an employee's classification is filed.

W. Va. Code § 29-6A-4(a) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant.

Misclassification is recognized as a continuing practice, because each day an employee is improperly compensated in a lower classification than she is entitled to hold is a separate violation. Thus, Grievant could have filed a grievance at any time to challenge her classification as a Secretary I. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). As noted by the Supreme Court in Syllabus Point 5 of Martin, *supra*, "any relief is limited to prospective relief and to back relief from and after fifteen ([See footnote 4](#)) days preceding the filing of the grievance." Based upon Martin, Grievant is entitled to recover back pay from 10 days prior to the date this grievance was filed until she began receiving her proper rate of pay as a Secretary II.

Grievant contends she would have filed her grievance sooner, had she been aware that her immediate supervisor held the Program Manager II classification. From her perspective, she became misclassified as of June 1, 1999, when her immediate supervisor received this higher classification. Grievant interpreted the correspondence she received from DOP in 1997, denying her reclassification to Secretary II, as a statement that she could not be classified as a Secretary II so long as her immediate supervisor was classified as a Program Manager I.

Even if Grievant was correct in asserting that her classification is directly controlled by the

classification status of her immediate supervisor, this would not entitle her to recover additional back pay. See Akers v. Dep't of Health & Human Resources, Docket No. 99-HHR-302 (Dec. 30, 1999); Craig v. Dep't of Health & Human Resources, Docket No. 98-HHR-334 (June 24, 1999); Dudding v. W. Va. Dep't of Health & Human Resources, Docket No. 91-HHR-480 (Sept. 30, 1992). If misclassification were not a continuing violation, her discovery of an essential fact necessary to support her claim that she is misclassified would allow her to file a timely grievance in accordance with the "discovery" provision in W. Va. Code § 29-6A-4(a), but she would nonetheless remain limited to recovery of back pay for 10 days prior to filing her grievance. See Mullens v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-226 (July 31, 1997). See generally, Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). Further, a preponderance of the evidence in this grievance indicates DOP did not reclassify Grievant to Secretary II solely on the basis of the updated classification of her immediate supervisor. Rather, there were a number of changes in the position description which caused DOP to conclude that the Secretary II classification was the "best fit" for the duties she was performing. Thus, Grievant's "discovery" of Mr. Schrader's elevation to Program Manager II may have provided the impetus for filing this grievance, but it was not the sole determining factor in DOP's decision to reclassify her position to Secretary II.

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

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason

County, No. 96-C-02 (June 17, 1996). 3. Respondent Department of Health and Human Resources failed to establish by a preponderance of the evidence that this grievance was not elevated to Level IV from Level III within the five-day time limit specified in W. Va. Code § 29-6A-4(d)(1).

4. A grievance must be filed within ten days of the grievable event, or ten days from the time the grievant becomes aware of the grievable event, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. W. Va. Code § 29-6A-4(a).

5. Misclassification is a continuing practice, but where a timeliness defense is raised, the right to back pay is limited to ten days preceding the filing of the grievance. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Akers v. Dep't of Health & Human Resources, Docket No. 99-HHR-302 (Dec. 30, 1999). 6. Grievant's right to recover back pay for the time period that she was misclassified as a Secretary I instead of a Secretary II is limited to ten days prior to filing her grievance. Akers, *supra*.

Accordingly, this grievance is **GRANTED** to the extent that Respondent West Virginia Department of Health and Human Resources is hereby **ORDERED** to pay Grievant back pay, with interest, for the difference between her salary as a Secretary I and a Secretary II, from ten days prior to October 18, 1999 to December 1, 1999. All other requested relief is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 29, 2000

[Footnote: 1](#)

Grievant appeared *pro se*. Respondent DHHR was represented by counsel, Assistant Attorney General Anthony D. Eates, II. Respondent DOP was represented by its Assistant Director for Classification and Compensation, Lowell D. Basford.

[Footnote: 2](#)

This issue was discussed at a pre-hearing telephone conference conducted in this matter on January 27, 2000. Respondent's Motion to Dismiss was denied on an interlocutory basis at that time. At the Level IV hearing, Respondent presented no evidence to contradict Grievant's representation that she did not receive the Level III decision on December 7, 1999. Therefore, the prior ruling is affirmed for the reasons stated in this decision.

[Footnote: 3](#)

This Grievance Board follows a "mail-box rule" that a grievance is timely filed if it is placed in the mail and postmarked on the last day in which to meet the statutory time limit. *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). See generally, *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989).

[Footnote: 4](#)

W. Va. Code § 18-29-4(a)(1) permits school employees to file a grievance within 15 days of the event giving rise to the grievance. Under *W. Va. Code* § 29-6A-4(a), state employees have a 10-day limit to file a grievance.