

CAROL DELBART,

Grievant,

v. Docket No. 99-HHR-458

**DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/BUREAU OF CHILD SUPPORT
ENFORCEMENT and DIVISION OF PERSONNEL,**

Respondents.

DECISION

This grievance was filed by Grievant Carol Delbart against her employer, Respondent, Department of Health and Human Resources/Bureau of Child Support Enforcement ("HHR"), on September 22, 1999, alleging she was misclassified as a Secretary I. As relief she sought to be classified as a Secretary II or Administrative Secretary, retroactive to the date other secretaries were reclassified "(or September 1, 1996 if the reclassification was earlier than that date," and that "the pay equity raise be recalculated and that I receive the amount that would have been awarded to me if I had been properly classified in a timely way." Grievant clarified at the Level IV hearing that she believed she should have been classified as a Secretary II from 1996 through July of 1998, because secretaries stationed at the State Capitol Complex were reclassified as Secretary II's. She stated her duties changed in August of 1998, and from that point forward she believed she should have been classified as an Administrative Secretary. As this was a misclassification grievance, the Division of Personnel ("DOP") was made an indispensable party at Level III, on October 7, 1999. [\(See footnote 1\)](#)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant is employed by HHR. She is currently classified as a Secretary I, and has been so classified since at least December 1996, when she was assigned to work for Betty Justice, Brinkley Coordinator.

2. In November of 1997, the Bureau for Child Support Enforcement's Performance Evaluation Unit was created in response to new federal requirements. Ms. Justice became the Manager of the unit, and Grievant was placed in that unit as her secretary. This unit has six employees. It is a self-contained unit. It deals with all accountability and oversight tasks in the Bureau for Child Support Enforcement, and acts as the Audit Liaison Office for all external audits. It does compliance type reviews and assembles all of the agency's statistics. Ms. Justice reports to the Commissioner of the Bureau for Child Support Enforcement.

3. In August of 1998, Ms. Justice asked Grievant to complete a new position description form, as she had taken on new duties with the creation of the new unit. Grievant signed her position description form on August 27, 1998. She was told in January of 1999 that DOP's review of her position description form had not resulted in a change in her classification.

4. Grievant described the general function and purpose of her job on the position description form as, "[u]nder the supervision of the Manager of the BCSE Performance Evaluation Unit, I provide a variety of administrative support and program services. My duties include direct responsibility for gathering and compiling information for some reports and for organization of data and analysis, from other unit staff, into a report format."

5. Grievant's supervisor described the function of the position as, "[g]ather and organize data on program performance. Design data gathering charts, questionnaires, prepare reports. Conduct reviews. Provide administrative and other support including clerical support to Unit manager." She listed the minimum experience required for the position as "[a]t least 5 years of program support activities which include use of numerous computer software programs to perform a variety of support functions."

6. Grievant's position description form lists her duties as:

Responsible for gathering and compiling information for numerous reports which will be used internally and externally. Data is compiled and presented using reports, charts, graphs, flow charts, and written text. This requires the use of various software programs and sophisticated computer skills. Requires the ability to collect and compile accurate information. 15 hours per week.

Responsible for updating reports required in the various program activities. 4 hours per week.

Responsible for assisting in reviews such as the review of the Central Financial Unit Pilot Project for Cabell County and for presentation of the results. This involves direct research and analysis. 8 hours per week.

Responsible for preparing monthly statistical reports, presenting data in a variety of formats including graphic presentation in reports to be used internally and externally by BCSE. 3 hours per week.

Assist in determining the need for changes in procedures and formats for the purpose of clarifying report data. Design forms, questionnaires, report elements, etc. to clarify new and to organize existing data. The most recent assignment was the design of the data gathering protocol for a Bench Marking project to verify performance in selected counties. 3 hours per week.

Responsible for the preparation and presentation of written text reports, manuals, training and procedural guides, desk guides, etc. 3 hours per week.

Responsible for preparing Power Point presentations to be used in presentations such as to the Legislature. 2 hours per week.

Maintain all computer, paper files and management information for the Performance Evaluation Unit. 2 hours per week.

The position description form states that the first, third, second, and fourth tasks listed above are the most important.

7. Grievant audits the case work of other HHR employees, working as a team with employees in her unit who are classified as Quality Control Reviewers, by gathering and reviewing case information entered into the computer system. The information she compiles into reports is provided to her by a programmer. She compiles the data into reports by county and region. She also enters data, types and assembles reports, and works with other employees in the unit as a team to review the need for changes in procedures and formats.

8. This grievance was filed on September 22, 1999.

9. Ms. Justice told Grievant that Commissioner Sallie Hunt was behind her in getting an upgrade, and she would be doing anything possible to help her in this regard. When Lena Hill became Commissioner, Ms. Hill likewise stated she was behind Grievant. No one at HHR told her not to file a grievance. 10. HHR did not raise a timeliness defense at Levels I, II, or III. DOP was joined as a party to the grievance at Level III, and raised a timeliness defense at Level III.

Discussion

At Level IV, HHR moved to dismiss the grievance as untimely filed. HHR did not raise a timeliness defense at Levels I, II, or III. DOP had argued at Level III that the grievance was untimely. DOP had not had the opportunity to argue the grievance was untimely earlier, as it was not a party at Levels I or II. HHR argued that while misclassification is a continuing practice which may be grieved at any time, Grievant's claims dating back to 1996 are not timely. HHR argued any misclassification proven by Grievant would be limited to 10 days preceding the filing of the grievance.

The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

Further, effective July 1, 1998, W. Va. Code § 29-6A-3 requires the "employer" to raise the issue of timeliness at or before Level II. Grievant argued that the defense was not raised at or before Level II, and could not now be raised. HHR argued that it was not clear on what time periods were involved until the Level IV hearing, and pointed out that DOP was not joined as a party until Level III, so DOP did not have the opportunity to raise this defense before Level III. HHR pointed out that the statute does not address when a party other than the "employer" can raise the timeliness defense, and DOP is not Grievant's employer.

On March 13, 1998, the West Virginia Legislature passed House Bill 4314, which, among other things, amended W. Va. Code § 29-6A-3(a), adding the following language to paragraph (2) relevant to this matter:

(2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before

the level two hearing. . . .

HHR is precluded by statute from raising the timeliness defense for the first time at Level IV. HHR's argument that it should be allowed to raise a timeliness defense at Level IV because it was not clear what the grievance was about until Level IV, is rejected. While HHR may have been a little confused about Grievant's claims, it had ample opportunity at the lower levels to straighten out its confusion. Further, the statement of grievance makes it clear that the request for reclassification went back to 1996.

Grievant did not question whether DOP could ever raise a timeliness defense, she simply argued it had to be raised at or before Level II. W. Va. Code § 29-6A-2(g) defines employer as "that state department, board, commission or agency utilizing the services of the employee covered under this article." While DOP is not utilizing Grievant's services, this Grievance Board has determined in grievances where an entity other than the employer "has exclusive control over a significant component of [the grievant's] job, specifically its classification status," which is the issue in the grievance, that entity, in this instance DOP, is not only an indispensable party to the grievance, but is also considered to be a "statutory employer" under W. Va. Code §§ 29-6A-1, et seq. Hayes v. W. Va. Dep't of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). It appears that this theory that DOP is a "statutory employer" was rejected by the Supreme Court of Appeals of West Virginia in Parsons v. West Virginia Bureau of Employment Programs, 189 W. Va. 107, 428 S.E.2d 528 (1993), when it rejected this Grievance Board's conclusions that DOP could participate in choosing the Level III grievance evaluator, or have a co-evaluator. While Hayes may need to be revisited, it is not necessary to do so here, as the result is the same regardless of the outcome of this issue, and this is a matter best left to a time when it has been more fully developed by the parties. If DOP were considered a "statutory employer," DOP was not a party to the grievance until Level III and was not given the opportunity to respond to the grievance in any way before Level III. In fact, the grievance procedure does not require that DOP be notified of the existence of a grievance until the grievant appeals to Level III. W. Va. Code § 29-6A-4. DOP could raise the timeliness defense at the first level where it had the opportunity to do so, Level III. See Barnett v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-144 (July 20, 1999).

If DOP is not a "statutory employer," while the statute does not address any party other than an

employer raising a timeliness defense, it does not specifically preclude it, and as stated before, Grievant did not argue DOP could not do so. This Grievance Board has determined that an intervenor may argue that a grievance was not timely filed, even though the statute does not address when or if they must do so, and the burden is upon the intervenor to prove this affirmative defense, as it would be upon a respondent. Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 12, 1999). See Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997). As the agency with exclusive control over Grievant's classification status, DOP was made an indispensable party to this grievance, and should likewise be allowed to raise a timeliness defense; and may do so at any time.

[\(See footnote 2\)](#)

As to when a grievance must be filed, W. Va. Code § 29-6A-3(a) provides, in pertinent part:

A grievance must be filed within the times specified in section four of this article . . .
Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

W. Va. Code § 29-6A-4(a) provides, in pertinent part:

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. . . .

Only working days are counted in determining when the 10 day time period runs for filing a grievance. Holidays are not counted. W. Va. Code § 29-6A-2(c).

Grievant argued the grievance was timely filed because she filed when she learned that the secretary positions in the Capitol Complex were Secretary II's. She further argued with regard to the change in her duties in August of 1998, that she did not have a grievable matter at that time because she was directed by her supervisor to have her job classification reviewed, and it made no sense to file a grievance while HHR was working with her to get her classification changed. Grievant stated she did not file a grievance in 1998 when her duties changed because her supervisor, under the direction of the Commissioner, asked her to fill out a position description form, which she did, and she expected she would be upgraded; and she stated she was told by her supervisor that the Commissioner was behind her in getting an upgrade, and she would be doing anything possible to help her in this regard. When the Commissioner changed from Sallie Hunt to Lena Hill, Ms. Hill

likewise stated she was behind Grievant. Grievant stated she assumed that since she was working within the agency and getting this help, she did not need to file a grievance. No one at HHR told her not to file a grievance.

HHR responded that an employee has an affirmative obligation to file a grievance if she believes she is being worked out of classification, and just because the employer is working with the employee, this does not excuse the employee from filing a grievance in order to preserve the claim to back pay. Grievant's claim that she should have been classified as a Secretary II from 1996 to August 1998 is not timely, and Grievant has not demonstrated a valid excuse for her failure to timely file the grievance. Grievant's argument that she only just discovered the facts giving rise to the grievance, in that she just discovered other secretaries were classified as Secretary II's, is rejected. Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29- 4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." The same discovery rule found in the education grievance procedure is also found in the grievance procedure for state employees at Code § 29-6A-4, quoted above. It is the duties assigned to the grievant which give rise to a misclassification grievance, not the classification assigned to other employees. In fact, if another employee is assigned to a different classification from the grievant, but performing the same duties as the grievant, this does not mean the grievant should be in the same classification as this other employee, as that employee may be misclassified.

the Grievance Board has held that such a mistake does not constitute discrimination. Ritchie v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). The Grievance Board has consistently refused to grant the type of relief Grievant seeks because of a mistake or a violation of a policy, because such actions constitute ultra vires acts, and because two wrongs do not make a right. See Guthrie v. W.Va. Dept. of Health and Human Resources, Docket No. 95-HHR-277 (Jan. 31, 1996); Earnest and Hatfield v. Southern W.Va. Community College, Docket Nos. 91-BOD-352/290 (Sept. 30, 1992), rev'd, Circuit Court of Kanawha County, Civil Action No. 92-AA-296 (Apr. 23, 1993); Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec 18, 1989). See also 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 (May 25, 1997); Gilliam v. W.Va. Dept. of Transp., Docket No. 96-DOH-511 (Apr. 24, 1997).

The remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that he performs, is not to similarly misclassify the grievant. Akers v. W. Va. Dept. of Tax and Revenue, 194 W. Va. 956,

460 S.E.2d 702 (1995).

Ritchie v. Div. of Corrections, Docket No. 98-CORR-105 (Nov. 30, 1998). Grievant knew what her duties were all along. She did not discover anything new about her duties when she learned that some secretaries held a different classification. See Garrison v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-521 (Feb. 29, 2000).

Even if this portion of the grievance were timely, Grievant did not offer a comparison of her duties to those of secretaries at the Capitol Complex. She did not even indicate she had any knowledge, personal or otherwise, of the duties performed by these other employees. She merely asserted that because all the secretaries at that location had been reclassified as Secretary I's (when in fact they were not reclassified), and were now Secretary II's, she should also have been classified as a Secretary II; and she pointed to where her supervisor was on the organizational chart in comparison to the supervisors of these Secretary II's. [\(See footnote 3\)](#) While DOP admitted that where a supervisor was on the organizational chart was one factor to be considered, the duties of the position remain the important consideration.

Although Grievant's reasoning for not filing a grievance at the time she submitted her position description form in August 1998 cannot be faulted, such a submission does not by statute toll the time period for filing a grievance. "[A] state employee who suspects she is misclassified has two choices: she may apply to Personnel for reclassification, and thereby waive any back pay claim; or she may grieve and possibly recover back pay limited to the ten day period preceding the filing of the grievance, should her employer raise a timeliness defense. See Mullens v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 96-HHR-226 (July 31, 1997). In other words, an employee harboring any doubts regarding her classification should file a grievance at once, and certainly no later than her request for reclassification, or risk waiving any claim for back pay." Akers v. Dep't of Health and Human Resources, Docket No. 99-HHR-092 (Dec. 30, 1999).

Although W. Va. Code § 29-6A-3(a) specifically lists the excuses to timely filing, this Grievance Board has nonetheless determined that "[e]quitable theories, including estoppel may be applied to toll the time for filing a grievance." Rose, et al., v. Raleigh County Bd. of Educ., Docket Nos. 94-41-296/314 (Nov. 29, 1994), aff'd per curiam, 199 W. Va. 220, 483 S.E.2d 566 (1997). The application of the doctrine of equitable estoppel to untimely filed grievances was discussed in Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994), aff'd No. 95-AA-7 (Kanawha County

Cir. Ct. May 1, 1996); appeal refused (W. Va. April 1997):

The West Virginia Supreme Court of Appeals, in Naylor v. W.Va. Human Rights Commission and Bird Machine Company, Inc., 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge."

Grievant's supervisors' support of her reclassification and their statements of support to her were not a "deliberate design by the employer" to cause her to delay filing, nor do they amount to "actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." Lilly, supra.

Misclassification is a continuing practice, and as such, a grievance may be initiated at any time during the time the misclassification continues. However,

[a]s with a salary dispute, any relief is limited to prospective relief and to back relief from and after [ten] days preceding the filing of the grievance. ([See footnote 4](#)) Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). W. Va. Code § 29-6A-2. Stollings v. Div. of Env'tl. Protection, Docket No. 97-DEP- 411 (June 8, 1998). The grievance was timely as to the claim of working out of classification, as it was a continuing violation; however, back pay is limited to ten days preceding the filing of the grievance.

Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant argued her duties from August of 1998 were drastically different from her previous duties, and were those of an Administrative Secretary. She pointed to the fact that she must exercise independent judgment, and her duties are non-routine. She also argued that DOP's determination that she was properly classified as a Secretary I was arbitrary and capricious, and based upon extraneous factors. Grievant pointed to a statement by Lowell D. Basford, DOP's Assistant Director, that if she were classified as an Administrative Secretary it would "open up a can of worms." She also pointed to the fact that she did not personally receive a letter from DOP advising her that she was properly classified as a Secretary I, and what further action she could take. She asserted it was arbitrary and contrary to law to base an employee's classification upon his or her supervisor's title, and argued DOP should have performed a desk audit.

HHR deferred to DOP's determination of Grievant's proper classification. DOP argued Grievant

was properly classified based upon the position description form describing her duties.

In order for a grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, DocketNo. NR-88-038 (Mar. 28, 1989). DOP's classification specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of the Work" section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989).

The key to the analysis is to ascertain whether the grievant's current classification constitutes the "best fit" for his required duties. Simmons v. W. Va. Dep't of Health and Human Resources, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broadus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Importantly, DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. See, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

The holding of the Supreme Court of Appeals of West Virginia in Blankenship presents a state employee contesting his classification with a substantial obstacle to overcome in attempting to establish that he is misclassified.

The relevant portions of the classification specifications for Secretary I and Administrative Secretary are provided below.

SECRETARY I

Nature of Work

Under general supervision, at the full-performance level, relieves supervisor of clerical and minor

administrative duties, exercising discretion and independent judgment. Necessity for dictation, familiarity with word processors, and other special requirements vary depending upon supervisor's preference. Performs related work as required.

Distinguishing Characteristics

This class is distinguished from the Office Assistant series by the assignment of support duties to a specific individual overseeing a section, or a division. The incumbent composes routine correspondence for the supervisor, screens calls and visitors and responds to inquiries requesting knowledge regarding office procedure, policy and guidelines, and program information. The position has limited authority to speak for the supervisor.

At this level, the work requires the knowledge necessary to complete complex procedural assignments. Incumbent determines appropriate procedures from among a variety of resources, methods, and processes. Incumbent is responsible for his/her own work, and may assign and direct the work of others. Although some tasks are defined and self-explanatory, the objectives, priorities, and deadlines are made by the supervisor. Work is reviewed, usually upon completion, for conformance to guidelines. Contacts at this level are frequent and often non routine and/or of a confidential or sensitive nature, requiring tact and the ability to judge which inquiries can be answered or must be referred.

Examples of Work

Responds to inquiries where knowledge of unit policy, procedure, and guidelines is required.

Answers telephone, screens calls, and places outgoing calls.

Screens mail and responds to routine correspondence.

Signs, as directed, supervisor's name to routine correspondence, requisitions, and other documents.

Schedules appointments and makes travel arrangements and reservations for supervisor.

Takes and transcribes dictation, or transcribes from dictation equipment.

Composes form letters, routine correspondence, and factual reports.

Types reports, manuscripts, and correspondence using standard typewriter or word processing equipment; proofreads and corrects to finished form.

Gathers, requests, and/or provides factual information, requiring reference to variety of sources.

May delegate routine typing, filing, and posting duties to subordinate clerical personnel.

May maintain basic bookkeeping records for grants, contract or state appropriated funds.

May prepare payrolls, keep sick and annual leave records, act as receptionist and perform other clerical duties as needed.

May attend meetings take notes and relay information; typically would not interpret information or speak on behalf of supervisor.

Knowledge, Skills and Abilities

Knowledge of general office procedures including typing, filing, and the use of variety of office equipment.

Knowledge of the correct use of English grammar.

Knowledge of the basic bookkeeping.

Ability to arrange efficient work schedules.

Ability to learn the policies and procedures of the unit and the organization.

Ability to type accurately, using a typewriter and/or word processor.

Ability to communicate well, both orally and in writing.

Ability to assign and check the work of others.

Ability to take and transcribe dictation where required.

Ability to greet the public and work well with others.

ADMINISTRATIVE SECRETARY

Nature of Work

Under general direction, performs advanced level work by assuming responsibility for adjunctive administrative duties under the guidance of an administrator. Applies in-depth knowledge of program areas, the mission of the division, and the administrator's jurisdiction, policies and views. Provides support services to administrator by supplying specific information, composing reports and correspondence, and taking initiative to recommend actions, or by taking action in modifying and/or improving unit procedures, policies, rules and regulations. Depending on size of organizational unit, may offer some clerical support to administrative superior, often in matters which must remain confidential. Typically performs

administrative support for an agency/division administrator. Performs related work as required.

Distinguishing Characteristics

The paraprofessional work at this level is generally confidential and requires a working knowledge of program areas within the division or organizational unit to which assigned. Administrative support duties are predominant; clerical/ secretarial duties typically comprise less than 20% of work time.

Examples of Work

Attends meetings for supervisor to take notes and offer input vis-a-vis supervisor's views, or is briefed on meetings after the fact in order to assist the implementation of new procedures. Studies and analyzes operational procedures; prepares reports of findings and recommendations for implementation of new procedures or the modification of existing procedures.

Collects and prepares operating reports such as time and attendance records, terminations, new hires, transfers, budget expenditures, and statistical inquiries.

Receives telephone calls, personal callers and incoming mail.

Makes arrangements for conferences, including date, time, location and space.

Plans, schedules, assigns, and reviews the work of other employees.

Oversees office services such as the completion of maintenance reports, ordering of supplies, filing.

Supplies administrator with specific detailed information for completion of reports, speeches, etc.

Types a variety of documents, often confidential in nature.

May conduct initial job interviews and recommend candidates for employment.

May monitor particular programs, draft reports on programs status, assist in applications for grants or outside monies, and draft correspondence for division heads concerning the programs areas.

May delegate work to other sections.

May write news releases and otherwise interact with the public on behalf of or in lieu of the

administrator.

Knowledge, Skills and Abilities

Knowledge of division rules, regulations and procedures.

Knowledge of modern office practices.

Ability to write and maintain detailed records.

Ability to retrieve and compile information from multiple sources to complete assignments.

Ability to draft correspondence dealing with routine inquiries or specific inquiries regarding the status of program areas. Ability to communicate effectively with superiors, subordinates, other division personnel and the general public.

Ability to analyze operational procedures and prepare reports of findings and recommendations for modifications.

Ability to perform basic mathematical operations.

Ability to type and operate a variety of office machines.

Mr. Basford explained that the scope of Grievant's work is very narrow, as compared to the variety of work performed by other secretaries classified as Secretary I's, because the role of her unit is limited. He stated that in the context of the classification process, Grievant's duties are considered to be less difficult than those of others classified as Secretary I's, because of the narrow focus of her duties and responsibilities. Her work is not as varied as that of the typical Secretary I. He pointed out that Grievant relies heavily on software to produce the reports for which she is responsible, and she must be proficient in the use of this software. He also noted that the focus of the unit itself must be considered in evaluating the positions in the unit, and that the focus of Grievant's unit is internal to the agency, with the agency itself being the unit's clientele. All Grievant's contacts are within the agency, and she has a much narrower personal contact role than the average Secretary I.

Mr. Basford compared Grievant's data compilation and report preparation duties to the duties performed by a Office Assistant III. He stated that the presentation of reports is considered to be advanced level clerical work, not secretarial work. He believed, nonetheless, that Grievant was properly classified as a Secretary I.

While Grievant spends some time performing the same type of work as Quality Control

Reviewers, the vast majority of her time is spent taking data provided to her and putting it into a report format. This is the purpose of her job. There is no indication that she analyzes this data and draws conclusions from it, or that she must take raw numbers and decide which category they best fit into. She is provided information, and she tallies the numbers and organizes the information into charts, graphs, etc., using computer programs. It is important that she be accurate and that she be proficient in the use of the computer software; and she obviously is very good at this. None of this, however, makes her an Administrative Secretary.

Grievant apparently is an employee who is willing to do whatever she is asked to do, is quite capable of taking on additional, more complex duties, and at times, determining the best way to carry out those duties, and she is a team player. Grievant may perform some duties outside of her job description; however, employees can perform duties outside their job description and still be properly classified. Dooley v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-498 (Mar. 19, 1991). Class specifications are to characterize the type of work to be performed, not to identify every task of the position. Class specifications are descriptive, not exhaustive, and are to give a "flavor" of the difficulties, complexities, and duties of the position. Hager v. Health and Human Resources, Docket No. 95-HHR-241 (Sept. 29, 1995). Grievant has not demonstrated that DOP's determination that she is a Secretary I is clearly wrong, and that the Administrative Secretary classification specification is the best fit for her duties.

Finally, Grievant was upset about a number of statements made by witnesses during the grievance process, and the procedure followed by HHR and DOP in reviewing her classification. None of these areas of concern directly impact the issue to be decided by the undersigned. First, Mr. Basford's statement that to classify Grievant as an Administrative Secretary would open up a can of worms is not indicative of a failure to properly review her classification or arbitrary and capricious action. He stated he viewed Grievant's suggestion that Administrative Secretary is the best fit for her as being preposterous, and believed that if Grievant were classified as an Administrative Secretary it would wreck havoc with the entire classification system for secretaries. He stated that employees classified as Administrative Secretaries at HHR have much more complex responsibilities than Grievant, and are at a higher level in the organizational structure. Mr. Basford's statement was perhaps a poor

choice of words in a grievance hearing, but merely reflected his view that Grievant's position was not close to being an Administrative Secretary, and if she were placed in this classification, every secretary in the state would need to be reclassified.

As to Grievant's assertion that a desk audit was required, Mr. Basford explained that DOP does not routinely perform desk audits, and had done only 100 to 150 in the last year. Grievant did not demonstrate a desk audit of her job was required or needed.

Grievant's complaint that she should have received written notification of Personnel's decision on her classification, and notification that she could ask for reconsideration, is certainly valid. It would only be fair to provide this information to Grievant as soon as possible, in a clear manner, with her rights identified. However, the fact that this was not done in this case is not evidence of a conspiracy.

Grievant was upset by HHR Director of Personnel Mike McCabe's statements that a memorandum from Commissioner Hunt to Virginia Tucker, HHR's Assistant Secretary, was an improper politicalization of the process. The memorandum stated at the end, "I would greatly appreciate your intervention with the Division of Personnel in obtaining a reconsideration of the classification of Ms. Delbart." Certainly Grievant, and probably others, would disagree with Mr. McCabe's opinion; and it is just that - his opinion. However, there is no evidence that any of this affected Grievant's duties and responsibilities, or DOP's determination that Grievant was properly classified; and whether Mr. McCabe's opinion is correct or not is of no importance to the analysis of the undersigned in reviewing Grievant's duties and responsibilities and Mr. Basford's explanation of the classification specifications at issue.

Grievant felt Mr. Basford's cross-examination of her at Level III was punitive. She believed he was retaliating against her for filing a previous grievance in which she apparently prevailed. The undersigned saw no evidence of this. Further, if Grievant believed this to be the case, she or her representative should have said so at the Level III hearing so that Mr. Basford could have presented his side of the story, and the Level III grievance evaluator could have taken care of the matter at that time.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).
2. A state employer must raise a timeliness defense at or before Level II in order to preserve the right to assert this defense. W. Va. Code § 29-6A-3(a)(2).
3. As DOP was not a party to the grievance until Level III and was not given the opportunity to respond to the grievance in any way before Level III, DOP could raise the timeliness defense at the first level where it had the opportunity to do so, Level III. See Barnett v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-144 (July 20, 1999).
3. Grievant's claim that she was misclassified from 1996 until September 21, 1999, is not timely.
4. The grievant may attempt to demonstrate that she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96- DOH-445 (July 29, 1997). Grievant did not demonstrate any reason to excuse her failure to timely file a grievance from 1996 though September 21, 1999.
5. Misclassification is a continuing practice, and as such, a grievance may be initiated at any time during the time the misclassification continues. However, “[a]s with a salary dispute, any relief is limited to prospective relief and to back relief from and after [ten] days preceding the filing of the grievance.” Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). W. Va. Code § 29-6A-2. Stollings v. Div. of Env'tl. Protection, Docket No. 97-DEP-411 (June 8, 1998).
6. Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).
7. In order for a grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).
8. Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. See, W. Va. Dep't of Health v. Blankenship,

189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

9. Grievant did not demonstrate that the Administrative Secretary classification specification was a better fit for her duties than Secretary I.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Date: April 21, 2000

Footnote: 1

Grievant's supervisor responded to the grievance at Level I on September 24, 1999, stating she was without authority to grant the relief requested. Grievant appealed to Level II on September 27, 1999. The same response was given at Level II on October 1, 1999. Grievant appealed to Level III on October 6, 1999. A Level III hearing was held on October 19, 1999. The grievance was denied at Level III on October 22, 1999, by Lena Hill, Commissioner. Grievant appealed to Level IV on October 28, 1999. On December 15, 1999, Commissioner Hill issued an "Amended Level III Grievance Decision," granting the grievance and ordering that Grievant be reclassified as a Secretary II, and be paid back pay from 10 days preceding the filing of the grievance. On January 28, 2000, Commissioner Hill, in a letter addressed to Allen Campbell, Attorney, stated she was unaware she could not issue an amended decision, and that "I hereby rescind the amended Level III grievance decision dated December 15, 1999." Grievant did not question the propriety of any of this, and did not withdraw her grievance as a result of the "Amended" decision. A Level IV hearing was held on February 1, 2000. Grievant was represented by a co-worker, Connie Dunlap, HHR was represented by B. Allen Campbell, Esquire, and DOP was represented by Stephanie C. Schulz, Esq. By agreement of the parties, Ms. Schulz submitted the classification specifications for

Secretary I, Secretary II, and Administrative Secretary, as Joint Exhibits A, B, and C, respectively, after the Level IV hearing. Those three Joint Exhibits are Ordered admitted into evidence. This grievance became mature for decision on March 20, 2000, upon receipt of Grievant's rebuttal argument.

Footnote: 2

W. Va. Code § 29-6A-4(c) states in part that "[t]he personnel director of the state civil service commission [now DOP] or his designee may appear at such [Level III] hearing and submit oral or written evidence upon the matters in the hearing," and § 29-6A-4(d)(1) contains a nearly identical provision on participation at Level IV. An argument could be made that these Code provisions limit DOP's participation to the presentation of evidence. However, this argument was not made in this case, and the undersigned believes the better reading is that these statutory provisions should not be read as limiting DOP's role. The undersigned is not aware of any instance when this Grievance Board has limited DOP to submitting evidence. DOP has been allowed to participate fully at hearings, with all the rights of any other party.

Footnote: 3

At the same time Grievant also argued DOP was precluded by law from basing an employee's classification upon anything other than the employee's duties and responsibilities. In particular, she argued the employee's classification could not be based upon her supervisor's position.

Footnote: 4

The education employees' grievance procedure provides that a grievance must be initiated within 15 working days of the date the event becomes known to the grievant, whereas the state employees' grievance procedure provides a ten working day filing deadline.