TARA DAVIS,

Grievant,

v v.

Docket No. 01-DPS-609

DEPARTMENT OF PUBLIC SAFETY/

WEST VIRGINIA STATE POLICE and

DIVISION of PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Tara Davis, is employed by the Department of Public Safety/ West Virginia State Police, ("DPS"). She filed this grievance on July 17, 2001. In her lengthy Statement of Grievance, Grievant asserted she had been misclassified since 1993, and other employees had been treated more favorably. (See footnote 1) The Relief Sought was "reclassification, salary adjustment, and restitution." Although unclear from the Statement of Grievance and Statement of Relief Sought, Grievant apparently sought back pay from 1993/1994.

This grievance was filed directly to Level III. No Level III hearing was held and no testimony was taken. (See footnote 2) The Level III Grievance Evaluator, Colonel Howard Hill, decided thecase on the documents submitted by Grievant, and a written response by the Division of Personnel ("DOP"). The Grievance Evaluator granted the grievance and stated, "Grievant's position must be reclassified as a Secretary II, effective the date of this Decision." Although not included in the Decision, Grievant was granted a 5 percent salary increase from the date of the Level III Decision.

Grievant appealed to Level IV seeking back pay. (See footnote 3) A Level IV hearing was held on May 31, 2002, on the issue of back pay, and this case became mature for decision on July 18, 2002, after receipt of the parties' proposed findings of fact and conclusions of law.

(See footnote 4)

Issues and Arguments

The issue in this grievance is back pay. Grievant has changed her relief sought and now asserts she should receive back pay from 1988 not 1993. Grievant maintains she has performed the same duties since she assumed her position with the Professional Standards Unit in 1988.

Respondent objected to the change in relief. Respondent notes the position of Secretary II was not in existence in 1988, and since Grievant's pay has always been within the Secretary II pay grade, she is not entitled to additional compensation upon reclassification. Respondent also notes Grievant filed and abandoned a prior grievance on this issue; thus, the issue should be res judicata. Further, if any back pay is warranted,it should be limited either to ten days prior to the filing of the grievance, or in the alternative, to the date of the prior grievance.

Grievant also now maintains she was threatened by her immediate supervisor, as he told her not to appeal her first grievance, and that is why she did not pursue her grievance in 1997. Accordingly, she asserts she should not now be prevented from receiving all the back pay requested - from 1988. It is noted that Grievant did not raise this issue in her Statement of Grievance, and stated on her grievance form the reason she did not pursue her grievance in 1997 was because she was told the issue was not her work, but whom she worked for, and Grievant must work for a Captain to be a Secretary II.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by DPS since 1980. She is a classified-exempt employee.
2. In 1988, Grievant transferred to the Inspector's Office, which later became the Professional Standards Unit. Her duties were clerical.
3. Over time, Grievant's duties increased, and at the time of the statewide reclassification, during 1994, Grievant's position was classified as a Secretary I. Grievant is viewed as an efficient and competent employee by DPS.

4. Grievant disagreed with this classification and appealed this decision to DOP. A job audit was performed, and her appeal was denied. 5. Grievant was informed of her right to file a grievance at this time, but she did not pursue the issue any further. (See footnote 5)

6. In 1997, Grievant again completed a Position Description Form and again asked to be reclassified as a Secretary II. Another job audit was performed, and DOP again found Grievant to be properly classified as a Secretary I.

7. Grievant filed a grievance asking to be reclassified in 1997. Grievant's supervisor at the time of this grievance was Sgt. Carl Blankenship. He fully supported Grievant's grievance, and he testified extensively at the Level III hearing in that grievance about the many duties Grievant performed, and how important Grievant was to the effective functioning of the unit.

8. This grievance was denied at Level III in November 1997. At the time this grievance was denied DPS did not want Secretary II's working for anyone below the rank of Captain, and Grievant was aware of this fact.

9. Grievant was aware of her right to appeal this grievance.

10. Grievant did not appeal this denial to Level IV.

11. Grievant has performed the same duties for many years, and there has been no substantial change in the duties of her position since at least 1994. (Grievant's testimony.)

12. There was no Secretary II classification in 1988. 13. Since their inception, Grievant has always been paid within the pay grade of both the Secretary I and the Secretary II classifications.

14. DOP does not believe Grievant should be reclassified to a Secretary II, and stated this and the reasons why in the document it submitted to Colonel Hill. There was no discussion in the Level III Decision explaining why the opinion from DOP, which is entitled to great weight, was not followed. (See footnote 6)

15. Captain Barrington Gore, now Major, was assigned as Grievant's supervisor in March 2001.

16. Grievant filed this grievance July 17, 2001, directly to Level III. She did not specify a date certain from which she was seeking reclassification in either her Statement of Grievance or Relief Sought.

17. This grievance was granted at Level III on December 13, 2001, and subsequently a 5

percent increase, retroactive to that date was received by Grievant.

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 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). To resolve the issue of back pay, it is necessary to decide many other issues, most of which were generated by the Level III ruling in this case. This ruling conflicts with DOP's Rules and definitions. However, before that issue is resolved it is necessary to examine the effect of Grievant's failure to pursue her prior grievance on this exact same issue.

I. Res judicata

As indicated by Respondent, typically, the relitigation of an issue is barred by the doctrine of res judicata. "The doctrine of res judicata may be applied by an administrative law judge to prevent the 'relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated.'" Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, 376 S.E.2d 639, 646 (1988). See Ellis v. Mingo County Bd. of Educ., Docket No. 96-29-366 (Apr. 16, 2000). The doctrine of res judicata requires the following four conditions to be the same:

(1) identity in the thing sued for;

(2) identity of the cause of action;

(3) identity of persons, and of parties to the action;

(4) identity of the quality in the persons for or against whom the claim is made.

Syl. Pt. 2, Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). Further, "[t]he indenticality of issues litigated is the key component to application of administrative res judicata. . . . " Liller at 646. The 1997 grievance hearing and decision met the above- stated conditions. The grievance, relief sought, parties, and setting are the same as in this grievance. Thus, this issue should not have been relitigated under the maxim of res judicata, a well-established legal doctrine stating that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes "an absolute bar to a subsequent action involving the same claim, demand or cause of action." Black's Law Dictionary 678 (Abridged 5th Ed. 1983). See Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20- 095, (Feb. 28, 1997); Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994); Ramsey v. W. Va. Dep't of Health & Human Serv., Docket No. 90-H-478 (July 31, 1991). However, this issue was not addressed until the Level IV hearing, and by that time Grievant had been reclassified. The undersigned Administrative Law Judge finds the prior 1997 Decision at least limits Grievant's back pay to after November 1997, as at that time Grievant was deemed to be correctly classified as a Secretary I. **(See footnote 7)**

II. Threat

Grievant now asserts, for the first time at Level IV, that Sgt. Blankenship told her he did not think it would be a good idea for her to pursue her grievance to Level IV, as the Colonel had already ruled. She maintains this statement prevented her from appealing her grievance. Grievant must establish this equitable estoppel argument, that she was threatened into not pursuing her grievance, by a preponderance of the evidence. Grievant is required to show her failure to file was "either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause theemployee to delay filing his charge." Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843 (W. Va. 1989)(citing Price v. Litton Business Systems, Inc., 694 F.2d 963 (4th Cir. 1982)). Grievant would need to show her reasonable reliance on Respondent's "conduct or representations" and an "evidence of improper purpose on the part of [Respondent] or actual or constructive knowledge of the deceptive nature of its conduct." Naylor, supra (citing Naton v. Bank of California, 649 F.2d

691 (8th Cir. 1981)). See Gaskins v. W. Va. Dep't of Health and Div. of Personnel, Docket No. 90-8-032 (Apr. 12, 1990).

The only proof of Grievant's assertion is her testimony at Level IV, after Grievant found out this prior grievance could limit her back pay. Grievant offered no witnesses to substantiate this contention. Additionally, Grievant's current assertion is contradicted by her Statement of Grievance which clearly indicates she did not pursue the 1997 grievance because she was correctly informed that the rank of the supervisor was a key to a Secretary's classification. Additionally, Grievant noted that although Sgt. Blankenship had left some time ago, she waited to file when she did because she now had a supervisor who was a Captain. Given this conflicting information, including Grievant's subsequent behavior, there is insufficient evidence of improper purpose or conduct. Grievant's later unsupported assertion will not be credited.

III. Type of personnel action

The next issue is how to define the action taken by Col. Hill in his Level III Decision. The Decision states Grievant was reclassified. However, DOP Rule 3.79. defines "Reclassification" as "[t]he revision by the State Personnel Board of the specifications of a class or class series which results in a redefinition of the nature of the work performedand a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved."

The State Personnel Board was not involved in this decision, so Grievant could not have been reclassified. If Grievant were reclassified, she could not receive a pay increase, as DOP Rule 5.4 (f) 2.a.2. states "[w]here the salary of the incumbent coincides with a pay rate in the new range, the salary shall remain unchanged." Accordingly, Grievant was not entitled to any pay increase if her position was reclassified, much less additional back pay.

Perhaps, what happened here could be seen as a promotion, except DOP Rule 3.76. defines "Promotion" as "[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." There was no vacant position into which Grievant was placed; she remained in the same position she had for many years. A person cannot be promoted into her own position. Miller v. Dep't of Transp./Div. of Highways, Docket No. 99-

DOH-324 (Apr. 7, 2000). Promotion would have entitled Grievant to a pay increase at the time she began her new duties, but she was not promoted.

Frequently, positions are reallocated. DOP Rule 3.78. defines "Reallocation" as "[r]eassignment 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 level of duties and responsibilities assigned to the position." Grievant's testimony was clear her duties have not changed in many years. This argument is her basis for requesting back pay to 1988. Clearly, Grievant's position could not have been reallocated because her position has beenassessed frequently over the years with new Position Description Forms, several job audits, and a grievance decision all agreeing that her duties had remained the same.

If Grievant's position had been reallocated she would have been entitled to a pay increase, as Rule 4.7. states that "[w]henever substantial changes occur in the duties and responsibilities permanently assigned to a position, the Director shall reallocate the position to its proper class. The incumbent or the appointing authority may seek a reconsideration of the allocation action by submitting a written request to the Director within ten (10) calendar days of the effective date of the action. The Director shall not reallocate a position based on temporary changes in the duties and responsibilities assigned to the position." Secretary II is one pay grade above Secretary I.

DOP Rule 5.4 (f) 3 states the pay on a position reallocation "shall be adjusted in accordance with salary regulations for promotion, demotion and lateral class change." DOP Rule 5.5 states when an employee is promoted, the employee's pay shall be adjusted as follows:

> **(a) Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current classification shall receive an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current classification shall receive an increase of one increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted, whichever is greater. In no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.**

. . .

> **(c) Additional Increase - The appointing authority may grant additional incremental increases, as established by the State Personnel Board, to an employee being promoted if the employee has sufficient qualifications in excess of the minimum required for the new class. The employee must possess at least six months of pertinent experience or an equivalent amountof pertinent training for each additional incremental increase granted. In no case shall the additional incremental increase cause the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.**

Accordingly, reallocation would result in an increase of at least 5 percent.

IV. Resolution/back pay

Given this set of factors and conflicting Rules and information, it would seem the best idea is to fashion a remedy that would be equitable. W. Va. Code § 29-6A-5(b) states:

> **Hearing examiners may . . . provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.**

The Grievance Board has repeatedly ruled misclassification is an ongoing practice and as such may be alleged at any time. Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052, 169 (Sept. 27, 1991). Depending on the circumstances, W. Va. Code §29-6A-4 may limit the amount of back pay. "As a general rule, where a state employee is aware of the facts constituting a grievable matter and delays filing[,] relief is limited to the ten-day period preceding the filing of the grievance." Hatfield at 5.

Here, Grievant could have filed a grievance much earlier or could have pursued her original grievance in 1997, but did not do so. It is obvious Grievant thought she was misclassified, but DOP repeatedly ruled Grievant was properly classified, and DOP's assessment is entitled to great weight. Additionally, there was no Secretary II classification in 1988, so she could not have received this classification then. Even if Grievant had beenreclassified in either 1994 or 1997, she would not have been entitled to any increase in salary because her pay fell within the pay grade.

Grievant was not reclassified until the 2001 Level III Decision was issued, and pursuant to

this Decision, Grievant was not entitled to any increase. The most equitable action here would be to try and apply prior precedent to this set of facts, and grant Grievant back pay to ten-days period prior to the filing of this 2001 grievance. See Martin, supra. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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).

2. Grievant did not demonstrate that a statement by her supervisor prevented her from pursuing her grievance in 1997.

3. W. Va. Code §29-6A-4 may limit the amount of back pay. "As a general rule, where a state employee is aware of the facts constituting a grievable matter and delays filing[,] relief is limited to the ten-day period preceding the filing of the grievance." Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052, 169 (Sept. 27, 1991). 4. W. Va. Code § 29-6A-5(b) states "hearing examiners may . . . provide relief as is determined fair and equitable," "take any other action to provide for the effective resolution of grievances," and "has the authority to provide appropriate remedies including, but not limited to, making the employee whole."

5. The fair and equitable relief in this set of circumstances is for Grievant to receive the 5 percent increase from ten days prior to the filing of her grievance on July 17, 2001.

Accordingly, this grievance is GRANTED.

Respondent is ordered to pay Grievant a 5 percent increase from ten days prior to filing her grievance, until the date of her 5 percent increase as the result of the Level III Decision.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 13, 2002

Footnote: 1

The evidence presented on the issue of favoritism was very limited, hearsay, and disputed by DOP in the prior Level III hearing. Accordingly, this issue will not be addressed further.

Footnote: 2

W. Va. Code § 29-6A-4 (c) states:

> ***[t]he chief administrator or his or her designee shall hold a hearing in accordance with section six [§ 29-6A-6] of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.***

(Emphasis Added.)

Accordingly, it is recommended that hearings be held in all Level III grievances in the future.

Footnote: 3

The parties engaged in mediation without results.

Footnote: 4

Grievant was represented by Attorney Brad Deel, and Respondent was represented by its Attorney John Hoyer. Respondent DOP had been joined and Assistant Director Lowell Basford attended the hearing briefly, but as the issue was back pay, his testimony was not needed.

Footnote: 5

Initially, Grievant testified she did not file a grievance at this time because she had had problems with DPS's then Director of Personnel. This statement was incorrect. At the time Grievant's appeal to DOP was denied, another Director of Personnel was in place, and Grievant voiced no complaints about this individual.

Footnote: 6

Col. Hill did review Grievant's Position Description Form and stated why he thought the position should be reclassified.

Footnote: 7

Additionally, in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 297(1995), the West Virginia Supreme Court of Appeals stated an employee may contest a misclassification at any time, but only once.