EDWINA FLARE,

Grievant,

v. **Docket No. 04-CORR-359**

WEST VIRGINIA DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX and DIVISION OF PERSONNEL,

Respondents.

DECISION

The grievant, Edwina Flare ("Flare"), seeks to be reallocated from her current position as an Office Assistant 2 to the upgraded position of Office Assistant 3. Flare is employed by the respondent, Division of Corrections ("Corrections"), and assigned to the maintenance department at the Mount Olive Correctional Complex. In addition to her normal duties, Flare was given responsibility for signing out tools after Paul Coleman retired. Mr. Coleman had been classified as a Maintenance Supervisor 2. Initially, Flare was led to believe that this was a temporary change. When she realized the change was not temporary, Flare filed a grievance.

The upshot of her lengthy statement of grievance was that it was prompted by the additional duties she assumed when Mr. Coleman retired. In her request for relief, Flare stated that she sought "[r]eallocation and [r]eclassification of [p]osition to at least an Office Assistant III with a 25% pay increase, to include a lump payment to cover the difference in pay for the 11 months I have been performing these duties and continuing thereafter."Flare has not asked to be relieved of the additional, tool-related duties.

The grievance evaluator at Level I lacked the authority to grant the relief requested. At Level II the grievance was denied as untimely. The Level II evaluator asked Flare why she "waited 11 months to file a formal complaint." She said it was because she was advised that the changes were temporary

and that the new “duties would be removed” when new supervisors were selected.

The Level II decision reflects that the Level II evaluator conducted an independent investigation into the veracity of Flare's explanation for the delay in filing her grievance. Specifically, he wrote in the Level II decision that he had “discussed this with Mr. Tim Whittington,” who is the Associate Warden of Operations. Flare's discussions had been with James Stover, Director of Maintenance. There is nothing in the Level II decision to suggest that Flare was privy to the evaluator's discussion with Associate Warden Whittington. Such independent investigations do not afford a grievant the opportunity to respond to, or clarify, the information obtained by the grievance evaluator.

The grievance process was interrupted at Level III while Flare submitted a position description form to the Division of Personnel (“Personnel”), with a request to be reallocated. Her request was denied by Lowell Basford, who is the Assistant Director of Personnel in charge of the Classification and Compensation section. Flare appealed Assistant Director Basford's decision to the Acting Director of Personnel, without success. The grievance process then resumed at Level III. A Level III hearing was held on September 17, 2004. (See footnote 1) At Level III, Flare was represented by Willard Clifford. Charles Houdyschell, Jr., Senior Assistant Attorney General, represented Corrections. Assistant Director Basford represented Personnel. The grievance was denied at Level III as untimely and as lacking in merit.

When it was brought to Level IV, on September 29, 2004, Flare represented herself. Representation of the other parties remained the same as at Level III. Upon agreement of the parties, this grievance was submitted on the record developed at the lower levels, as supplemented by submissions from the parties.

This grievance matured for decision on January 10, 2005, by which date the supplemental material had been received from both Flare and Corrections. Nothing further was received from Personnel.

Upon review of the entire record, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Flare has been employed by Corrections as an Office Assistant 2 in the maintenance department at the Mount Olive Correctional Complex (“Mount Olive”) for over six years.

2 2. The maintenance department at Mount Olive maintains a supply of tools that can be checked out from the tool room for various projects. Someone needs to be responsible for, at a minimum, checking the tools in and out and for maintaining the tool inventory. These responsibilities have security implications because of the inherent dangerin allowing the inmates at Mount Olive, which is a maximum security facility, access to tools such as hammers and screwdrivers that could easily be used as weapons. Tr.14-15, 17.

3 3. In addition to his other duties as a Maintenance Supervisor 2, Mr. Coleman was responsible for the tools. Tr.9, 13.

4 4. After Mr. Coleman retired, Flare's desk was moved from a private office into the tool room, where she became responsible for keeping a log of the tools that were checked out. Tr.8. This change occurred on July 11, 2003. Gr. Exh. 2 at III.

5 5. Initially it appeared that moving to the tool room and maintaining the log for signing out and returning tools was merely a temporary, stop-gap measure while the maintenance department adjusted to Mr. Coleman's departure. Tr.8; Gr. Exh. 2 at III.

6 6. On April 22, 2004, Flare confronted her supervisor, James Stover, Director of Maintenance, and learned for the first time that the changes were permanent. Gr. Exh. 2 at III.

7 7. Flare does not object to performing the additional duties that were assigned to her after Mr. Coleman retired. She believes, however, that they should be accompanied by an increase in pay.

8 8. Flare filed this grievance at Level I on April 28, 2004.

9 9. At Level III, the grievance process was placed in abeyance while Flare asked Personnel to reallocate her position.

10 10. In her Position Description Form, Flare reported that her duties include answering the telephone, dispatching maintenance personnel throughout the complex, contacting vendors for pricing and to determine availability of parts and supplies, requisitioning materials and supplies, issuing tools and then checking them back in upontheir return. Flare estimated that approximately 80% of her time is spent on clerical tasks. She only attributed 20% of her time to tool-related tasks.

11 11. Personnel denied Flare's request for reallocation. Assistant Director Basford determined that Flare's duties are “full-performance level, clerical duties which are performed in accordance with prescribed policies and procedures.” He concluded that Flare was properly classified

because her duties fell within the “scope and nature of the Office Assistant II classification.” DOC Exh. 1 at III.

12 12. Flare appealed Assistant Director Basford's decision to the Acting Director, who affirmed it on the grounds that “the predominant duties assigned to the position are full-performance level clerical support.”

13 13. Under Personnel's classification system, the nature of the work performed by an Office Assistant 2 is as follows:

> Under general supervision, performs full performance level work in multiple-step clerical tasks calling for interpretation and application of office procedures, rules and regulations. Performs related work as required.

14 14. Under Personnel's classification system, the distinguishing characteristics of the position of Office Assistant 2 are as follows:

> Performs tasks requiring interpretation and adaptation of office procedures as the predominant portion of the job. Tasks may include posting information to logs or ledgers, and checking for completeness, typing a variety of documents, and calculating benefits. May use a standard set of commands, screens, or menus to enter, access and update or manipulate data.
>
> At this level, the predominant tasks require the under standing [sic] of the broader scope of the work function, and requires an ability to apply job knowledge or a specific skill to a variety of related tasks requiring multiple steps or decisions. Day-to-day tasks are routine, but initiative and established procedures areused to solve unusual problems. The steps of each task allow the employee to operate with a latitude of independence. Work is reviewed by the supervisor in process, randomly or upon completion. Contacts are usually informational and intergovernmental.

15 15. Under Personnel's classification system, the nature of the work performed by an Office Assistant 3 is as follows:

> Under general supervision, performs advanced level, responsible and complex clerical tasks of a complicated nature involving interpretation and application of policies and practices. Interprets office procedures, rules and regulations. May function as a lead worker for clerical positions. Performs related work as required.

16 16. Under Personnel's classification system, the distinguishing characteristics of the

position of Office Assistant 3 are as follows:

> Performs tasks requiring interpretation and adaptation of office procedures, policies, and practices. A significant characteristic of this level is a job[-]inherent latitude of action to communicate agency policy to a wide variety of people, ranging from board members, federal auditors, officials, to the general public.

17 17. The Office Assistant 3 classification "is considered to be advanced level as opposed to full performance level." Tr.19. It applies to complex, complicated work, involving unusual procedures and processes, where the employee is regularly required to apply non-standard responses.

18 18. In contrast, Flare's work is "highly structured" and controlled by "policies and procedures within the Division of Corrections." Tr.19.

19 19. Flare has contact with vendors but does not engage in the level of interaction that would be expected of an Office Assistant 3.

20 20. Assistant Director Basford compared Flare's duties to those of a Storekeeper 2, which is a classification with the same pay grade as an Office Assistant 2. He found her duties to be less complex than those of a Storekeeper 2 and, accordingly, concluded that it would be unfair to elevate Flare to a classification with a pay grade that is higher than that of a Storekeeper 2. Tr.19.

21 21. Terry Frye, a retiree who formerly held the position of Maintenance Director at Mt. Olive, testified about the security ramifications of maintaining control over tools that were being used in a correctional facility such as Mt. Olive. Tr.14-15, 17. In terms of tool control, Mr. Frye was of the opinion that Flare "is doing a maintenance supervisor's job." Tr.16.

22 22. Flare was advised by at least two people in her supervisory chain that she could be transferred to an Office Assistant 2 position in the pods. She took this as a threat of retaliation.

Discussion

Timeliness

Corrections has asserted the affirmative defense that this grievance was not timely. "Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence." *Rhodes v. Div. of Corr.*, Docket No. 03-CORR-152 (Jan. 27, 2004).

Corrections correctly asserts that "[a] grievance must be filed within ten days following the occurrence of the event upon which the grievance is based." W. Va. Code §29-6A-4(a)(1). Corrections argues that Flare knew of the change in her office location and her duties as of July 11,

2003, but failed to file her grievance until April 28, 2004. While it is true that Flare was aware of the changes as early as July 11, 2003, she was led to believe that they were only temporary. The ten-day limitations period did not begin to run until Flare was “clearly notified of the decision” that triggered the grievance. *Barthelemy v. W. Va. Div. of Corr.*, 207 W. Va. 601, 535 S.E.2d 201 (2000), *Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997). That did not occur until April 22, 2004, when Flare confronted her supervisor and learned, for the first time, that the “temporary” changes were going to be permanent.

As noted, Flare filed her grievance on April 28, 2004, which was within ten days after she became aware that the changes were permanent. Therefore, her grievance was timely.

Retaliation

Flare did not allege retaliation as a basis for this grievance. Nonetheless, she testified, without contradiction, that the Level II grievance evaluator and her supervisor made remarks to her about being moved to the pods. Presumably, this would put her in greater contact with the inmates or is otherwise undesirable. Flare thought that this was being used as a threat because she likes her job and does not want to be transferred out of maintenance.

No matter how the remark was intended, it is clear that the Level II grievance evaluator was aware that it sounded like a threat. He began by telling Flare “not to takethis as retaliation” but he expected that the Warden would move her to an Office Assistant 2 position “in the complex” that she “could handle.” Tr.11.

There was never any suggestion that Flare could not handle her assigned duties. In fact, she never asked to be relieved of the additional responsibilities. The threat to move her to a different position was wholly inappropriate because it was completely contrary to the expectation that an employer will recognize and respect the right of an employee to pursue a grievance. Corrections should take care to avoid any actions or remarks that have the potential to chill an employee's grievance rights.

The Merits

Personnel is, by statute, vested with responsibility for establishing a classification scheme for positions in the classified service. W. Va. Code § 29-6-10. A grievant claiming that her position is misclassified must prove, by a preponderance of the evidence, that her duties are a better match for a classification that is different from her current one.

In this case, Flare seeks reallocation to the position of Office Assistant 3. The burden in such case falls on the grievant who is claiming that she is misclassified. *Reed v. W. Va. Div. of Corr.*, Docket No. 97-CORR-127 (May 22, 1998). The question to be addressed is whether the evidence adduced by Flare demonstrates that her duties fall within the description of work performed by an Office Assistant 3, as opposed to the description of work performed in her current classification of Office Assistant 2.

"The key to the analysis is to ascertain whether a grievant's current classification constitutes the 'best fit' for her required duties." *Lemley v. Dep't of Health & Human Res*., Docket No. 04-HHR-159 (Aug. 27, 2004). The "predominant duties of the position inquestion are class-controlling." *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89- DHS-606, 607, 609 (Aug. 31, 1990).

As reflected in her testimony at Level III and in her Position Description Form, the predominant duties performed by Flare are routine clerical functions, such as answering the telephone, sending maintenance personnel out on calls in the complex, and ordering supplies. These are not the "complex clerical tasks of a complicated nature" that characterize the work of an Office Assistant 3. Nor does Flare enjoy the "latitude of action to communicate agency policy to a wide variety of people, ranging from board members, federal auditors, officials, to the general public," that is vested in an Office Assistant 3.

When tested against Personnel's descriptions for Office Assistant 2 and Office Assistant 3, Flare's predominant duties most closely align with the work expected of an Office Assistant 2. Therefore, Personnel's conclusion that Office Assistant 2 constitutes the "best fit" for Flare's duties is well-founded and could not be considered erroneous.

Additional duties or an increase in workload do not give rise to a legitimate claim of misclassification. *Lemley v. Dep't of Health & Human Res*., Docket No. 04-HHR-159 (Aug. 27, 2004)(citing *Kuntz v. Dep't of Health & Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997)). As noted above, it is the nature of the employee's predominant duties, rather than the volume of the work assigned to the employee, that controls classification. *Broaddus v. Div. of Human Serv*., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

Flare has argued that her tool-related responsibilities "are complex duties originally assigned to a Maintenance Supervisor 2. They are Supervisor and Security issues because they deal with tools in a Maximum Security Prison." Neither this argument nor Mr. Frye's testimony, which raised the question

of whether Flare's tool-related duties have asecurity component that takes them outside the scope of normal clerical duties, were addressed in the Level III decision. This omission, while not desirable, is understandable because Flare did not present sufficient evidence to establish that she did anything more than keep a record of which tools were taken and which tools were returned. In this respect, her duties remain within the clerical realm.

Flare has failed to prove that the duties of her position are more closely aligned to the classification of Office Assistant 3 than her current classification of Office Assistant 2. Therefore, this grievance must be denied.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned concludes as follows:

Conclusions of Law

1 1. “Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence.” *Miano v. W. Va. Dep't of Transp.,* Docket No. 02-DOH-008 (June 27, 2002)(citations omitted).

2 2. “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3 3. “A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. *W. Va. Code* § 29-6A-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocallynotified of the decision being challenged.” *Miano v. W. Va. Dep't of Transp.,* Docket No. 02-DOH-008 (June 27, 2002)(citations omitted).

4 4. Because this grievance was filed within ten days after Flare became aware that the changes in her office location and duties were not temporary, this grievance is timely.

5 5. To prevail upon a claim of misclassification, a grievant must prove, by a preponderance of the evidence, that a cited Personnel classification specification matches the grievant's duties more closely than the Personnel classification currently assigned to such grievant. *Lemley v. Dep't of Health & Human Res*., Docket No. 04-HHR-159 (Aug. 27, 2004) (citing *Hayes v. Dep't of Natural Res*., Docket No. NR-88-038 (Mar. 28, 1989)). 6 6. Flare has not demonstrated by a

preponderance of the evidence that the Office Assistant 3 classification is the "best fit" for her position.

7 7. The increases in Flare's workload, which do not alter the nature of her predominant duties, do not support her request for reallocation. *Kuntz v. Dep't of Health & Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997).

8 8. Flare has failed to meet her burden in this grievance.

Accordingly, this grievance is **DENIED**.

Any party 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 West Virginia Code section 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.

Date: March 21, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

References to pages in the Level III transcript shall appear as "Tr.__."