THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

GREGORY NICHOLSON,

Grievant,

v. Docket No. 07-HHR-210

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES

AND DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant Gregory Nicholson, is employed by the West Virginia Department of Health and Human Resources ("DHHR") as the Acting Chief Operations Officer("COO") for that agency. On May 11, 2007, Mr. Nicholson filed a level one grievance form. His "statement of grievance" contains the following:

On April 30, 2007, my immediate supervisor, Danny Franco, Deputy Secretary for Administration, notified DHHR management by e-mail that he would retire without resolving a classification issue regarding the organizational structure for administration. In November of 2005, the exempt position of Assistant Secretary of Administration became vacant after a lengthy time of the employee in the position being on sick and personal leave. This absence and pending vacancy lead to the restructuring of the two highest level administrative units in DHHR management, the Office of Assistant Secretary for Finance and Assistant Secretary for Operations. The new structure would become the Office of Deputy Secretary for Administration with three reports as Chief Officers for Finance, Technology and Operations. Upon the processing of a posting request for the vacant position, previously classified as a Health and Human Resources Executive, a classified position of Health and Human Resources Office Director III] was requested. Without discussion, this posting was later processed by the Division of Personnel as an Administrative Services Manager IV (ASM IV). Deputy Secretary Franco withdrew the posting, as he did not believe it was appropriate for the duties

and management level within the DHHR, and was not equal to similar positions in other departments of state government. I was asked to continue in my current duties as both Director of the Office of Property Management, an ASM IV, and Acting Chief of Operations while an appropriate classification was requested. DHHR management, including theDivision of Personnel, was to take on the task of resolving this issue. With Mr. Franco's retirement and no other encouragement from management, I do not feel this mis-classification [sic] can be resolved without filing a grievance. The department has taken action to rectify other classification issues for other top management staff, but has not elected to correct the classification for the Chief Operations Officer.

Grievant requests the following relief:

It is my desire that an appropriate classification be established that would recognize the duties and responsibilities of the employee who has the management of an operations organization within the largest and one of the most complex state government departments: and, that this classification be in line with the pay grade and classification of other governmental departments, such as the Director of General Services in the Department of Administration and the Chief of Technology Officer in DHHR, both of which are pay grade 25 classifications. Upon creation of an appropriate classification equal to that of its peers, I request that a posting for this position be issued, and, whether or not I am the successful candidate, that I be paid back wages, plus interest, in compensation for the approximately three years that I remained in the acting role as Assistant Secretary of Operations and the Chief of Operations. (See footnote 1)

The parties waived levels one and two by agreement dated May 15, 2007. The grievance was dismissed at level three, in an order dated May 18, 2007, because the grievance evaluator did not believe he had authority to grant the remedy requested. The grievance was appealed to level four and The West Virginia Division of Personnel ("DOP") was joined as a party because the matter involves classification of a state employee which is the responsibility of that agency. This matter was scheduled for a hearing beforeAdministrative Law Judge, Thomas J. Gillooly. The hearing was held, as scheduled, on February 14, 2008, at the Charleston office of the West Virginia Public Employees Grievance Board. At the hearing, Grievant Nicholson represented himself, DHHR was represented by Jennifer Akers, Esquire and DOP was represented by Karen O'Sullivan Thornton, Esquire. All of the post hearing fact/law proposals, submitted by the parties, were received at the Grievance Board

office by March 25, 2008. This grievance became mature for decision on that date. (See footnote 2)

Synopsis

Grievant's basic contention is that the position in which he is presently serving in an “acting” capacity is misclassified. When Deputy Secretary Franco submitted the new position of COO for DHHR to DOP, it was given an ASM 4 classification rather than the HHR OD 3 classification that was requested. Therefore, the position was placed in pay grade 22 rather than pay grade 23. Grievant believes the position should be classified so that it would qualify for a pay grade 25. In a misclassification grievance, Grievant must prove, by a preponderance of the evidence, that the work he is doing is a better fit in a different classification than the one presently assigned to Grievant's position. (See footnote 3) Additionally, DOP's interpretation and application of the classification specifications at issue are givengreat weight unless clearly erroneous. (See footnote 4) Because Grievant was unable to prove that the COO position does not fit the ASM 4 classification and because the evidence does not demonstrate that DOP's determination was clearly wrong, this grievance must be denied.

The following findings of fact are derived from the complete record created in this matter.

Findings of Fact

1 1. Grievant Nicholson is presently employed by DHHR in the position of Acting Chief of Operations. The position is presently classified as an Administrative Services Manager 4 (“ASM 4") at pay Grade 22.

2 2. In 2002 and 2003, Virginia Tucker was serving in an exempt position titled, Assistant Secretary for Operations for DHHR. She was suffering from serious health problems and needed extensive medical leave.

3 3. During this period, Grievant was serving as Director of Property Management for DHHR. When Ms. Tucker was absent for extended periods, Grievant was often called upon to take on the duties normally performed by Ms. Tucker.

4 4. By a memorandum dated October 31, 2003, Deputy Secretary Franco informed management at DHHR that Grievant would be serving as Acting Secretary of Operations due to Ms. Tucker's extended absence. Grievant did not receive additional compensation for assuming these additional duties. 5 5. In April of 2004, Grievant submitted a Position Description Form (“PDF”) (See footnote 5) to DOP because the duties and responsibilities of his Director of Property

Management position were increasing, and Grievant had taken on many duties previously performed by Ms. Tucker. The PDF did not include purchasing responsibilities he was also performing. At that time the Director of Property Management position was classified as an ASM 3, at pay grade 20.

6 6. The PDF was approved to reallocate Grievant's position, the Director of Property Management for DHHR, to the classification of ASM 4. In September of 2004, Grievant's position was moved from pay grade 20, to pay grade 22, in recognition of this reallocation to ASM 4.

7 7. The annual salary range for pay grade 22 starts at $ 43,800 and ends at $81,036. At the time of Grievant's reallocation, his annual salary was set at $70,080.

8 8. On December 1, 2005, Virginia Tucker resigned. At that time, Deputy Director Franco reorganized the management of the DHHR by creating three “Chief” officers: Chief of Finance (“COF”), Chief of Technology (“COT”) and Chief of Operations (COO). The position of Assistant Secretary for Operations, previously held by Ms. Tucker, was eliminated and most of those duties were to be absorbed by the new COO position.

9 9. On July 12, 2006, Deputy Secretary Franco submitted these new Chief positions to DOP for posting. Mr. Franco requested that the COO position be classified asa Health and Human Resources Office Director 3 (“HHR OD 3") position which is paid at pay grade 23. The annual salary at pay grade 23 ranges from $46,872 to $86,724.

10 10. In August of 2006, the position of COO was posted within the ASM 4 classification.

11 11. Deputy Secretary Franco was disappointed that the COO position was not given a higher classification with a higher pay grade to reflect what he felt were the significant duties of the position beyond the Director of Property Management position. Mr. Franco withdrew the posting in hopes of getting a reconsideration of the classification.

12 12. From the date of withdrawing the posting in August of 2006, until he retired in April of 2007, Mr. Franco worked with the DOP and the Governor's staff in an effort to have the COO position upgraded to a higher classification.

13 13. By memorandum dated April 30, 2007, Deputy Secretary Franco expressed his disappointment to Cabinet Secretary Martha Walker, that he had been unable to get a higher classification assigned to the COO position. (See footnote 6)

14 14. The management of DHHR believes that the ASM 4 classification does not cover the breadth of the responsibilities of the COO position. They also believe theycannot attract qualified

applicants for the COO position if it is posted in the ASM 4 classification. (See footnote 7)

15 15. As the Acting COO, Mr. Nicholson is responsible for the DHHR Office of Purchasing, Office of Property Management and the Office of Central Facility Management.

16 16. In the area of real estate management, there are 204 buildings and 2,716 acres under management by the COO with an insured value of $286 million. The COO also manages 286 vehicles that are owned or leased by DHHR.

17 17. DHHR also has 932,801 square feet of space under a lease in 96 buildings, which is the responsibility of the COO. This amounts to 14.6% of all state leases, and is the largest amount of leased space of any state agency. Under the Manchin Administration, the Department of Administration has taken over most of the leasing responsibility for this property, but a great deal of the daily operation remains with the DHHR. The intent of the Department of Administration is to continue to absorb more of the leasing management duties.

18 18. In fiscal year 2007, the Office of DHHR Purchasing managed 368 transactions involving more than $25,000 each and 1,839 transactions involving less than $25,000 each.

19 19. Historically,"Operations" positions have been considered as "administrative support" positions. They include such functions as accounting, purchasing, propertymanagement, and other duties that support the function of the programs run by the agencies. (See footnote 8)

20 20. The ASM 4 classification is distinguished from the ASM 3 classification "by the responsibility to manage a statewide administrative function of the largest state divisions." (See footnote 9)

21 21. The HHR OD 3 classification has been utilized for "programmatic" positions with statewide "[r]esponsibilities include formulating plans, programs, systems and procedures for a variety of highly complex programs." (See footnote 10) This classification is not intended for "administrative support" positions such as the COO.

22 22. The DOP gave the following reasons why the Chief Operating Officer for DHHR was not comparable to the Director of General Services ("DGS") position in the Department of Administration: 1 *

> Not all of the DHHR facilities report directly to the COO, some report to the Bureau for Behavioral Health and Health Facilities. Conversely, all facilities managed by the General Services report directly to the DGS.

2 *

When large projects are undertaken by a DHHR hospital facility, the COO's office would serve in a support role, while any projects undertaken at any building owned by the State Building Commission would be the direct responsibility of the DGS.

3 *

The DGS is responsible for a greater number of facilities and employees than the COO.

4 *

The DGS is a classified exempt position while the COO position is anticipated to be a classified position.

23. The DOP gave the following reasons why the CFO and CTO positions are not comparable to the COO position:

5 *

The CFO and CTO position responsibilities are more complex than the responsibilities of the COO.

6 *

The subordinates, that report to and work for the CFO and the CTO, are in high professional classifications. They are in high pay grades because of the specific expertise and technical knowledge needed to perform their duties. Conversely, the subordinates of the COO are generally in classifications such as maintenance, custodians, storekeepers and secretaries that tend to be in lower classifications and pay grades, requiring skills that are not as complex.

Discussion

Timeliness:

At the level four hearing, DOP raised the issue, for the first time, of whether the grievance was timely filed. The first issue in this regard is whether DOP failed to raise this issue within the time required by the statute. W. Va. Code § 29-6A-3(a)(2) states: “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.” In this case, Grievant and DHHR waived levels one and two. Additionally, no hearing washeld at level three because the grievance evaluator dismissed the grievance, stating that he had no authority to grant the remedy sought by Grievant. The DOP did not become a party to this grievance until level four and had no opportunity to raise the issue of timeliness, before that date. Since there was no hearing held at any level before level four, it was not

possible for DOP to raise the timeliness defense before that time, therefore the raising of this defense at the level four hearing did not violate W. Va. Code § 29-6A- 3(a)(2). (See footnote 11)

Where Respondent seeks to have a grievance dismissed on the basis that it was not timely filed, Respondent has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once Respondent has demonstrated a grievance has not been timely filed, Grievant has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH- 445 (July 28, 1997). W. Va. Code § 29-6A-4(a) provides that a state employee must file a grievance, "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 relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. *See Kessler, supra.*; *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. HumanRights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989); *Frost v. Bluefield State College and Gibson*, Docket No. 07-HE-349 (June 13, 2008).

DOP alleges that there are at least two discrete events that can be pointed to when the ten days for filing the level one grievance should have started; the date DOP posted the position in the ASM 4 classification or the date DHHR decided to pull the posting. The last of these events occurred more than eight months before the level one grievance was filed in May of 2007. Grievant states that the event that gave rise to the grievance was Mr. Franco's retirement from DHHR, because at that point no one else in the DHHR management was going to zealously pursue a higher classification for the COO position. Grievant filed his level one grievance on May 11, 2007, within ten working days of his receipt of the e-mail written by Mr. Franco on April 30, 2007.

Ultimately, none of the specific events, cited by the parties for the beginning of the ten day time for filing a grievance, is controlling in this case. This is a misclassification grievance and misclassification "is a continuing practice, and thus, the grievance may be initiated at any time during which the misclassification continues." *Thomas v. Dep't of Health & Human Res.*, Docket No. 01-HHR-385 (Nov. 20, 2001). The normal effect of misclassification claims is to fix the period for which any back pay may be awarded to ten days prior to the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Whyte v. Dep't of Envirn'l Protection*

and Div. Of Personnel, Docket No. 07-DEP-364 (April 3, 2008). The remedy sought by the grievance is unusual for a typical misclassification case. Grievant seeks to have the position he is in posted so he and others may apply for it. But the basis of his grievance is that theposition he is holding, Acting Chief Operations Officer, is not properly classified. He does not agree with the classification assigned to the position by DOP and he wants the position posted again, with a higher classification. While the grievance does have some unusual features, it fits best in the misclassification category. Since this is a misclassification grievance it can be brought anytime (but only once) while Grievant remains in the classification. *Thomas, supra.* Therefore, the grievance was timely filed. However, as noted in *Martin supra.,* any back pay the grievant might be entitled to would be limited to ten days prior to the date of the filing of his grievance.

Misclassification:

In this grievance, as in all grievances that do not involve discipline, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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). 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the Grievant has not met his burden. *Id*.

In a misclassification grievance, Grievant must prove, by a preponderance of the evidence, that the work he is doing is a better fit in a different classification than the one presently assigned to Grievant's position. *See generally Hayes v. W. Va. Dep't of NaturalRes*., Docket No. NR-88-038 (Mar. 28, 1989); *Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement*, Docket No. 00HHR-361 (Apr. 5, 2001). In this particular case, Grievant's current position, COO for DHHR, was placed in the ASM 4 classification by DOP. Deputy Secretary Franco disagreed with that classification and pulled the posting for the position. However, DOP maintains that ASM 4 remains the proper classification for the position. For Grievant to prevail, he must prove that the classification assigned to the position by DOP is incorrect. The key to the analysis is whether the classification designated by DOP constitutes the "best fit" for the duties the Grievant performs.

Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position are class- controlling. *Broaddus v. W. Va. Div. of Human Serv*., Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990). In making this analysis, DOP's determination of classification must be given great weight unless it is found to be clearly wrong. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993); *See,* Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt.1, *Dillon v. Bd. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588 (1983). The clearly wrong standard requires the administrative law judge to presume that DOP's classification decision is valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

Deputy Secretary Franco originally sought an HHR OD 3 classification for the COO position which is at pay grade 23. However, Lowell Basford explained that the COOposition is an “administrative support” position. Managers in administrative support positions insure that the various programs operated by the state agencies have sufficient resources to carry out their missions. On the other hand, the nature of the work for the HHR OD 3 classification characterizes that position as a “programmatic” classification with statewide responsibilities to plan and implement the actual programs of the agency. This classification is not intended for administrative support positions such as the COO. Additionally, Grievant avers that the COO position is more like classifications which are at pay grade 25 instead of pay grade 23 like the HHR OD 3 classification.

To support the argument that the COO position deserves a pay grade 25, Grievant compares it to the DGS position. Indeed, there are similarities. Both positions are administrative support positions and both require the management of a great deal of property. Grievant also points out that the COO position has responsibilities for fleet management, purchasing and insurance that the DGS does not have. However, it was noted by Warren Keefer and Lowell Basford that the Department of Administration is absorbing much of the leasing responsibility presently and formerly performed by the COO for DHHR. Mr. Basford stated that there are significant differences in the number of employees and facilities managed by the two positions, with the DGS managing a far greater number of both. He also noted that the DGS had more direct management responsibilities for the facilities than the COO. Finally, the DGS is a classified exempt position and DHHR has sought for the COO

position to be classified. The DOP's interpretation that the two positions are not comparable is supported by substantial evidence and a rational basis. Grievant argues that the CFO and CTO positions within the DHHR, are on the same level of the organizational chart and should have the same pay grade as the COO. The CFO is presently at pay grade 23 and the CTO is at pay grade 25. However, it is the nature of the work and the predominant duties of the position that control classification, not the position's placement on the organizational chart. *See, Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990). The fact that the CFO and the CTO are at different pay grades demonstrates that proposition. There is no question that all three positions have duties that are essential to the operation of DHHR. However, the specific duties and responsibilities of the CTO and the CFO are of a more complex nature. Additionally, the subordinates, that report to and work for the CFO and the CTO, are in high professional classifications. They are in high pay grades because of the specific expertise and technical knowledge needed to perform their duties. Conversely, the employees of the COO are generally in classifications such as maintenance, custodians, storekeepers and secretaries. These tend to be in lower classifications and pay grades, requiring skills that are not as complex. Once again, DOP's determination that these three positions are not comparable for the purposes of determining pay grade and classification is supported by the evidence and has a rational basis. Therefore, the interpretation is not clearly wrong.

There is no doubt that the COO position has daunting duties and responsibilities that must be performed with care and diligence in order to ensure the operation of one of the state's largest agencies. By all accounts, Grievant is very adept at performing those responsibilities. However, the record shows that DOP's determination that theclassification that best fits that the COO position is the ASM 4 classification, is supported by the evidence and has a rational basis. Grievant did not prove that the DOP's determination of classification and pay grade was clearly wrong and the grievance must be denied. (See footnote 12)

Conclusions of Law

1 1. Misclassification is a continuing practice. Thus, a misclassification grievance may be initiated at any time during which the misclassification continues. *Thomas v. Dep't of Health & Human Res.*, Docket No. 01- HHR-385 (Nov. 20, 2001). The normal effect of misclassification claims is to fix the period for which any back pay may be awarded to ten days prior to the filing of the grievance.

Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); *Whyte v. DEP and DOP*, Docket No. 07-DEP-364 (April 3, 2008). 2 2. This is a misclassification grievance and Grievant is serving in the position he alleges is misclassified. Grievant has not filed a prior grievance alleging that his position was misclassified. This grievance was filed within the time lines established by W. Va. Code § 29-6A-4(a).

3 3. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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). 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Since this is a misclassification grievance, Grievant must prove, by a preponderance of the evidence, that the work he is doing is a better fit in a different classification than the one presently assigned to Grievant's position. *See generally, Hayes V. W. Va. Dep't of Natural Res*., Docket No. NR-88-038 (Mar. 28, 1989); *Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement*, Docket No. 00HHR-361 (Apr. 5, 2001). The key to the analysis is whether the classification designated by DOP constitutes the "best fit" for the duties the Grievant performs. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991). Thepredominant duties of the position are class-controlling. *Broaddus v. W. Va. Div. of Human Serv*., Docket Nos. 89-DHS-606 through 609 (Aug. 31, 1990).

4 4. DOP's determination of classification must be given great weight unless it is found to be clearly wrong. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993); *See,* Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt.1, *Dillon v. Bd. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588 (1983).

5 5. The clearly wrong standard requires the administrative law judge to presume the DOP's classification decision is valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v.*

Paine, 221 W. Va. 458, 655 S.E.2d 204 (2007); *Bennet v. Insurance Comm'n and the Div. of Personnel*, Docket No. 07-INS-299 (June 27, 2008).

6 6. DOP's determination regarding the classification and pay grade assigned to the COO position had a rational basis and was supported by substantial evidence on the record. Therefore, Grievant was unable to prove his grievance by a preponderance of the evidence.

Accordingly the grievance 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. *See* W. Va. Code § 29-6A-7 (*See Footnote 1)*. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to suchappeal 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.

DATE: November 20 , 2008

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William B. McGinley

Administrative Law Judge

Footnote: 1

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

This matter was reassigned to the undersigned Administrative Law Judge for administrative reasons.

Footnote: 3

See generally Hayes v. W. Va. Dep't of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989); Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement, Docket No. 00-HHR-361 (Apr. 5, 2001).

Footnote: 4

Syllabus Point 4, Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc., 166 W. Va. 775, 277 S.E.2d 613 (1981), appeal dismissed, 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284.

Footnote: 5

The Position Description Form is an official record of the duties and responsibilities assigned to a position and used by the DOP to allocate the position to the proper classification.

Footnote: 6

This memorandum consists of five paragraphs and was admitted into evidence as part of Grievant's exhibit number two. In one paragraph, Mr. Franco stated the following:

"[Mr. Nicholson] has not complained at all about getting the issues resolved and has been a team player for over 3 years now. He had every right to file a grievance...but I asked him to let the system work...well, it hasn't. Accordingly, via this e-mail, I am informing him that I see no resolution and I cannot, in good conscience, ask him to continue on while 'waiting for the system to work'".

Footnote: 7

Testimony of Deputy Secretary of DHHR, Warren Keefer.

Footnote: 8

Testimony of Lowell D. Basford, manager of the DOP Classification and Compensation Section from 1976 through the middle of 2007. Basford now serves as a consultant to DOP on a contract basis.

Footnote: 9

See DOP Classification Specifications for Administrative Services Manager 4, Distinguishing Characteristics section which states the following:

Distinguishing Characteristics The Administrative Services Manager 4 is distinguished from the Administrative Services Manager 3 by responsibility to manage a statewide administrative function of the largest state divisions. Positions in this class have responsibility for managing multiple units of a diverse administrative support function (i.e., accounting, purchasing, printing, etc.) in the largest state divisions and where significant federal relationships are involved in the fiscal and administrative function. Typically, positions in this class manage the section through subordinate Administrative Services Managers.

Footnote: 10

See DOP Classification Specifications for Health and Human Resources Officer Director 3, Nature of Work section.

Footnote: 11

For a full discussion of the employer's obligation to raise the timeliness defense at or before the level two under W. Va. Code § 29-6A-3, see, Greathouse v. Dep't of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000). It should also be noted that the wording of the provision regarding when the timeliness defense must be raise was significantly changed in the new grievance procedure. See W. Va. Code § 6C-2-3(c)(1).

Footnote: 12

DOP argues that the remedy sought by Grievant, that a new classification be created, cannot be granted. Even though this issue does not need to be addressed, given the decision that DOP's classification determination was not clearly wrong, it should be noted that, this Board has previously held that in the state classification system:

It is within the jurisdiction of the Grievance Board to determine whether a classification should have been created that would more closely fit the duties and responsibilities of a grievant. Pridemore v. West Va. Bureau of Employ. Programs, Docket No. 92-BEP- 435 (Aug. 17, 1993). Compare AFSCME v. Civil Service Comm'n of W.Va., 380 S.E.2d 43 (W.Va. 1989).

Nida v. W. Va. Dep't of Health and Human Resources, Docket No. 93-HHR-240 (Aug. 20, 1993). This analysis was reaffirmed in Travis, et al., v. West Virginia Department of Health and Human Resources, Docket No. 95-HHR-359 (March 24, 1997), Blake, et al., v. WestVirginia Department of Health and Human Resources, Docket No. 95-HHR-043 (April 30, 1996), and Johnston v. West Virginia Department of Health and Human Resources, Docket No. 94-HHR-206 (June 15, 1995); Skiles v. Dep't of Health and human Resources and Div. Of Personnel, Docket No. 02-HHR-111 (April 8, 2008).