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STATE EMPLOYEES GRIEVANCE BOARD

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RAY CURRY

v.

Docket No. 89-DHS-401

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES and
WEST VIRGINIA DIVISION OF PERSONNEL

DECISION

The grievant, Ray Curry, is employed by the West Virginia Department of Human Services (DHS) as an Economic Service Supervisor II (ESS II) in its Williamson office. He initiated a grievance at Level I June 12, 1989, alleging his position had been misclassified since 1980 and had been so during parts of 1976. His supervisor was without authority to grant relief and the grievance was denied at Level II following a conference held June 22, 1989. The matter was again denied following a hearing held July 14, 1989.¹ Appeal to Level IV was made July 28, 1989, where a hearing was held October 1, 1991.² Proposed findings of fact and conclusions of law were received by November 5, 1991.

¹The transcript of this proceeding is part of the record herein.

²After his appeal to Level IV the grievant, as did
(Footnote Continued)

The grievant began his tenure with DHS on May 4, 1972, as an Eligibility Specialist III (ESS III). There is no dispute that from April 1, 1976, to September 30, 1976 the grievant, while classified as an ESS III, performed the duties of an Eligibility Supervisor I. Effective October 1, 1976, the grievant was officially promoted to the position of Eligibility Supervisor I.

On January 30, 1979 the Eligibility Supervisor classification series was abolished and replaced with one consisting of Economic Service Supervisor I, II and III. This change was effective January 1, 1979. Effective March 17, 1980, the grievant was promoted to his current ESS II position.

The grievant asserts that he has been performing his duties of an ESS III since he was promoted to the ESS II position on March 17, 1980.³ As relief he requests that he be awarded back pay and interest and that Personnel reclassify his position.

(Footnote Continued)

a great many other DHS employees with pending misclassification-related grievances, entered into negotiations with the agency in order to reach some informal settlement. The talks were unsuccessful, at least where the grievant was concerned, and he requested in May 1991 that the case proceed to hearing. Prior to hearing the parties again discussed settlement but could not reach a compromise. In August 1991 the West Virginia Division of Personnel was joined as a party-respondent. In September 1991, the undersigned denied the agency's request that the case be consolidated with Olive v. W.Va. Dept. of Human Services, infra.

³Of course the grievant also asserts and, as previously noted, the agency concedes that his position was misclassified from April 1, 1976 to September 30, 1976.

The agency maintains that the grievant failed to establish that he was serving as an ESS III during the time in question. DHS does not assert that the grievance was not timely filed⁴ but does maintain that the doctrine of laches precludes an award of the grievant's requested relief. For reasons hereinafter discussed, the undersigned concludes that the grievant must prevail.

It is well settled that laches is an affirmative defense and it is the burden of the asserting party to present evidence sufficient for the application of the doctrine. Hooper v. W.Va. School of Osteopathic Medicine, Docket No. BOR-027-4 (June 29, 1989). For the doctrine to attach, the party must demonstrate two elements: lack of due diligence on the part of the party asserting its claim and prejudice to the opposing party resulting from the delay. Cooper-Richmond v. W.Va. Dept. of Human Services, Docket No. 89-DHS-284 (March 4, 1991). While DHS has established the first element, it has failed to demonstrate the second.

Joe Smith, the Assistant Director for the West Virginia Division of Personnel (Personnel) and former Director of Personnel for DHS, testified generally about the procedures

⁴The West Virginia Supreme Court in A.F.S.C.M.E. v. Civil Service Commission, 380 S.E.2d 43 (W.Va. 1989) (AFSCME IV), established a ninety-day "window" period for state employees who were not parties to that action, to file classification-related grievances. The last date for a timely filing was June 26, 1989, see Gaskins v. W.Va. Dept. of Health, Docket No. 90-H-032 (April 12, 1990). As previously noted, this grievance was filed June 12, 1989.

available to the grievant during his tenure with DHS by which he could protest the classification of his position. That testimony establishes that by 1982, if not before, DHS had an adequate system for handling complaints concerning the proper classification of its positions and that this fact was communicated to all employees in some fashion. The grievant testified that he did not know such issues were grievable until he read an article in a May 1989 union newsletter in which a decision of the West Virginia Supreme Court was discussed.⁵ Since the grievant's "ignorance of the law" assertion cannot be accepted as a valid reason for his failure to be diligent in filing his claim and since Mr. Smith's testimony was otherwise un rebutted, it is concluded that DHS has shown the delay necessary for laches.

On the issue of prejudice DHS presented the testimony of Joe May, its Region II Income Maintenance Administrator,⁶ and John McGinnis, its accountant in Income Maintenance. Both represented that an award of back pay to the grievant would seriously hamper the Williamson office's ability to maintain adequate personnel to meet the needs of its clients. Mr. May specifically testified that by his calculations the grievant, if his claims were substantiated, could be awarded \$60,000.00 to \$70,000.00 and such

⁵This was most likely the AFSCME IV case. See n. 4.

⁶Mr. May's areas of assignment included the Williamson office.

a sum would preclude overtime pay in Williamson and necessitate lay-offs. Significantly, Mr. May conceded that the Williamson offices had its own projected budget but its funding was merely a party of DHS' overall financial structure.

Mr. McGinnis represented that the relief requested, if granted, would have detrimental impacts on Williamson's manpower budget. He opined that the award would have to be paid from DHS personnel funds and those funds were already strained. Mr. McGinnis also explained that the Williamson office did not operate with an independent pool of funds and its expenditures were made against DHS' budget.

It is recognized that to some extent any evidence presented in support of a chain of laches may appear speculative in nature. Here, however, the evidence is little more than conjecture. No explanation was given as to how the grievant's claim could result in an award of \$60,000.00 or \$70,000.00. It is noted that the grievant's claim is markedly similar to that made in Olive v. W.Va. Dept. of Health and Human Resources and W.Va. Division of Personnel, Docket No. 89-DHS-402 (April 15, 1992) where it was determined that the potential award amounted to \$8,774.00. Even allowing for the differences in the cases Mr. May's estimates appear exceedingly high. Further, the DHS' attempt to focus attention on the Williamson office "budget" was not at all persuasive. It is rather clear from the record that DHS receives only one yearly allocation of funds and that its various satellite offices such as the one in Williamson are simply required to make projections on expenditures and adhere to them

as closely as possible. The predictions of Mr. May and Mr. McGinnis that clients would bear the brunt of an award of back pay from the Williamson "budget" to the grievant were therefore baseless.⁷ Certainly, even if Mr. May's figures on the amount of the monies involved were accepted as reliable they bear little similarity to the relief at issue in Maynard v. Bd. of Educ. of Wayne County, 357 S.E.2d 247 (W.Va. 1989).⁸ Accordingly, DHS has failed to establish prejudice resulting from the grievant's delay in filing.⁹

In a classification-related complaint, a grievant must show that he or she was performing the duties of one professional categorization, as revealed by the official Personnel specifications thereof, while being assigned to another. In essence, this may be accomplished by demonstrating that a portion more closely matches one classification than another.

⁷Notice is taken that DHS has made awards in other cases and if some loss of service to that client resulted some evidence in that regard could have been presented in the presenty one. As was noted in Olive, if DHS' argument were given full effect, no back wages would be payable for any grievance.

⁸The conclusion in Gary v. W.Va. Div. of Human Serv., Docket No. 89-DHS-299 (Dec. 27, 1990), are also applicable to the present case to the extent that they pertain to the assertion that potential financial difficulties consitute prejudice.

⁹DHS makes no assertion that any evidence needed to defend the action was lost or otherwise unavailable because of the passage of time. Thus, the conclusions herein are based solely on the financial impact-related contentions.

Cooper-Richmond, supra. The "Nature of Work" section of the job description for ESS II provides:

An employee in this class, under the supervision of an Area Administrator, is responsible for the training and on-going supervision of Economic Service Workers and Case Aides. The employee is responsible for ensuring that all applications and redeterminations for financial assistance for all Department of Welfare programs or benefits are processed in accordance with Departmental policy.

The "Nature of Work" section for ESS III is identical. While there are slight variations in the remaining sections of the descriptions, they are in essence the same. As in Olive there is little or no evidence to contradict the grievant's evidence in support of his assertion that he has been carrying out the duties listed in the ESS III specifications since his promotion to ESS II. DHS' defense is that the grievant was not entitled to that classification because it has been traditionally reserved for those employees who supervise employees in programs other than economic services.¹⁰ It is, however, the job description and not tradition which is controlling. As was pointed out in Olive, "[the] distinction between the [ESS III and the ESS II] classifications is not reflected in their specifications." It was further held in Olive that since the specification descriptions of the duties for the positions were the same, the

¹⁰ It appears that in order to attain the ESS III rank, one must be assigned supervisory duties over employees working in a program such as Women, Infants and Children (WIC). Precisely how this "tradition" began is not clear from the record. It is also not clear and somewhat curious as to why some changes were not effected in the ESS III specifications to reflect or endorse this practice.

grievant's burden in showing entitlement to the higher classification was met. The facts of the present case dictate the same holding.

In addition to the foregoing, the following Conclusions of Law are made.

CONCLUSIONS OF LAW

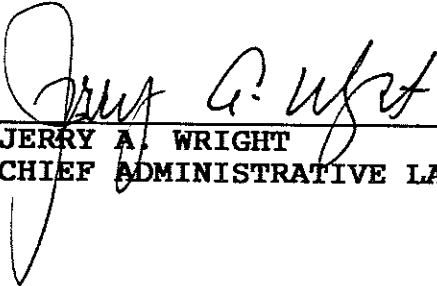
1. The grievant established by a preponderance of the evidence that since March 17, 1980, he has done the work of an Economic Service Supervisor III while classified as an Economic Service Supervisor II.

2. DHS did not establish laches, failing to show that the grievant's delay in filing prejudiced it in any significant way.

Accordingly, the grievance is **GRANTED** and the West Virginia Division of Personnel is hereby **ORDERED** to take all steps necessary for the reclassification of the grievant's position to Economic Service Supervisor III. The West Virginia Department of Human Services is hereby **ORDERED** to provide the grievant back pay plus interest for the time he worked out of classification from April 1, 1976 to September 30, 1976 and for the period provided for in Conclusion of Law 1.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which

the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.



JERRY A. WRIGHT
CHIEF ADMINISTRATIVE LAW JUDGE

Dated: July 31, 1992