MAMIE KAY SPENCER

v. Docket No. 93-HHR-523

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

WELCH EMERGENCY HOSPITAL

DECISION

The grievant, Mamie Kay Spencer, is employed by the West Virginia Department of Health and Human Resources (HHR) and assigned to Welch Emergency Hospital (WEH) as a Staff Respiratory Technician (SRT). She filed a grievance at Level I September 16, 1993, alleging,

> Grieving the fact I was a Supervisor of Respiratory Therapy for one and half years working out of my classification from July 1991 to June 1993.

The grievant's supervisor was without authority to grant relief and the grievance was waived to Level III on September 23, 1993. The grievance was denied at that level following a hearing held November 9, 1993 and an appeal to Level IV was made December 16, 1993. A hearing was held March 14, 1994, and the parties declined to submit proposed findings of fact and conclusions of law.

FACTS

There is little if any dispute over the facts of the case. The record developed at Levels III and IV supports the following findings.

1. The grievant has been employed as an SRT at WEH for approximately six years.

2. In July 1991, Elaine Lacaria, who was then the WEH Director of Respiratory Therapy, was approved for maternity leave. Prior to the commencement of her leave, Ms. Lacaria inquired of the grievant whether she would assume the duties of the Director position in her absence, which at that time was to be approximately four months.

3. After several discussions with Ms. Lacaria and WEH Administrator Stephen Shride, the grievant agreed to assume the duties. During the discussions, Mr. Shride advised the grievant that he could not promise her an increase in salary or any other additional compensation. He did agree to

recommend the grievant for a five percent merit raise but cautioned her that he did not have final authority on the matter.

4. With guidance from Mr. Shride and WEH Director of Personnel Cathy Addair, the grievant performed the duties of the position from July 1991 until March 1992 when Ms. Lacaria returned to work. The grievant returned to her SRT duties at that time.

5. Mr. Shride recommended the grievant for a merit raise as he had promised. The grievant was awarded the raise effective January 1, 1992. While consideration was necessarily given the grievant's pre-July 1991 performance, the grievant's willingness toassume the responsibilities of the Director position and her performance in the position were primary factors in Mr. Shride's recommendation. (See footnote 1)

6. Ms. Lacaria worked approximately two days in March 1992 and resigned her position. After discussions with Mr. Shride, the grievant agreed to once again assume the duties of Director while a replacement for Ms. Lacaria was sought. Mr. Shride made no promises of additional compensation and the grievant was aware that she would receive none.

7. The Grievant continued as Acting Director until January 1993 when the position was permanently filled. (See footnote 2)

8. In September 1993, the grievant obtained a copy of a policy of the West Virginia Division of Personnel (Personnel) entitled "Temporary Classification Upgrades" which became effective July 15, 1993. She interpreted certain portions of the policy as authorizing agencies to provide temporary salary increases for employees who served in higher classifications during another employee's absence. Believing that the policy applied or should apply to her service in the Director position, she filed thisgrievance on September 16, 1993, in order to obtain payment thereunder. (See footnote 3)

ARGUMENT

At the Level IV hearing, the grievant conceded that the policy referenced above was not in effect during her service in the Director position and did not contend that it should apply retroactively to that service. Essentially, the only argument advanced by the grievant was that it was inequitable to deny her extra compensation for her time in the position.

HHR asserts that since the grievant assumed the duties in issue willingly and with full knowledge that she would not be given extra salary or a higher classification, there is no basis for a finding that she was treated inequitably. HHR cites Freeman v. W.Va. Dept. of Health and Human Resources,

Docket No. 90-H-237 (Dec. 26, 1990) and Wolfe v. W.Va. Tax Dept., Docket No. T-88-011 (July 28, 1989) in support of its contention that an employee who voluntarily accepts the duties of a higher classificationeffectively "waives" his right to later claim that he should have been reclassified or awarded a higher salary. The agency also asserts that since the alleged "misclassification" ended in January 1993 and the grievance was not filed until September 1993, it was not timely. (See footnote 4)

CONCLUSIONS

After a thorough review of the parties' positions, the foregoing findings of fact and the applicable law, the undersigned makes the following conclusions of law.

1. A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. W.Va. Code §29-6A-4(a). While the grievant's service in the Director position was a continuous practice, the last occurrence of that practice took place in January 1993. Since the grievant did not articulate any equitable theory by which the statutory timelines would be tolled and none is found applicable, the grievance was untimely. See Gaskins v. W.Va. Dept of Health, Docket No. 90-H-032 (April 12, 1990).

2. Notwithstanding the timeliness of the complaint, the grievant has failed to establish that she was treated unfairly or that HHR violated any applicable policy, statute or regulation. Employees who, with full understanding that they have no guarantee of higher compensation voluntarily fill in at a higher classification level cannot later claim that they should have been reclassified for that period. Freeman v. W.Va. Dept. of Health and Human Resources, Docket No. 90-H-237 (Dec. 26, 1990).

Accordingly, the grievance is **DENIED.**

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.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: October 28, 1994

Footnote: 1 *The record supports that the grievant performed admirably in the position and perhaps even exceeded her predecessor.*

Footnote: 2 *There is no contention on the grievant's part that WEH was not making efforts to fill the position. The record reflects that WEH had limited funds for the position's salary and that it was very difficult to attract a qualified applicant who would accept that salary.*

Footnote: 3 *In December 1992 Personnel implemented a reclassification of all HHR positions. It appears that during its review of the various classifications within HHR and the duties assigned those classifications Personnel considered the grievant to be serving in the Director position temporarily and therefore confined its study to the grievant's SRT position. Apparently, Personnel did not abolish or otherwise make changes to the SRT series and notified the grievant that her classification and pay grade would remain the same. During her testimony at Level IV, the grievant stated that in July 1993, Personnel rejected her request for reconsideration and that this rejection "was the major reason" for her grievance. The grievant also testified, however, that she had not requested of Personnel that she be reclassified to Director. It is, therefore, difficult to discern why the denial was the impetus for the grievance. In any event, the grievant does not cite the rejection as a reason for the timing of the grievance and it is not necessary to explore the issue further.*

Footnote: 4 *The agency also points out that the grievant, at the time she assumed the duties of Acting Director in July 1991, was earning more than the entry level salary for that position and that under Personnel's regulations, she would not have attained an increase in pay had she actually been promoted to the position. HHR further notes that after the grievant received the January 1992 merit increase she was making considerably more than the entry level salary. Since the resolution of other issues, including the timeliness of the complaint, is dispositive of the case, it is not necessary to address this contention.*