CHRISTINE CRAIG,

Grievant,

v. DOCKET NO. 98-HHR-334

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU OF CHILDREN AND FAMILIES and DIVISION OF PERSONNEL

Respondents.

D E C I S I O N

This grievance was filed by Grievant, Christine Craig, against Respondent, West Virginia Department of Health and Human Resources/Bureau of Children and Families ("HHR"), on July 6, 1998, alleging she had been working out of classification since July 1997, and seeking backpay to that date. She also initially sought reclassification, but withdrew this requested relief as she did not meet the minimum experience requirements for the classification sought.

Respondents do not dispute that Grievant was working out of classification from July 1997, through January 29, 1999, when she transferred to another position. The Level III decision issued August 20, 1998, awarded Grievant backpay from June 22, 1998 (ten working days preceding the filing of the grievance), and ordered that the duties which rendered her misclassified be removed from her. HHR does not contestthe Level III decision, and does not dispute that it continued to assign her the duties which rendered her misclassified after the issuance of the Level III decision through January 29, 1999. Respondents assert that Grievant is not entitled to backpay to July 1997, but is only entitled to backpay from June 22, 1998, asserting a timeliness defense. The sole issue to be decided is whether Grievant may receive backpay from July 1997, through June 21, 1998.

The following Findings of Fact are made based upon the record developed at Levels III and IV. (See footnote 1)

Findings of Fact

1. Grievant has been employed since November 1996, by the Department of Health and Human Resources ("HHR") as a Health and Human Resources Specialist.

2. Grievant has been performing the duties of a Social Service Coordinator, which is in a higher pay grade than her classification, since June 1, 1997. 3. In April 1997, Grievant was notified that the Division of Personnel ("Personnel") had assigned her position to the Social Service Coordinator classification, as a result of a reorganization of her unit.

4. On June 6, 1997, a WV-11, Personnel Action Form was submitted to reallocate Grievant's position to a Social Service Coordinator.

5. Grievant's reallocation was rejected by the Division of Personnel on September 13, 1997, because she did not meet the minimum experience requirement for the Social Service Coordinator classification.

6. Grievant became aware in September 1997, that there was a problem with her reallocation request, that she did not meet the minimum experience requirement. She was asked by her supervisor to submit more forms detailing her prior experience, and she did so.

7. Grievant was told by her supervisor and her office director that they were working on the reallocation. No one asked her to not file a grievance.

8. This grievance was filed on July 6, 1998.

9. Grievant continued to work out of classification as a Social Service Coordinator after the issuance of the Level III decision on her grievance, through January 29, 1999.

Discussion

The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

The first area which needs to be addressed is whether this defense was timely raised by Respondents. Effective July 1, 1998, W. Va. Code § 29-6A-3 requires the respondent to raise the issue of timeliness at or before Level II. Grievant did not argue the defense was not properly raised,

and the parties did not provide the undersigned with any information about what occurred at Level I. The parties, however, agreed to waive Level II, and the issue of timeliness of the filing was raised at Level III by HHR's representative, who was also Grievant's supervisor. Accordingly, the undersigned finds the timeliness defense was timely raised.

As to when a grievance must be filed, W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

W. Va. Code § 29-6A-4(a) provides, in pertinent part:

> 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 grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. . . ..Only working days are counted in determining when the 10 day time period runs for filing a grievance. Holidays are not counted. W. Va. Code § 29-6A-2(c).

Misclassification is a continuing practice, and as such, a grievance may be initiated at any time during the time the misclassification continues. However,

> [a]s with a salary dispute, any relief is limited to prospective relief and to back relief from and after [ten] days preceding the filing of the grievance. (See footnote 2)

Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). W. Va. Code § 29-6A-2. Stollings v. Div. of Envtl. Protection, Docket No. 97-DEP-411 (June 8, 1998). The grievance was timely as to the claim of working out of classification, as it was a continuing violation; however, backpay is limited to ten days preceding the filing of the grievance, absent some excuse.

Grievant argued she should be allowed to recover backpay to June 1997, because did not receive written notice that her position would not be reallocated. Respondents argued Grievant cannot recover backpay because she knew in September 1997, at the latest, that she lacked the experience necessary to placement in the Social Service Coordinator position, but chose not to file her grievance at that time.

Grievant knew there was a problem with her reallocation in September 1997, due to the fact she did not meet the minimum qualifications, regardless of whether she received official notice that the reallocation had been denied. Further, Grievanttestified that what caused her to file her grievance was not the discovery that her position would not be reallocated, but her placement on a panel with

others in a higher pay grade, and her desire to have her classification issue resolved before the office underwent a reclassification.

Grievant pointed out that a co-worker, Angela Myers, had filed a grievance alleging misclassification after Grievant had filed hers, and the Level III grievance evaluator had awarded her backpay to July 1997, the period during which she had been working out of classification. Grievant provided the undersigned with a copy of Ms. Myers' Level III decision. The Level III grievance evaluator found Ms. Myers believed her position had been approved to be reallocated until she saw an updated organizational chart showing her classification had not been changed, and filed her grievance at that time. Thus, in Ms. Myers' case, she did not discover the facts upon which the grievance was based until July 1998, and for that reason, she was allowed to recover backpay for the entire period she was working out of classification.

While Grievant received no written notification that her reallocation had been disapproved, she knew she did not meet the minimum experience requirements for the Social Service Coordinator in September 1997, and that she could not be reallocated to that position, although her supervisors were doing what they could to push through a reallocation. Grievant's situation is different from Ms. Myers'.

The question arises, however, whether Grievant's supervisors' statements to her that they were continuing to try to get her position reallocated are sufficient to toll the time periods for filing a grievance. Although W. Va. Code § 29-6A-3(a) specificallylists the excuses to timely filing, this Grievance Board has nonetheless determined that "[e]quitable theories, including estoppel may be applied to toll the time for filing a grievance." Rose, et al., v. Raleigh County Bd. of Educ., Docket Nos. 94-41-296/314 (Nov. 29, 1994), aff'd per curiam, 199 W. Va. 220, 483 S.E.2d 566 (1997). The application of the doctrine of equitable estoppel to untimely filed grievances was discussed in Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994), aff'd No. 95-AA-7 (Kanawha County Cir. Ct. May 1, 1996); appeal refused (W. Va. April 1997):

> The West Virginia Supreme Court of Appeals, in Naylor v. W.Va. Human Rights Commission and Bird Machine Company, Inc., 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge."

Grievant's supervisors' continuing efforts to get her reclassified, and their discussions with her about

these efforts, do not amount to a deliberate design to delay the filing of the grievance, or actions which the employer should have understood would delay the filing.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). 2. The Supreme Court of Appeals of West Virginia held in American Federation of State, County & Municipal Employees v. Civil Service Commission, 174 W. Va. 221, 324 S.E.2d 363 (1984) (AFSCME I), that "the doctrine of equal pay for equal work, as embraced by W. Va. Code §29-6-10(2) (1992), requires that state employees employed in a particular employment classification, but performing work in another classification that is compensated at a higher pay grade, be paid consistent with the higher classification." Shremshock v. W. Va. Dep't of Transp., Docket No. 94-DOH-095 (Aug. 31, 1994).

3. The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

4. Misclassification is a continuing practice, and as such, a grievance may be initiated at any time during the time the misclassification continues. However,

> [a]s with a salary dispute, any relief is limited to prospective relief and to back relief from and after [ten] days preceding the filing of the grievance.

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5. As to Grievant's claim for backpay, this grievance was not timely filed, as Grievant knew of the events giving rise to the grievance in September 1997, but did not file his grievance until July 1998.

6. No facts were shown which would excuse Grievant's late filing.

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. Respondent is **ORDERED** to pay Grievant all backpay to which she is entitled for working out of classification, as though she had been classified as a Social Service Coordinator, less the amount she received as a

Health and Human Resources Specialist, plus interest, from August 20, 1998, through January 29, 1999; and from June 22, 1998, through August 20, 1998, if it has not already done so.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: June 24, 1999

Footnote: 1

The Level III decision states that a Level I decision was issued on July 9, 1998, and that Level II was waived. The record does not reflect what the Level I decision was. A Level III hearing was held on August 10, 1998, and the decision was issued on August 20, 1998. Grievant appealed to Level IV on August 27, 1998, seeking backpay to July 1997. The first Level IV hearing was held on December 1, 1998, at which time some testimony was taken. This grievance was then placed in abeyance so the parties could attempt to settle this matter, but they were unable to do so. A second day of hearing was held on May 7, 1999. Grievant appeared pro se, HHR was represented at the first hearing by Meredith Harron, Esquire, and at the second hearing by B. Allen Campbell, Esquire, and Personnel was represented by Lowell D. Basford, Assistant Director, Classification and Compensation Division. This matter became mature for decision at the conclusion of the second day of hearing.

Footnote: 2

The education employees' grievance procedure provides that a grievance must be initiated within 15 working days of the date the event becomes known to the grievant, whereas the state employees' grievance procedure provides a ten working day filing deadline.