SHELIA AKERS,

Grievant,

v. Docket No. 99-HHR-302

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WELCH EMERGENCY HOSPITAL and
WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

Shelia Akers (Grievant) is employed by Welch Emergency Hospital (WEH) as an Accountant/Auditor III. She filed this grievance on June 25, 1999, seeking back pay for the period of time when she worked out of classification. Levels I and II of the grievance process were waived. A Level III hearing was held on July 9, 1999, before Barbara J. Wheeler, Esq., and this grievance was denied at Level III by Commissioner Jonathan Boggs.

A Level IV hearing was held on September 28, 1999, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by Kathryn Reed Bayless, Esq., and WEH was represented by Assistant Attorney General Tiffany Bost. (See footnote 1) **The parties were given until October 29, 1999, a date later extended to November 8, 1999, upon the request of Ms. Bost, to submit proposed findings of fact and conclusions of law. This grievance became mature for decision on that date. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.**

FINDINGS OF FACT

1. On January 31, 1997, WEH Patient Account Supervisor David Gillenwater (Gillenwater)

retired. He had been classified as a Supervisor III at pay grade 12.

2. The next day, his duties were assigned, on an interim basis, to Grievant, who remained classified as an Accountant/Auditor II .

3. Grievant asked her supervisor, David Gresham (Gresham), whether her pay would be increased as a result of her new position. Gresham discussed a possible salary increase for Grievant with WEH Human Resources Director Cathy Addair (Addair). 4. By memo of July 25, 1997, Gresham informed Grievant that "[i] have decided to expand your current role as the coordinator of staff scheduling to that of interim manager of the Patient Accounting Office."

5. By memo of August 18, 1997, Addair informed Gresham that Grievant was classified as an Accountant II at pay grade 12; that Gillenwater had been classified as a Supervisor III, also at pay grade 12; and that Grievant would "suffer no financial harm from being assigned to these [Gillenwater's] duties."

6. Effective December 1, 1997, Grievant was reclassified by the West Virginia Division of Personnel, to an Accountant/Auditor II, at pay grade 13.

7. Grievant assumed that the position of Patient Account Supervisor would be posted. In January, 1999, Gresham told her that the position's line item had been pulled from WEH's budget; that it would not be posted; and that she would assume the PatientAccount Supervisor position permanently.

8. In February, 1999, Grievant filed a request for reclassification and completed a position description form.

9. On June 16, 1999, Grievant was reclassified as an Accountant/Auditor III, Pay Grade 14.

10. Grievant filed this grievance on June 25, 1999.

DISCUSSION

Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater

weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant argues that she is entitled to back pay in the amount of the difference between the pay she received as an Accountant/Auditor II, Pay Grade 12 or 13, and the pay she now receives as an Accountant/Auditor III, Pay Grade 14, from February 1, 1997, when she assumed Gillenwater's duties as Patient Account Supervisor, until she was reclassified on June 16, 1999. Respondent Department of Health and Human Resources (DHHR) concedes that, for the entire time before her reclassification, Grievant performedGillenwater's duties. The evidence completely supports this conclusion. However, DHHR has raised a timeliness defense. (See footnote 2)

W. Va. Code § 29-6A-4(a) provides as follows:

> **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.**

"Days" is defined as "working days exclusive of Saturday, Sunday or official holidays." W. Va. Code § 29-6A-2(c). A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Pryor, et al. v. W. Va. Dep't of Transportation/ Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997); West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

A misclassification, however, is a continuing practice, and thus, a grievance may be initiated at any time during which the misclassification continues. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). A grievant must file her grievance no later than ten days after her misclassification ends. Gaskins v. W. Va. Dep't of Health/Div. of

Personnel, Docket No. 90-H-032 (Apr. 12, 1990). A grievant cannot waituntil she discovers a legal theory to support her grievance, long after the misclassification began. Pryor, supra; Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91- ABCC-052 (Sept. 27, 1991). Back pay is limited to the ten day period preceding the filing of the grievance, if an employer properly asserts a timeliness defense. Martin supra.

The uncontradicted record in this grievance reflects that, when Grievant took over the Patient Account Supervisor duties from Gillenwater, she questioned Gresham and Addair several times regarding her pay grade, and was always told that her pay grade was correct. This is supported by Addair's memo, dated August 18, 1997, to Gresham, in which Addair informs Gresham that Gillenwater was assigned to pay grade 12, and that "[t]herefore, Ms. Akers will suffer no financial harm from being assigned to these duties."

Effective December 1, 1997, Grievant was reclassified by the West Virginia Division of Personnel, to an Accountant/Auditor II, at pay grade 13.

Grievant assumed that the Patient Account Supervisor position would be posted, and intended to apply for the position on a permanent basis when it was. However, in January, 1999, she was informed that it would not be posted, and that she would assume its duties on a permanent basis. In February, 1999, Grievant filed a request for reclassification with the Division of Personnel. On June 16, 1999, she was reclassified as an Accountant/Auditor III, at pay grade 14. Grievant filed this grievance six working days later. Accordingly, WEH has failed to prove, by a preponderance of the evidence, that this grievance was not timely filed.

At Level IV, Human Resources Director Addair testified that WEH had no Patient Account Supervisor other than Grievant since Gillenwater retired; that Grievant wasalready filling the Patient Account Supervisor position on July 25, 1997, when Gresham's memo informed her that her role as coordinator of staff scheduling would be expanded to include that of interim manager of the Patient Accounting Office; that she cannot contradict that Grievant was filling the Patient Account Supervisor position before July 25, 1997; that she thought Grievant was already properly classified and in the same pay grade as Gillenwater, and so did not believe she was being wrongly paid; and that Grievant did not have a claim for backpay until Personnel informed her that she was misclassified. As noted above, DHHR concedes that, for the entire time before her reclassification, Grievant performed Gillenwater's duties. Therefore,

Grievant has proved, by a preponderance of the evidence, that she was misclassified as an Accountant/Auditor II before being reclassified as an Accountant/Auditor III.

In support of her claim for back pay, Grievant argues that state agencies have a duty to properly classify and pay their employees; that WEH knew it had assigned Grievant to a new position and assured her that she was properly paid after several inquiries by her; that the purpose of statutes of limitations is to encourage the presentation of claims in a timely manner; that WEH cannot claim that it was caught unawares by Grievant's claim; that Personnel's Position Description Form does not advise an employee that she must file a grievance or lose any entitlement she might have to back pay; that WEH received a windfall by not having to fully pay for the services of an employee it misclassified; and that Grievant did not know that she was misclassified until Personnel **(See footnote 3)** **informed her of that fact. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997).**

The undersigned is persuaded by these arguments. Unfortunately for Grievant, these arguments have been raised before this Grievance Board before, and the Board has declined to accept them. In Dudding v. W. Va. Dep't of Health and Human Resources/Welch Emergence Hospital, Docket No. 91-HHR-440 (Sept. 30, 1992), the misclassified grievant argued that "it should not be necessary for an employee to file a grievance in order to obtain back pay[,]" but the administrative law judge, although recognizing the questionable personnel policy underlying his denial of relief, ruled that no statute, regulation, or rule required WEH to adopt a policy addressing back wage claims other than through the grievance process.

The undersigned is constrained to follow this precedent. This Grievance Board has recognized the principle that "finality is desirable in the law," and applied it to grievance procedures. Oxley v. Summers County Bd. of Educ., Docket No. 98-45-104 (Nov. 19, 1998); Spurlock v. Lincoln County Bd. of Educ., Docket No. 97-22-019 (May 29, 1997); Oxley v. Summers County Bd. of Educ., Docket No. 95-45-123 (Feb. 13, 1997).

The Supreme Court of Appeals of West Virginia has explained the doctrine of stare decisis as follows: "[a] simple statement of this rule will be found in Black's Law Dictionary, 3d Ed., wherein it is stated that it means: 'To stand by decided cases; to uphold precedents; to maintain former adjudications. . . [t]he doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, andthat, when the law is

declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.'" In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113 (1947). The Supreme Court has also limited back pay recovery in misclassification grievances arising under W. Va. Code § 18-29-2 to the statutory limitation period. Martin, supra.

It appears that the effect of the above-cited precedent is that a state employee who suspects she is misclassified has two choices: she may apply to Personnel for reclassification, and thereby waive any back pay claim; or she may grieve and possibly recover back pay limited to the ten day period preceding the filing of the grievance, should her employer raise a timeliness defense. See Mullens v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 96-HHR-226 (July 31, 1997). In other words, an employee harboring any doubts regarding her classification should file a grievance at once, and certainly no later than her request for reclassification, or risk waiving any claim for back pay.

The undersigned sincerely regrets the harsh result this outcome produces for Grievant who, through no fault of her own, was worked out of classification by WEH for two years, yet who can recover only a fraction of the difference between her actual pay and the pay she deserved. As noted above, this results in an unjust enrichment for WEH, which will not have to fully pay for the services of an employee it worked out of classification. Unjust enrichment occurs when one party has and retains money or benefits which in justice and equity belong to another . . . . the benefit may be an interest in money. . . .; beneficial services conferred . . . .; or anything which adds to his security or advantage. Baugh v. Darley, 112 Utah 1, 184 P.2d 335 (1947). When one party is given the rewards, without the costs, of another party's efforts, unjust enrichment results. Metzner v. Metzner, 191 W. Va. 378, 446 S.E.2d 165 (1994).

Finally, the representations made by WEH to Grievant, to the effect that she was being properly classified and paid, do not rise to the level required to estop it from raising its timeliness defense. Those representations were not "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 [her] charge," Naylor v. W. Va. Human Rights Comm'n, 180 W. Va.

634, 378 S.E.2d 843 (1989), as the record is clear that Addair was simply misinformed in making them.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Wherethe evidence equally supports both sides, a party has not met its burden of proof. Id.

2. The burden of proving that a grievance was not timely filed, which is an affirmative defense, rests upon the party asserting that defense. Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996).

3. A grievance must be filed within ten days of the grievable event, or ten days from the time the grievant becomes aware of the grievable event, 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).

4 Misclassification is a continuing practice, but where a timeliness defense is raised, the right to back pay is limited to ten days preceding the filing of the grievance. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

5. WEH failed to prove, by a preponderance of the evidence, that this grievance was not timely filed.

6. Grievant proved, by a preponderance of the evidence, that she was misclassified as an Accountant/Auditor II before being reclassified as an Accountant/Auditor III.

7. Grievant's back pay recovery is limited to the ten day period preceding the filing of the grievance. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Accordingly, the grievance is GRANTED, and DHHR is ordered to pay Grievant back pay in the amount of the difference, if any, between the pay she received as an Accountant/Auditor II, Pay Grade 12 or 13, and the pay she now receives as anAccountant/Auditor III, Pay Grade 14, for the period of ten working days preceding the filing of her grievance, plus interest.

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. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated December 30, 1999

Footnote: 1

1 Respondent West Virginia Division of Personnel did not appear or submit any exhibits or proposals at Levels III or IV.

Footnote: 2

2 The parties having waived Levels I and II, Level III was the first opportunity to present assertions or defenses. Accordingly, Respondent's timeliness defense is deemed properly asserted under W. Va. Code § 29-6A-3(a)(2). See Barnett v. W. Va. Dep't of Health & Human Resources/Div. of Personnel, Docket No. 99-HHR-144 (July 20, 1999).

Footnote: 3

3 Personnel is the only body within state government that can make such a determination. See Parsons v. W. Va. Bureau of Employment Programs, 189 W. Va.107, 428 S.E.2d 528 (1993).