CELESTE L. FRAZIER,

Grievant,

v. **DOCKET NO. 98-HHR-338**

DEPARTMENT OF HEALTH &

HUMAN RESOURCES/WILLIAM

R. SHARPE HOSPITAL

DECISION

Grievant, Celeste Frazier (See footnote 1), seeks back pay for a period of time during which she performed duties out of her job classification. This grievance was filed on October 9, 1997. Grievant's immediate supervisor was without authority to grant relief, denying the grievance on October 10, 1997. Grievant appealed to level two, and the grievance was granted by Terry Small, Chief Information Officer at William R. Sharpe Hospital, on November 14, 1997. However, because the back pay award had not been approved by officials of the Department of Health & Human Resources ("DHHR"), most of that award was later rescinded on June 2, 1998, when it was determined that, although Grievant had worked out of classification for the period in question, she was only entitled to back pay for a period of ten days prior to the initiation of her grievance. Grievant appealed to level three, where a hearing was conducted on August 18, 1998. In a decision dated August 25, 1998, Jonathan Boggs, Commissioner for the Bureau for Behavioral Health, again found that, although Grievant had worked out of classification, her back pay award was limited. Grievant appealed to level four on September 1, 1998. Grievant was represented by Ron Grogg, and DHHR was represented by counsel, Sarah Brack. The parties subsequently agreed to submit this grievance for consideration based upon the record developed below. This matter became mature for decision on December 18, 1998, upon receipt of DHHR's written brief. Grievant did not submit any written proposals.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed as a nurse at William Sharpe Hospital since June of 1994.

2. From the beginning of her employment until November 1, 1997, Grievant was classified as a Nurse I. Effective November 1, 1997, Grievant was reclassified to Nurse II.

3. The parties have stipulated that from June 6, 1995, until November 1, 1997, Grievant was performing the duties of a Nurse II. **(See footnote 2)**

4. Grievant knew in 1995 that she was performing duties outside her classification of Nurse I.

Discussion

The only issue in dispute is how much back pay Grievant should receive for workingout of classification. Because this does not involve a disciplinary matter, Grievant must prove the allegations of her complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). Respondent contends that it has relied upon well-established legal precedent in limiting Grievant's back award to ten days prior to the filing of her grievance. It alleges that Grievant knew of her misclassification, but delayed filing her claim without sufficient justification.

Grievant testified at level three that she and other nurses called "someone" in 1995 to inquire about being reclassified. This unidentified person allegedly told Grievant that funds were not available for their reclassification and that they should not file a grievance. Not only could Grievant not identify this person, she did not even state whether this person was employed by Sharpe Hospital or by some other office of DHHR. Moreover, she did not know this person's position or even what department she called.

It is well-settled that misclassification is an ongoing practice, and as such may be alleged by an employee at any time. Haley v. Dept. of Transp., Docket No. 93-DOH-148 (Apr. 29, 1994). Nevertheless,

> **where a state employee is aware of the facts constituting a grievable matter and delays filing[,] relief is limited to the ten-day period preceding the filing of the grievance. Relief is not available for the earlier time period, if the employer asserts a timeliness defense, because the claim for the earlier period is time-barred by W. Va. Code, (sic) 29-6A-4.**

Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052/169 (Sept. 27, 1991); See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Grievant's defense to her extensive delay in filing is her reliance upon the alleged statements of an unknown person. The West Virginia Supreme Court has recognized that,in cases where an employer has discouraged an employee from filing a grievance, the employer may be estopped from limiting the back pay award. "Equitable estoppel is available only if the employee's otherwise untimely filing was the result 'either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.'" Indep. Fire Co. v. Human Rights Comm'n, 180 W. Va. 406, 376 S.E.2d 612, 615 (1988) (citations omitted); See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

The Grievance Board has dealt with numerous cases involving claims by grievants that they relied upon statements by the employer which caused them to delay in filing a grievance. However, in all of these cases, the grievant identified a specific person, usually a supervisor, who made the alleged statements which were relied upon. See Collins v. Bureau of Employment Programs, Docket No. 94-BEP-1080 (Apr. 28, 1995); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994); Powell-Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993). Grievant has not done so in this case. In fact, the identity of the person who allegedly told her not to file a grievance is completely unknown, along with his or her department and position. For all we know, Grievant could have spoken with a custodian! The undersigned does not doubt that the conversation Grievant alleges did take place. However, she cannot meet her burden of proof with the scant information presented here.

Grievant also raised objections at level three to DHHR's rescission and amendment of the initial level two decision, which granted her full back pay. However, the exact same factual situation has already been addressed by this Grievance Board and resolved in favor of the employer. In Franz v. Dept. of Health & Human Resources, Docket No. 98-HHR-228(Nov. 30, 1998), the administrative law judge found that DHHR has a long-established policy of requiring approval of lower level decisions involving monetary awards. Until it has been approved by various DHHR officials, such a decision is only a recommended decision, and it

can be altered at any time prior to final approval. Accordingly, DHHR's amendment of the level two decision prior to final approval in this case was appropriate.

In accordance with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary matters, the grievant must prove the allegations of her complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996).

2. "Where a state employee is aware of the facts constituting a grievable matter and delays filing[,] relief is limited to the ten-day period preceding the filing of the grievance." Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC- 052/169 (Sept. 27, 1991); See Martin v. Randolph County Bd. of Educ.,195 W. Va. 297, 465 S.E.2d 399 (1995).

3. "Equitable estoppel is available only if the employee's otherwise untimely filing was the result 'either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.'" Indep. Fire Co. v. Human Rights Comm'n, 180 W. Va. 406, 376 S.E.2d 612, 615 (1988) (citations omitted); See Naylor v. W. Va. Human Rights Comm'n,180 W. Va. 634, 378 S.E.2d 843 (1989).

4. Grievant failed to prove by a preponderance of the evidence that actions ofher employer caused her to delay in filing this grievance.

5. Grievant is entitled to back pay for the ten-day period prior to filing her grievance through November 1, 1997, when she was reclassified.

Accordingly, this grievance is DENIED, and Grievant is entitled to back pay as set forth in this Decision.

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, and 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. 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.

Date: January 22, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant's name changed to Celeste Perri, because of marriage, during the processing of this grievance. However, because the grievance was initially docketed in under her former name, it will continue to be used for purposes of maintaining consistency in the Grievance Board's records.

Footnote: 2

Grievant's original claim also included allegations that she was performing the duties of a Nurse III during part of this time period. However, she did not address these allegations at level three, and stipulated that her duties during the time in question were those of a Nurse II. Since she did not file a brief at level four, it is presumed that this claim has been abandoned.